

# EXTENSIVE TAX MINIMIZATION AS AN OBSTACLE TO HUMAN RIGHTS COMPLIANCE



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Any shortcomings are solely at fault of the author.

## List of abbreviations

CSR	Corporate Social Responsibility
EPZ	Export Processing Zone
FDI	Foreign Direct Investment
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ILO	International Labor Organization
IMF	International Monetary Fund
MNE	Multinational Enterprises
NGO	Non Governmental Organization
OECD	Organization for Economic Cooperation and Development
SGSR	Secretary General's Special Representative
The Committee/CESCR	The Committee on Economic, Social and Cultural Rights
TNC	Transnational Corporation
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNSG	United Nations' Secretary General

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## 1. Introduction

### 1.1 Theme and justification

Since the formation of the United Nations (UN) in 1945 the world has witnessed an unprecedented expansion of internationally recognized human rights.<sup>1</sup> Nevertheless, a world in compliance with human rights continues to be one of the most important challenges facing the international community. Respecting the dignity of every individual human being and creating a legal climate in which human rights can flourish are not only fundamental ethical requirements, but also preconditions for sustainable political stability, as well as for economic and social development in the world.<sup>2</sup> Over the past fifteen years the intensification of globalization and the liberalization of trade, combined with the scrutiny of non-governmental organizations (NGOs), the media and other actors in civil society, have led to a focus on how Transnational Corporations (TNCs) influence the societies in which they operate. Changes caused by economic globalization and advancement in communication technologies have left a state-centered approach to human rights inadequate and have led to a call for a change in our conception of the nature of human rights and the relationship between different actors within it.<sup>3</sup> Corporate Social Responsibility (CSR) has become a catchphrase in the international development agenda as one has started to realize that it is impossible to combat today's obstacles to a world in compliance with human rights without the participation of the business sector. Public demands for companies to behave responsibly, pressure from affected communities and naming and shaming campaigns by NGOs are growing, and these demands are increasingly framed in terms of human rights.

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<sup>1</sup> Smith (2007)p.1

<sup>2</sup> BDA (2010)p.3

<sup>3</sup> Alston (2005)p. 4

Every year developing countries lose billions of dollars through tax evasion and extensive tax avoidance by powerful TNCs, which are some of the largest tax payers in the world.<sup>4</sup> A great portion of developing countries' already scarce revenues is vanishing without the population benefitting from the human rights obligations its states have undertaken by becoming part of human rights conventions. Tax revenues are an essential source for evoking resources that enable the government to promote the realizations of human rights, yet taxation has received little attention compared to other financing issues such as trade, aid and debt.<sup>5</sup> While the focus of many has been on increasing aid flows from developed to developing states, too little attention has been paid to the much larger flows in the other direction.<sup>6</sup> Many companies advertise their philanthropic contributions to the societies in which they operate, such as building a school in a developing country. However, it becomes clear that something is wrong when the same companies avoid paying taxes that could build 50 schools in the same country.<sup>7</sup> The call for attention has recently become louder. The director of the Business and Human Rights Resource Center, Christopher Avery, said at his presentation at a side event at the Human Rights Council in October in 2009:

“if I am asked to identify emerging business and human rights issues that will likely get much more attention in the coming years, I would put tax avoidance or tax evasion at the top of this list”.<sup>8</sup>

Others have compared efforts to include tax in the development discourse with the attention given to the environment ten years ago, and assessed it to get as much attention as environment issues do today in ten years time.<sup>9</sup> The emerging consensus on the gigantic cost to development of extensive tax minimization can be illustrated by the UNs' Secretary General (UNSG) drawing attention to the issue in a recent high-level meeting of the Economic and Social Council.<sup>10</sup>

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<sup>4</sup> Baker(2005)p.171, Christian Aid (2008) , Cobham (2007)

<sup>5</sup> Stener, Alson, and Goodman (2007) p.305 , Kokke & Weyzig (2008) p.1

<sup>6</sup> Martens(2007)

<sup>7</sup> Avery(2009) :oral presentation

<sup>8</sup> *ibid.*

<sup>9</sup> Owens in Houlder (2004)

<sup>10</sup> Ban-ki Moon (2010):oral presentation



## 1.2 Research questions

There are numerous aspects which are of great importance on the agenda to hamper extensive tax minimization, such as strengthening tax authorities and financial administration, combating corruption and bribery and reducing the informal economy. Nevertheless, this paper will focus on the role of TNCs' tax policy, not because the other topics' less importance, but because of the scope of this thesis. Recently, an increasing number of NGOs have reported on TNCs' extensive tax minimization and its harmful impact on the societies in which the corporations are operating. However, few have looked at tax evasion and tax avoidance as a human rights concern. Seeing extensive tax minimization as an obstacle for human rights compliance offers a potential for something being done to hamper its harmful consequences. This is because human rights summarize the fundamental interests of human beings based on shared ideas about the requirements for a dignified life, which both states and non-state actors are legally and morally bound to respect and realize.<sup>11</sup> The legal human rights responsibility of TNCs is controversial and this thesis will therefore examine whether prevention of extensive tax minimization is, or whether it should be, incorporated in this responsibility. It is important to emphasize that action is needed by governments, individually and collectively, to address extensive tax minimization through improved laws and enforcement mechanisms. Thus, this thesis will also examine state responsibility towards fiscal matters as a human rights related issue. More concretely the primary research question of this thesis is:

1. To what degree is extensive tax minimization by TNCs a human rights concern?

Because human rights law still falls short of implementing regulations on TNCs regarding these issues, this thesis will address how efforts to hamper extensive tax minimization is demonstrated by the CSR agenda, where human rights is an important component. The secondary research question will be:

2. Should efforts to reduce extensive tax minimization be integrated in the CSR agenda from a human rights perspective?

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<sup>11</sup> OHCHR(2008) p.2

## 1.3 Terminology clarification

### 1.3.1 Transnational Corporations

A major theme in this thesis is that TNCs play an increasingly important role with regard to human rights compliance. A broad definition of TNCs will be used in this paper in order to capture their diversity and complexity. The Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises (MNE) do not define the term but states that:

“These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.”<sup>12</sup>

MNE and TNC are both used to express the same. Regardless of the term used, it is their ability to operate across national frontiers and outside the effective supervision of domestic and international law that makes them important actors needing greater investigation under international law.<sup>13</sup> Although their relative importance varies enormously, there are few parts of the world that rest unaffected by TNCs' influence.<sup>14</sup> TNCs are primary capitalist enterprises, and they behave according to the most fundamental rule of capitalism, the drive for profit.<sup>15</sup> With this in mind it can be questioned whether TNCs' pursuit of growth and profit enables them to exercise sincere respect for human rights.

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<sup>12</sup> OECD(2008) Chapter 1, §3

<sup>13</sup> Wells and Elias In :Alson (2005): 149

<sup>14</sup> Dickens(2004)

<sup>15</sup> *ibid.* p.199

### 1.3.2 Corporate Social Responsibility

There is no universally accepted definition of this term partly because it is being used both descriptively and normatively. CSR refers some times to what the corporations should do, and other times to what the corporations actually do.<sup>16</sup> Because of the expanding range of issues being handled under the collective term of CSR, and the fact that different stakeholders promoting CSR emphasize different aspects, it is often pointed out that there is not a uniform CSR agenda. Nevertheless, this thesis uses the term because there is an agenda in the sense that there is an increasing agreement on issues that companies should be concerned with, and because CSR represents a particular approach to corporate regulation, one that is voluntary and based on self regulation.<sup>17</sup> CSR is by many regarded to be a vehicle through which the private sector can participate in poverty reduction and other social purposes, which is not possible to achieve through government acting alone.<sup>18</sup> In its most common sense, CSR is used to describe corporate behavior which is ethical and has regard to social and environmental interests as well as financial considerations, as reflected in the World Bank's working definition:

“commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life.”<sup>19</sup>

Numerous TNCs use sustainable development as a superior frame for their CSR-strategy.<sup>20</sup> Sustainable development can be defined as: “meeting needs and aspirations of the present without compromising the ability to meet those of the future”.<sup>21</sup> Further:

“Far from requiring the cessation of economic growth, it recognizes the problems of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries plays a large role and reap large benefits.”<sup>22</sup>

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<sup>16</sup> Jelstad (2005)

<sup>17</sup> Utting (2007) p.710, note 7.

<sup>18</sup> Fox (2004) p.29

<sup>19</sup> Ward (2004) p.3

<sup>20</sup> Fox (2004) p.29

<sup>21</sup> WCED (1987) §.49

<sup>22</sup> *ibid.*

Many TNCs incorporate concerns relating to human rights in their CSR reporting. Current thinking in the field suggests that because TNCs can potentially affect all internationally recognized human rights, the suitable scope of human rights for companies to consider when reporting includes, at a minimum, the rights contained in the Universal Declaration of Human Rights (UDHR) and its two implementing instruments: the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>23</sup> One can roughly divide CSR strategies in two, namely “do no harm” and “do good”. From a human rights perspective “do no harm” means not to violate human rights, and the “do good” strategy will include contributing to or create a system of rights protection and aid to those deprived of their rights.<sup>24</sup> The current trend belongs within the former strategy.

There is also an important debate concerning whether CSR strategies should be legally binding or based on voluntary initiatives. Mary Robinson is one of those who argue that as human rights have become increasingly threatened by non-state actors, there is a need for a legal regime to emphasize the value of an ethical globalization, implying that voluntary guidelines by TNC are not enough.<sup>25</sup> There are few who argue openly that corporations should not have any responsibility to act in respect with the society and the environment where they operate. The discordance is about what should be included in this responsibility and whether these regulations should come from the corporations themselves or through binding international political regulations.

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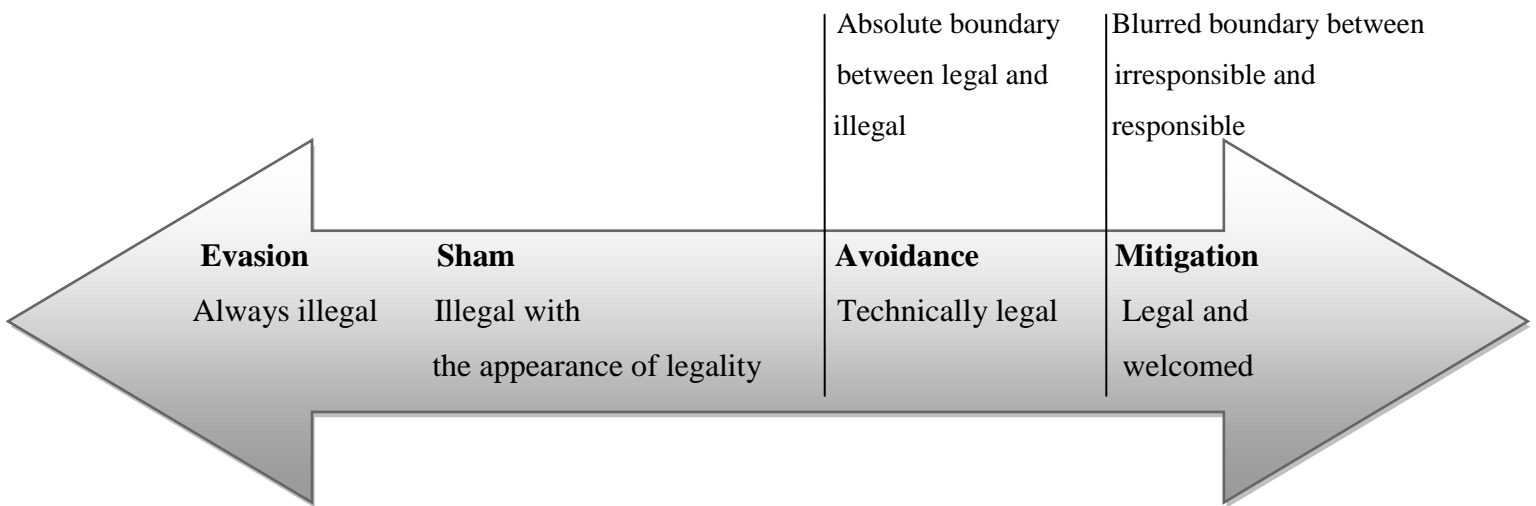
<sup>23</sup> Ulmas (2009) p.4

<sup>24</sup> Kolstad, Wiik and Larsen (2008) p.4

<sup>25</sup> Mary Robinson. “Globalization has to take human rights into account”. *Irish Times*, January 22.2002 In: Andreassen (2006) p.124

### 1.3.3 Extensive tax minimization

In order to comprise both illegal tax evasion and legal but irresponsible tax avoidance, this thesis will employ the term *extensive tax minimization*. Whereas tax evasion always is illegal, tax avoidance may constitute of non- or low payment of taxes through agreements with governments, benefiting from loopholes, subsidies, creative accounting practices, etc. Although these measures may be legal under national law, they rise concerns about whether the tax avoidance harms the government’s ability to meet its obligations to provide for fundamental internationally-recognized human rights. Beloe, Cruickshank and Lye make the following distinction between the legal and illegal boundary and a softer boundary between what is responsible and irresponsible:<sup>26</sup>



The thesis will follow the logic of this model because instead of focusing entirely on an absolute boundary between illegal and legal approaches to tax, it will also look into what is considered responsible and what is regarded as irresponsible.

<sup>26</sup>Beloe, Cruickshank and Lye (2006) p.2

#### 1.3.4 Responsible and fair tax

Many NGOs argue that in order to behave in a morally responsible way, companies should adopt an attitude towards tax planning which will ensure that they pay their “fair share” of tax.<sup>27</sup> This leaves open the question concerning what to include in the term “fair”. There are different views regarding the distinction between what one observes as fair and unfair, or responsible and irresponsible, with regard to tax planning. Political affiliation will play its part, in general left wing governments tend to favor higher taxes and higher public spending than right wing governments. The fact that different economic schools vary in what they consider the best tax practice further complicate the task of arguing for an ethical fair or responsible way of planning a corporation’s tax policy towards the society in which it operates. However, in practice many observers may think that they will recognize fairness when they see it, or at least that they will recognize unfairness when it occurs.<sup>28</sup> This does not take away the critical need for more research and development of methods of analysis which can facilitate this debate. Many would argue that in democratic states, the peoples’ elected representatives should be trusted to undertake by legislation a level of tax that is considered fair. Companies can in accordance with this view pay the minimum tax determined by law and still be considered responsible.<sup>29</sup> Contrary to this view, this paper will argue that what is legal is not necessarily fair and responsible. A TNC who wants to be regarded as acting in a responsible and sustainable manner should be expected not exclusively to see tax as a cost to be avoided, but as a legitimate payment from wealth created to the countries and communities that advanced the wealth creation.<sup>30</sup> These concerns has little to do with fairness in the sense of treating all parties equally, than with a sense that they have a responsibility not to take advantage of countries that do not have the economic or political muscle to take care of themselves.<sup>31</sup> This thesis will argue that TNCs should have a responsibility to contribute in generating tax revenue to the host state, this is

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<sup>27</sup> Williams(2007) p.21

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Beloe, Cruickshank and Lye (2006) p.4

<sup>31</sup> Williams (2007) p.29

the fair thing to do because of the state's role in promoting welfare in society.<sup>32</sup> Possible definitions of fair and responsible tax could insist that tax for foreign investment is at least equal to taxation of local companies or that it should as a minimum cover the host-countrys' expenses relating to the corporations' operations. The level of responsible taxation will therefore vary in different countries. A corporate framework that seeks to ensure a responsible and fair approach to tax policies should be based on guiding principles of accountability, transparency and consistency. This paper will not go further into which ways TNCs can make judgment on these issues, only saying that they should implement considerations about their tax strategies' consequences for the countries where they operate.<sup>33</sup>

Another issue relating to what fair and responsible tax should be occurs when TNCs are operating in host states which are ruled by oppressive governments. It might be argued that in these circumstances it is best that corporations pay as little tax as possible, in order to avoid extending this government's life. However, this thesis argues that where a TNC suspect that its tax payment will not be used on protecting and fulfilling obligations under a human rights covenant which the country have signed, it *might* instead use its negotiation power to insist on increased spending relating to these issues. The "might" in the last sentence is of crucial importance as this thesis will not pursue to give a universal answer to what corporation's ought to do in specific circumstances in order to act responsible with regard to tax. This is because factual empirical conclusion must be taken on a case-to-case basis in order to be analyzed contextually.

#### 1.4 Methodology and a brief literature review

The thesis will analyze these issues in a multidisciplinary perspective, taking ethical, legal and political argumentation into account. It will be an explorative and argumentative paper,

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<sup>32</sup> *Ibid.* p.19

<sup>33</sup> Beloe, Cruickshank & Lye(2006) p.25-29 presents several approaches that may assist TNCs to put some context around the issue of responsible tax and help develop a more nuanced understanding of potential trajectories.

which will examine “de lege ferenda”, a Latin expression which means "what the law should be", as opposed to “lex lata” which means "the law as it exists”. As few have looked at extensive tax minimization in light of human rights, it is important to note that more research and knowledge is needed in this field. This thesis maps and assesses the most relevant available documentation from different stakeholders. Internet has been the main search engine, as most reports and articles today are available online. The findings have not been a result of simply searching Google for relevant literature, rather the different stakeholders’ web pages have been accessed. Different stakeholders who address global tax issues include the civil society through NGOs, state actors through governments, non-state actors such as TNCs, and multinational organizations such as the United Nations (UN) and Organization of Economic Cooperation and Development (OECD). The Business and Human Rights’ Resource Center has recently introduced a new section of their webpage<sup>34</sup> relating to tax avoidance and human rights. This webpage has been an important source when searching for relevant literature. It introduces material on tax evasion and tax avoidance by the private sector, and provides links to further reports relevant to the topic. Books and reports which have not been accessible through the internet have been accessed by contacting the relevant organizations, bought through internet stores or rented at the University’s bibliotheca. Reports from NGOs including Tax Justice Network, Christian Aid and Centre for Research on Multinational Corporations have been assessed, while keeping a critical mind as these organizations write reports according to their agendas. One important entry point for advocacy around the issues of corporate responsibility towards human rights within the UN is the mandate of the Secretary General’s Special Representative (SGSR) on Business and Human Rights; Professor John Ruggie. UN literature is found through UN’s document search online.<sup>35</sup> Key international standards with relevance for the chosen topic include the UDHR and the ICESCR with its General Comments no. 3 and 4. The Committee on Economic, Social and Cultural Rights’ (CESCR) Concluding Observations has also been assessed to search for concerns regarding states’ fiscal policy.

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<sup>34</sup> <http://www.business-humanrights.org/Home> Accessed 18.02.2010

<sup>35</sup> <http://www.un.org/en/documents/>



One significant challenge in writing a thesis on this topic has been the lack of data pinpointing the assumed correlation between lost state tax revenues and the state's reduced ability to deliver to its population on human rights issues. The thesis is not suggesting that all revenues that are lost to tax evasion and tax avoidance would necessarily be channeled to important elements of human rights conventions, such as health and education. It is essential to note that there are many complex and interconnected issues involved, such as corruption and bribery which is difficult to measure. The thesis also acknowledges the danger of drawing a casual correlation between low taxes and low human rights compliance on a general level, because factual empirical conclusions must be made on a case-to-case basis in order to be analyzed contextually. Nevertheless, a report by Christian Aid from 2008: "Death and taxes: the true toll of tax dodging" has been significant in addressing the assumed correlation between tax and the protection and fulfillment of certain human rights. The report has calculated that the prospects for poor people in developing countries could be dramatically changed for the better if the same amount of tax revenues were spent on healthcare today, as it did in 2000. They argue that the life of 350.000 children under the age of five would be saved every year if one managed to get an end to tax evasion. Christian Aid estimates that since the UN Millennium Goals (MDG) were set in 2000, the developing world has lost tax revenues with the value of an estimated US\$ 160 billion a year, as a result of tax evasion. This is substantially more than the amount of development aid received each year in the same period. If the current level continues without something being done about it, the tax revenue losses caused by tax evasion will consist of US \$2.5 trillion by 2015.<sup>36</sup> It is important to note that these numbers are calculated based on tax evasion, and if one were to include the losses due to extensive tax avoidance as well, the figures would increase dramatically. These important numbers illustrates that measures to tackle extensive tax minimization can raise vital public revenues which can potentially facilitate efforts to meet important elements of human rights realization.

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<sup>36</sup> See Christian Aid (2008) p.51-53 for the methodology used to measure the association between tax revenues and under five mortality rates, and the calculations of tax losses due to evasion.

When examining which ethical responsibility TNCs should have towards fiscal affairs when operating in a developing country, a report written by Kolstad Wiik and Larsen has been of particular importance. In it Norwegian CSR activities in developing countries are addressed by looking into the issue of human rights and assigned ethical responsibilities for corporations. Further essential literature will be presented as they are applied in the text.

### 1.5 Structure of thesis

In order to address whether extensive tax minimization by TNCs is a human rights concern, section two will start with discussing whether or not TNCs should be incorporated in the human rights regime which is primarily for states. Acknowledging that the business sector indeed is a right-holder in the human rights regime, this thesis will focus on which indirect and direct human rights duties one can point towards TNCs, as well as looking into international voluntary initiatives for strengthening the business sector's role in relation to human rights. Section three will address the importance of tax, followed by an assessment of harmful tax behavior through tax evasion and extensive tax avoidance. Thereafter it will connect the states' human rights responsibilities to fiscal policy through an examination of article 2.1. in the ICESCR. As states' legal responsibility towards introducing a responsible system of taxation interpreted from the above mentioned article is difficult to enforce, this thesis will look into which ethical responsibility TNCs should have regarding their fiscal agenda. Section four will consider to what degree tax related issues are incorporated in TNC's CSR agenda and examine briefly why they should be.

## 2. Human rights responsibilities of TNCs as non-state actors

### 2.1 Should TNCs be incorporated in the human rights regime?

#### 2.1.1 The state as the primary duty-bearer

When a state becomes party to a human rights convention it undertakes responsibilities toward the rights contained in the respective convention. Governments have a clear and direct obligation towards human rights and they are the primary duty-bearers under international human rights law. Eide articulates three different levels of obligations, notably to respect, protect and fulfill.<sup>37</sup> The obligation to *respect* entails the state's duty to abstain from doing something that violates the integrity of the individual or infringes her or his freedom. The obligation to *protect* requires from the state the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, and other human rights to the individual. The obligation to *fulfill* requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to attain satisfaction of those needs, recognized in the human rights instruments.<sup>38</sup> In sum, the state gives a promise to other convention parties to treat its citizens in a certain way. This promise can be realized through different means. Legislation is central in this regard, but as Høstmælingen puts it: "human rights do not live its life through the law alone."<sup>39</sup> As it is primarily the state that is the duty-bearer in respecting, protecting and fulfilling the individuals' rights, one may argue that the human rights system presupposes that the authority lies within the government of the state. This is far from the case in many of the world's states, because the power vacuum created by a weak state-apparatus is filled by other actors.<sup>40</sup> This might be other state actors such as the military, or other regional powerbases, but also non-state actors such as the private sector. A government's ability to govern is different from state to state, and thus the degree of human rights protection of individuals will vary from state to state. Should this open for other actors to be held responsible for human rights protection and fulfillment? Protecting human rights

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<sup>37</sup> Eide (1989) p.37

<sup>38</sup> *Ibid.*

<sup>39</sup> Høstmælingen (2007) p.80

<sup>40</sup> *Ibid.* p.86

exclusively through obligations on governments appear quite uncontroversial if states represent the only obstacle to human dignity and if all states could be relied on to restrain conduct within their borders effectively.<sup>41</sup> Nevertheless, this is not the case and a system where the state is the only target of international legal obligations may not be considered sufficient to protect human rights. It is important to underline that there needs to be a clear difference between the duties and responsibilities of the government on the one hand, and on the other, those of TNCs. Corporations can never be, nor should be expected to become, a surrogate government. TNCs attempt to uphold and support human rights should not redirect awareness from the critical need for national governments to create the fundamental framework for respecting, protecting and fulfilling human rights. These efforts must be seen as complementary to the role of the states in implementing and enforcing national laws on human rights.<sup>42</sup> The UN SGSR on business and human rights' concept of corporate human rights responsibilities is built on three principles: i) protect, which implies that it is the task of the *state* to protect the people within its frontier against human rights infringements by non-state actors, ii) respect, which entail that it is the duty of the *company* to respect human rights and to put in place the necessary management structures to this and iii) remedy, which implies that it is essential to develop and strengthen judicial and non-judicial complaint mechanisms in order to impose remedies for human rights infringements committed by companies. This thesis will focus on the two first concepts.<sup>43</sup>

### 2.1.2 TNCs enormous impact and ability

Demands of TNCs' responsibility towards the societies in which they operate are often based on arguments relating to authority and capacity. It has for a long time been recognized that business enterprises that operate across national boundaries have an enormous impact on the modern world, both in the societies where they operate, and in their home countries.<sup>44</sup> Out of the 100 largest concentrations of wealth in the world, 51%

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<sup>41</sup> Ratner (2001) p.461

<sup>42</sup> IOE, ICC and BIAC (2006) p.3

<sup>43</sup> Ruggie (2009)p.2

<sup>44</sup> Forsythe (2006) p.219

are owned by global corporations and only 49% of states.<sup>45</sup> TNCs are of particular importance in relation to the recent global trends because they are active in the most dynamic sectors of international economies. They bring new jobs, technology and capital, thus they certainly have the capacity to assert a positive influence and foster development.<sup>46</sup>

Ratner presents three arguments which support the view that corporate authority requires the human rights regime to move beyond the state as the only duty-bearer.<sup>47</sup> Firstly, the aspiration of many developing states to receive foreign investment results in the government neither to have the interest nor the ability to monitor corporate behavior. This is both with regard to the TNCs' employees and with respect to the broader community. Secondly, independently of its situation regarding foreign investment, the governments also might need corporate resources for own abuses of human rights. Since repressive governments may need business to supply them with materials, corporations may cooperate with governments in abusing human rights. Thirdly, as TNCs have become more international, they have also become more independent of government control. Many of the largest TNCs have headquarters in one state, shareholders in others and operations worldwide. If the host state fails to regulate acts of the company, other states, such as the corporation's home state, may decide to withhold from regulation because of the extraterritorial nature of the acts involved.<sup>48</sup> This leads to TNCs being able to move their activities to states with fewer regulatory burdens, including human rights regulations, in search of the largest possible profit. Ratner's three arguments illustrate that the effectiveness of human rights' protection and fulfillment could potentially increase if one were able to address the corporations directly. Altson argues that if the international human rights regime is not able to effectively address situations in which powerful corporate actors are involved in human rights violation or ensure that private actors are held responsible, it will both lose credibility in the years ahead and make itself

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<sup>45</sup> <http://www.globalpolicy.org/component/content/article/221/47211.html> [Accessed 20.03.2010]

<sup>46</sup> Weissbrodt and Kruger in Altson (2005) p.217

<sup>47</sup> Ratner (2001) p.461-3

<sup>48</sup> Spiro(1997) In: Ratner (2001) p.463

unnecessarily irrelevant in relation to important issues.<sup>49</sup> The last 15 years we have witnessed a renewed pressure on states to adopt norms and policies to ensure that the business practice contribute to-, instead of contradicting, internationally recognized human rights. The TNCs themselves are also under pressure from different stakeholders in the civil society to pay attention to human rights. Nevertheless there exist important obstacles to TNCs acting in compliance with human rights.

### 2.1.3 Reluctance in including TNCs

There are different arguments made to claim that non-state actors such as TNCs do not have *any* responsibilities for respecting human rights, even of the minimal obligation to “do no harm”. Andreassen observes three main arguments against TNC human rights responsibility.<sup>50</sup> First, the principle argument is that *states are the only actor who can ratify human rights treaties*, and that they therefore are the only actor who can be held responsible for enforcing human rights obligations. This view is based on the consideration that international legal personality is a requirement for bearing international rights and responsibilities. The argument is that since TNC does not have any international legal personality, there is no binding international agreement that directly addresses corporations. TNCs are thus mere objects of international law and can bear no obligations towards the international community.<sup>51</sup> The second argument against TNCs’ responsibility towards human rights is the *failure of attribution* argument which must be seen in relation to the first argument. Since states are the only actor with legal personality one cannot say that human rights violations are perpetrated by private firms, but primarily caused by action or inaction of the government. It is therefore unrealistic and in some cases impossible to trace responsibility for human rights breaches to private firms.<sup>52</sup> A third argument is based on a *stay away/ trickle down* argument which holds that private parties such as TNCs should avoid being involved in politics and human rights. The Nobel price winner in economy,

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<sup>49</sup> Altson (2005) p.19

<sup>50</sup> Andreassen (2006) p.122

<sup>51</sup> Casses (1986) p.103 ; Brownlie (1998) p.66; Baade (1980) p.8.

<sup>52</sup> Andreassen (2006) p.122

Milton Friedman, is maybe the person best known for his categorically denial of corporations' responsibility towards the societies in which they operate. In compliance with the classic liberalist view Friedman supports pure free trade. According to this view the role of the state should be minimal and the market mechanisms will guarantee a so-called level playing field, where all actors are equal and specialize within the sector where they have their relative comparative advantage. TNCs should only focus on commercial matters, such as investments and production and their activities in developing countries will eventually trickle down automatically by the so-called "invisible hand".<sup>53</sup> This will improve income opportunities of the poor and therefore also their general welfare. Friedman argues that as long as one does not cheat or fraud the corporation's social responsibility is accomplished:

"There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long that it stays in the rule of the game, which is to say, engage in open and free competition without deception or fraud."<sup>54</sup>

Henderson is one of few in the contemporary world who supports this argument. He argues that many of the advocates of CSR do not understand the rational of a market economy and the roles of profit within it.<sup>55</sup> Holliday, Schmidheiny & Watts however, underline an important point by arguing that what Friedman wrote four decades ago, before the surge in globalization, deregulations and privatization cannot still be used as an argument.<sup>56</sup>

These three main counter arguments to human rights responsibility do not sufficiently explain why TNCs should not be responsible under international law when their actions are contrary to international recognized human rights norms. It is important to emphasize that there is an ongoing debate about how international human right law can tackle this issue since there is not any accepted consensus regarding TNCs' human rights responsibility.

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<sup>53</sup> In economics, the invisible hand is the term used to describe the self-regulating nature of the marketplace. It is a metaphor first coined by the economist Adam Smith in *The Theory of Moral Sentiments*. For Smith, the invisible hand was created by the conjunction of the forces of self-interest, competition, and supply and demand, which he noted as being capable of allocating resources in society. This is the founding justification for the laissez-faire economic philosophy.

<sup>54</sup> Friedman(1970) p.6

<sup>55</sup> Henderson(2001) p.29-34

<sup>56</sup> Holliday, Schmidheiny and Watts (2002) p.105

The following section will argue that it is appropriate to place human rights responsibilities on TNCs and that international human rights obligations already exist both directly and indirectly to TNCs as non-state actors.<sup>57</sup>

## 2.2 Direct human rights responsibilities of TNCs

### 2.2.1 Deriving from provisions in the International Bill of Human Rights<sup>58</sup>

Many multinational organizations have concluded that companies should respect human rights and some international standards already refer explicitly, or by interpretation, to companies. These include the International Bill of Rights, but also the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the International Labor Organization (ILO) and the OECD Guidelines for Multinational Enterprises<sup>59</sup> are important. However, this section will focus on the former because of the scope of the thesis. The International Bill of Rights has been referred to by the UN as “the ethical and legal basis for all human rights work [...] the foundation upon which the international protection and promotion of human rights have been developed.”<sup>60</sup> The first fifty years after the adoption of the UN Charter and the UDHR corporations generally fell on the outside of the mainstream debate concerning the promotion and the protection of internationally recognized human rights.<sup>61</sup> The end of the Cold War and the subsequent success of expanding liberal economic systems have given private actors functions that before had been unthinkable to entrust them with.<sup>62</sup> Questions have since then been posed regarding whether the corporations should not followingly be held responsible for their actions that affect human rights in the communities where they operate.

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<sup>57</sup> Weissbrodt and Kruger In: Alston (2005) p.328

<sup>58</sup> The International Bill of Rights consists of the UDHR, the ICCPR and the ICESCR, these documents have universal application. At present the ICCPR have been ratified by 165 states, and the ICESCR rights by 160 states.

<sup>59</sup> ICHRP(2002) p.9

<sup>60</sup> OHCHR, Fact sheet No. 22 p.3 In: Smith (2007) p.35

<sup>61</sup> Forsythe(2006) p. 218

<sup>62</sup> Alston (2005) p.7



The international human rights regime is made by states, but can be argued to no longer be exclusively for states. It is true, and important to note that the International Bill of Rights focuses *primarily* on the duty of governments, but they can *also* be interpreted to indicate that persons have both rights and responsibilities. The human rights standards set forth in the UDHR were deemed to apply primarily to the member states of the UN. However, the assignment of basic legal human rights obligations to TNC may find justification in the Preamble of the UDHR, which states that the Declaration is a:

“common standard of achievement for all peoples and all nations, to the end that every individual, and every organ of society, [...] shall strive [...] to promote respect for these rights and freedoms”

One can thus argue that both states and “other organs of society”, such as TNCs, have responsibilities under the UDHR which announce the fundamental rights of individuals. Although the framers of the UDHR may not specifically have had TNCs in mind when they were drafting the preamble, the language used opens for flexibility in interpretation to legitimately include TNC as an “organ of society”. This is also reflected in the article 29 §1 of the UDHR which refers to *everyone’s* duties to the communities and §2 of the same article which states that everyone’s rights should be exercised with “due recognition and respect for the rights and freedoms of others”. Furthermore article 30 states that no state, *group*, or person might interpret the Declaration in any way that is aimed at the destructions of these rights. Judging by these provisions it could be argued that the UDHR also apply to non-state actors. The UDHR is a declaration by the General Assembly, and is not by definition legally binding, but it does have a strong moral force.<sup>63</sup> Andreassen argues that it is common to consider components of it a part of customary human rights law.<sup>64</sup>

Article 2, §3a of ICCPR has also been interpreted in giving TNC direct human rights obligations. According to this article the state is obliged to ensure that

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<sup>63</sup> Smith(2007) p.36

<sup>64</sup>Andreassen (2006) p.129

“any person whose rights or freedoms [...] are violated shall have an effective remedy, *notwithstanding* that the violation has been committed by persons acting in an official capacity” (emphasis added).

According to some observers the term “notwithstanding” would appear to indicate that a remedy is also required for violations by persons not acting in an official capacity.<sup>65</sup> Other observers however disagree and argue that the word “notwithstanding” simply indicates that the state is responsible for the violations committed by its officials.<sup>66</sup> Article 5 (1) in the ICCPR has also been put forward as evidence for TNC direct responsibility, it reads:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized herein [...]”

One may interpret from this article that not only states, but also individuals have the obligation to respect the norms in the treaties, and since TNCs are made out of individuals the obligations also fall upon them. Jägers argues that since human rights are considered to be fundamental for the dignity of the individual, the realization of these rights should not only be valid with regard to protection against the state. The individual should be protected against all violation of human rights, and not only when the one who breaches one’s rights could be directly identified as an agent of a government.<sup>67</sup>

The issue of direct obligations on TNCs as non-state actors is more controversial and legally less acknowledged in human rights law than the indirect obligation addressed in 2.3. Nevertheless, there appears to be a slowly evolving political will to impose on TNCs some responsibilities with regard to human rights. This is being seen through the growing international initiatives addressing direct, but voluntary, responsibilities of TNCs.

### 2.2.2 Soft law and standard setting initiatives

Many legal experts maintain that existing declarations referring to corporations are either

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<sup>65</sup> Clapham (1996) p.200

<sup>66</sup> Meuwissen In: Jägers (2002) p.43

<sup>67</sup> Jägers(2002) p.36

voluntary in character or so vaguely put, that they do not impose legal duties to companies to abide by human rights norms. However, the reality is more complex as both the OECD and ILO documents have the status of authoritative and high-level declarations of states and the UDHR remains one of the most respected and authoritative human rights documents.<sup>68</sup> They amount to what is called *soft law*, which consists of declarations, resolutions, guidelines, principles and other high-level statements by groups of states. The concept of soft law is very controversial among international lawyers as it can be considered to blur the distinctions between law and moral pressure.<sup>69</sup> The International Council of Human Rights Policy stated in 2002 that these soft laws are “neither strictly binding norms nor ephemeral political promises.”<sup>70</sup> They should not be looked upon as a substitute for national law, but they can lead to coherence to standards for companies who operate in many countries. TNCs’ CSR agenda, consisting of voluntary codes of conducts and public-private partnerships, fit into the wide category of soft law. Many argue that these codes of conduct should remain voluntary as soft law is becoming the norm in regulating international economic relations and that the rules are “flexible, adoptable, porous and not too constraining on state sovereignty and freedom of action.”<sup>71</sup> Some observers support this argument by claiming that since each company is unique, the private sector’s CSR standards should be handled with great care as there is no “one size that fits all.”<sup>72</sup> Other observers, however, argue that global binding regulation should be introduced in order to secure that the private sector acts sustainably. They criticize self-regulations because of the difficulty in sanctioning the corporations which do not follow their self-chosen responsibility; they fear that CSR will consist of nice words on a piece of paper without any function. This paper argues that in absence of an international system which can legally hold TNCs accountable for their actions, there is room for voluntary initiatives as the international human rights system evolves. Voluntary CSR initiatives can generate pressure from the civil society and establish expectations of a certain level of compliance

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<sup>68</sup> ICHRP (2002) p.74

<sup>69</sup> Bexell (2005) p.91-94

<sup>70</sup> ICHRP (2002) p.73

<sup>71</sup> Cutler (2002) p.189 In: Bexell (2005) p.92

<sup>72</sup> Henderson (2001) p.105

with human rights issues by TNCs. If societal pressure is strong enough, these expectations can lead to national legislation. When states become concerned, they can further generate pressure on the international level in order to put certain issues on the international agenda, which can be helpful in the process of devolving international human rights law. In this way there can be a spiral process of legal development at the international level as a response to the need for development of human rights law in a world in constant change.

One important voluntary initiative was launched by the UN in 2000 and is named Global Compact. The initiative has grown to more than 7700 participants, including over 5300 businesses in 130 countries around the world.<sup>73</sup> This initiative urges all private companies to commit themselves to respect the ten core principles in relation to human rights, labor rights and the environment. Even though this is a self regulatory mechanism, it does introduce human rights law into the policies of private entities and encourages them to report in compliance with the “Global Compact Guidelines for Communication for Progress”. Participants are supposed to correspond with their stakeholders on an annual basis about their progress in implementing the Global Compact principles through for example their annual financial reports or sustainability reports.<sup>74</sup>

### 2.2.3 International enforcement possibilities

A central matter of concern regarding TNCs and their human rights responsibility is the issue of enforceability. Under the current international law it is generally not possible to enforce human rights obligation on private parties at the international level.<sup>75</sup> Voluntary initiatives such as Global Compact introduced above can generate changes in corporate behavior since companies are urged to report on their performances, even though these initiatives are not enforcement mechanisms. National procedures should provide the

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<sup>73</sup> <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> Accessed 25.04.2010

<sup>74</sup> Another important initiative was put forward in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Right, who approved the “Norms on the Responsibilities of TNC’s and other Business Enterprises with regard to Human Rights”. The Norms are much criticized from both a substantive and procedural point of view and will therefore not attain any further attention in this thesis.

<sup>75</sup> ICHRP (2002)

primary means of enforcement, but as this thesis illustrates there are many obstacles for this being achieved in an effective way.

## 2.3 Indirect human rights responsibilities of TNCs

### 2.3.1 Indirect responsibility originating from the direct obligations of the state

Even though international law of human rights is primarily directed towards public authorities and their governments, it can be argued that it imposes obligations on non-state actors indirectly. This indirect responsibility originates from the direct obligations of the state where they are registered or where they do business to enforce their human rights treaty obligation.<sup>76</sup> Thus the indirect responsibility falls both on the country of origin and the host country. The legal premise for this liability is that states are not only obliged to respect human rights, but also to protect and enforce them effectively. Eide's articulation of three different levels of obligations, notably to respect, protect and fulfill is helpful in understanding the state's comprehensive human right responsibility. It is the second and third obligations which are the most interesting with regard to TNCs' indirect responsibility towards human rights. As noted, the second obligation to protect requires the state to take the measures necessary to prevent other individuals or groups, such as TNCs, from violating the rights belonging to each and every individual. The obligation to fulfill requires the state to take the measures necessary to ensure for each person within their jurisdiction opportunities to obtain satisfaction of the rights recognized in the human rights instruments.<sup>77</sup> This paper argues that if TNCs' contribution is necessary in order to obtain human rights compliance, then both the host state and the home state should be required to ensure that the TNCs contribute subsequently. However, this argument is controversial and far from legally well settled. What is generally more accepted is that the states are not fulfilling its obligation to protect and enforce peoples' human rights if they fail to protect individuals from harm by actors that fall under the category of "any organ of society".<sup>78</sup>

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<sup>76</sup> Andreassen (2006) p.127

<sup>77</sup> Eide (1989) p.37

<sup>78</sup> Andreassen (2006) p.127

### 2.3.2 Enforcing the state's duty to protect human rights

There exist today many international procedures which scrutinize the degree to which states are fulfilling their international human rights obligations. The UN and other regional mechanisms allow expert committees to review measures states have taken, and in some cases receiving complaints submitted by individuals. Some of these international procedures are well positioned to examine whether states are protecting citizens against threats committed by private actors such as companies.<sup>79</sup> As noted earlier, national procedures should provide the primary means of enforcement, but there remain many obstacles for these being achieved in an effective way. Victims face many barriers when they use national courts to complain a company abuse, such as national law being weak or outdated. Other elements, such as procedural rules, the cost and the delays involved and the relative weakness of victims compared to TNCs, make enforcement difficult.<sup>80</sup>

Nevertheless, Andreassen argues that in those cases where the country of operation is not willing to enforce through national legislation or where such legislation does not exist, the home country may take legal redress towards a company operation abroad.<sup>81</sup> In some national legal systems the home country of a TNC has a duty to ensure that its jurisdiction is followed by extraterritorial business activities and that this jurisdiction is in accordance with international recognized human rights.<sup>82</sup> However, this is far from the case in all TNCs' home states, and even in countries that have this duty "on paper" there are many obstacles for citizens living in the countries affected by TNCs' operations to actually be able to take up cases against these powerful actors.

This *indirect* form of TNCs' accountability has the advantage of remaining within the

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<sup>79</sup> ICHRP (2002) p.83

<sup>80</sup> The international Council on Human Rights Policy addresses these obstacles by addressing international procedures, the report "Beyond Voluntarism: human rights and the developing international legal obligations of companies" surveys several international enforcement procedures that might be used to ensure companies respect human rights.

<sup>81</sup> Andreassen (2006) p. 127

<sup>82</sup> *Ibid.* p. 128

human rights legal tradition, where the primary legal obligations belong with states. Its weakness is that enforcement is left to national governments, which might be unable or unwilling to take the steps required to ensure that companies respect human rights.<sup>83</sup>

## 2.4 Duality of obligations

There is a certain degree of what Andreassen terms *duality of obligations*, because even though states are the primary duty-bearer, the private entities have a responsibility to respect the rights of other private entities.<sup>84</sup> Even though the business sector does not have the same responsibilities as the state under the international human rights conventions, it must follow the national legislation which regulates much the same as the human rights does. The problem is that there remain several shortcomings in states being the only duty-bearer towards human rights, as we saw in section 2.1.2. The duality of obligations of state and non-state actors, such as TNCs, is expressed in far too general terms in the provision of the human rights treaties to be of any value when determining the precise practical nature of direct state legal responsibility for private actors' harmful activities.<sup>85</sup>

International human rights law is thus caught in a framework of state responsibility for human rights violation which is unable to deal fully with the changing role of the state in times of globalization.<sup>86</sup>

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<sup>83</sup> ICHRP (2002) p. 13

<sup>84</sup> Andreassen (2006) p.127

<sup>85</sup> *Ibid.*

<sup>86</sup> Bexell (2005) p.88

### 3. Extensive tax minimization and human rights: making the connection

Some observers have started to realize that human rights advocates have largely ignored what is arguably the single most important element in evoking resources that enable the government to promote the realizations of human rights, namely the fiscal policy.<sup>87</sup>

Extensive tax minimization as a an obstacle to the protection and fulfillment of internationally recognized human rights has not yet gained the support of the international community which is needed to make an impact on international human rights law. This might be because tax only recently has been considered as a human rights related problem necessitating international attention on a high level.<sup>88</sup> Take the example of environmental concern, its link to human rights has taken decades to evolve and attain international support. Now environmental degradation is linked to many human rights violations such as the realization of economic, social and cultural rights.<sup>89</sup> Below three arguments will be presented in favor of incorporating tax related issues into the human rights agenda, in the same way as the environment already has been. These three main arguments are based on what Cobham outlines as the main goals of taxation.<sup>90</sup>

#### 3.1 The importance of tax

##### 3.1.1 Raised revenues

Most evidently is the goal of raised revenues with which the government can meet its obligations toward its citizens in providing for fundamental internationally recognized human rights. Developing countries raise a much smaller portion of their national income in taxes than developed countries. The average for developing countries as a whole is less than 15 % of national income, and many raise a much smaller portion.<sup>91</sup> In comparison, the

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<sup>87</sup> Steiner, Alston and Goodman (2008) p.305

<sup>88</sup> This can be illustrated by the human rights and business recourse center, a pioneer in this field, only recently introduced website concerning this issue. <http://www.business-humanrights.org/Categories/Issues/Other/Taxavoidance>

<sup>89</sup> Sands (2003) p.297

<sup>90</sup> Cobham (2007)

<sup>91</sup> Action Aid (2009) p.5



worlds' richest countries raise 37%.<sup>92</sup> Extensive tax minimizations by TNCs have a clear impact concerning this issue, especially because of the difficulty of taxing personal income in many developing countries which have large informal economies. If the government does not receive tax revenues from TNCs which often are the largest tax payers in developing countries, the state cannot afford facilitating for its citizens' health services, education, security and other human rights related issues.<sup>93</sup> This implies that extensive tax minimizations deprive people from their rights set down in the various human rights treaties. This paper supports the view that tax is crucial for sustainable realization of human rights, because persistent government financing is a key issue in this regard. In order to provide human rights for inhabitants in a country in a sustainable manner it is important that the means to finance public goods, which are crucial for the upholding of human rights, come from the government's own resources. The UNSG underlined this point in March this year by stating that:

“Developing countries have the primary responsibility for mobilizing domestic resources for their own development in a sustainable manner. Sustained and equitable economic growth is a prerequisite for poverty reduction and international investment and trade can be important sources of support.”<sup>94</sup>

Tax represents an enormous potential for raised government revenues. The report "The Precarious State of Public Finance: Tax evasion, capital flight and the misuse of public money in developing countries – and what can be done about it" written by the Global Public Policy Forum, contains much new information and analysis about the importance of taxation of TNCs in developing countries. The report rightly points out that while the focus of many in the international community has been on increasing aid flows, too little attention has been paid to the much larger flows in the other direction. If developing countries were able to collect sufficient tax, they would need less financing from foreign loans, which would reduce debt problems and make them be less dependent on foreign

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<sup>92</sup> *Ibid.*

<sup>93</sup> Avery (2009): oral presentation

<sup>94</sup> Ban-ki Moon (2010): oral presentation

aid.<sup>95</sup> Action Aid has calculated that if developing countries were able to raise the portion of their national income from tax revenue to only 15%, they could realize an additional US\$198 billion per year.<sup>96</sup> This corresponds to all development assistance jointly, and is enough to meet and even exceed the annual Millennium Development Goals funding gap.<sup>97</sup>

The literature regarding the importance of tax revenues for development often focuses on taxations' role with regard to issues which correspond to economic, social and cultural rights. This could be the result of the common assumption that ICCPR and ICESCR entail different types of obligations. It is understood that ICCPR is followed by negative duties which do not cost anything to implement, as opposed to the ICESCR which according to this view is followed by positive duties. However, many commentators have shown that this is not the case, as both sets of rights require considerable government expenditure to meet its purpose.<sup>98</sup> A report by the special rapporteur on extrajudicial, summary and arbitrary execution concerning Guatemala from 2007 illustrates that higher state revenue as a consequence of a better fiscal policy is important also with regard to civil and political rights:

“The reason the executive branch of Guatemala State has so little money to spend on the criminal justice system is that the legislative branch, the Congress, impose exceptionally low taxes [...] Guatemala could so readily afford a better criminal justice system [...] the lack of resources is due to the lack of political will: rather than funding a high-quality criminal justice system, Congress have decided to impose very low levels of taxation and, thus, starve the criminal justice system and other parts of the Government.”<sup>99</sup>

The Center for Economic, Social and Cultural Rights illustrates that tax policies are important for the compliance of economic, social and cultural rights in Guatemala by stating that:

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<sup>95</sup> Martens (2008) In: Kokke and Weysig (2008) p.2

<sup>96</sup> Action Aid (2009) p.5

<sup>97</sup> Ibid.; Christian Aid (2009) p.2

<sup>98</sup> Holmes and Sunstein (1999), Beetham (1995)

<sup>99</sup> UN DOC. A/HRC/4/20/Add.2 (2007)

“Failure to implement redistributive tax [...] has undermined any meaningful progress in addressing poverty and inequality in Guatemala. More than half the population lives in poverty, while the richest 10 percent of the population accounts for 43 percent of the country’s income.”<sup>100</sup>

According to Baker and Pogge there is a clear link between human rights compliance and what they term international financial integrity. They argue that there is an obvious connection between capital flowing out of the country and the growth of poverty in developing countries and underline the importance of these issues becoming an integral element of human rights advocacy.<sup>101</sup> They argue that there are more people living in severe poverty today than the whole humanity in 1948 because of capital flight from the poorer countries is being accelerated through the global financial system. As extensive tax minimization consists of capital flowing out of developing countries it can in their view be said to be a cause of increased poverty. Mary Robinson once stated:

“I am often asked what is the most serious form of human rights violation in the world today, and my reply is consistent: extreme poverty.”<sup>102</sup>

In compliance with this view the Vienna Declaration of the 1993 Conference of Human Rights observed that “extreme poverty and social exclusion constitute a violation of human dignity.”<sup>103</sup> Measures to tackle extensive tax minimization will lead to higher public revenues which are necessary, though not necessarily sufficient, for tackling the widespread problem of poverty in developing countries. Since there is a growing consensus on seeing poverty through the lenses of human rights, it may be argued that the most efficient measure in raising higher national public revenues, which possibly would enable the government to handle poverty, should also be regarded as a human rights concern. This argument is based on article 2.1 of the ICESCR which states that governments should take steps to their maximum available resources in order to realize the rights contained in the covenant. The thesis will elaborate further on the fiscal dimension of article 2.1 of the ICESCR in section 3.3.

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<sup>100</sup> CESR (2008) p.7

<sup>101</sup> Baker, Pogge and Ganesan (2009)

<sup>102</sup> <http://www.amnesty.org.au/poverty/comments/17142/> [Accessed 16.04.2010]

<sup>103</sup> Vienna Declaration and Programme of Action. (1993) Part 1, § 25 , for the complete text: <http://www.unhcr.ch/html/menu5/wchr.htm> [Accessed 23.03.2010]

### 3.1.2 Redistribution

A second goal of taxation is redistribution which implies reducing inequality and to ensure that the benefits of development are felt by all.<sup>104</sup> The current situation in many developing countries is characterized by “growth with growing inequalities” and this is especially interesting as the economic growth rates in many of these countries have not been as good as now in many decades.<sup>105</sup> A report by a Canadian Government Agency underlines the importance of the goal of redistribution as it concludes that:

“Guatemala’s chronic problem with social development has been its elite’s unwillingness to pay taxes or to participate in any initiative to redistribute resources”.<sup>106</sup>

Further the UNDP Human Development Report from 2005 states that:

“Overcoming the structural forces that create and perpetuate extreme inequality is one of the most effective routes for overcoming extreme poverty [and] enhancing the welfare of society [...] inequality creates disadvantages for people throughout their lives. [...] high level of income inequality is bad for growth, and they weaken the rate at which growth is converted into poverty reduction: they reduce the size of the economic pie and the slice captured by the poor.”<sup>107</sup>

This paper argues that “the structural forces that create and perpetuate extreme inequality” is upheld by extensive tax minimization. Tax measures are often characterized as progressive or regressive. Progressive tax will take up a greater proportion of the taxpayer’s income or wealth as it increases<sup>108</sup>, and is argued to make a substantial contribution to reducing inequality.<sup>109</sup> However, there are those who argue that regressive tax rates are the best option for stimulating economic growth, because it takes away fewer resources from the wealthy, who in turn can invest these amounts in the economy. According to this view this will lead to job creation and innovation which will benefit all. It allegedly also leads to more revenue for the state as lower tax rates for the rich means that they will be less

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<sup>104</sup> Cobham (2007) p.2

<sup>105</sup> DNG (2008) p.1

<sup>106</sup> See: <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/NIC-22312396-NQ3#2>. [Accessed 01.03.2010]

<sup>107</sup> UNDP (2005) p.5

<sup>108</sup> Miller and Oats 2009:4-5

<sup>109</sup> Cobham (2005) p.15

inclined to cheat or avoid taxes, and because its simplicity eliminates loopholes and deductions. Nevertheless, to the extent that these considerations are real, the supporters of regressive tax policies do not address the inherent injustice of this kind of taxation system.<sup>110</sup>

Frey and Torgler argue that paying tax is a social act which reflects a desire to participate in a group, rather than economic maximization.<sup>111</sup> Consistent with this view, research done by Bosco and Mittione show that tax compliance by a country's inhabitants depend on the perceived or expected level of redistribution.<sup>112</sup> Arguments against using tax for distribution rely on the assumption that governments have at their disposal *other* tools such as the ability to make direct cash transfers to households. As there are many obstacles in the way for carrying this out in all low-income countries, this would mean giving up most of the governments' power to reduce inequality.<sup>113</sup>

### 3.1.3 Representation

Finally and most importantly, although often underappreciated, is the goal of strengthening and protecting channels of political representation.<sup>114</sup> Representation is a crucial element of good governance and good governance and human rights are mutually reinforcing. In fact, many commentators argue that the former is a precondition for the realization of the latter. Ross uses a panel of data from countries at all different levels of income to show that these channels of representation are systematically strengthened when the share of tax revenues in government expenditures is higher, meaning when governments rely mostly on tax.<sup>115</sup> A recent report argues that governments that are more reliant on tax revenues are

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<sup>110</sup> Spagnoli (2009)

<sup>111</sup> Frey and Torgler (2006)

<sup>112</sup> Bosco & Mittione (1997) In: Cobham (2007) p.7; Mittione (2006)

<sup>113</sup> Cobham (2007) p.3

<sup>114</sup> *Ibid.* p.2

<sup>115</sup> Ross (2004) In: Cobhard (2007) p.2

In this article, the 'taxation leads to representation' argument is explored and tested using pooled time-series cross-national data from 113 countries between 1971 and 1997. See the full article for further information.

likely to have a greater state capacity and be more responsive and accountable.<sup>116</sup> A book by Brautigam, Fjeldstad, and Moore, named “Taxation and State Building in Developing Countries: Capacity and Consent”, argue that taxation may play the central role in building and sustaining the power of states and in determining their ties to society. They believe that the state building role of taxation can be seen in two important areas: the rise of a social contract based on negotiating around tax, and the institution-building stimulus provided by the essential raised revenue.<sup>117</sup> They note that:

“Progress in the first area may foster representative democracy. Progress in the second area strengthens state capacity. Both have the potential to bolster the legitimacy of the state and enhance accountability between the state and its citizens.”<sup>118</sup>

The channels of representation emerge from the process of taxation, because it can lead to the development of responsiveness and accountability by providing incentives for government and citizens to go into a “tax bargain” of a “fiscal contract”. In this bargain, citizens accept and comply with taxes in exchange for government provision of efficient services, the rule of law and accountability.<sup>119</sup> Such bargains are mutually advantageous; as citizens receive improved governance while the government receives larger, more predictable tax revenues.<sup>120</sup> In absence of a long history of sustained, legitimate and representative governments, the systems of government can in itself an outcome of taxation.<sup>121</sup> Many TNCs do not reveal the amounts they pay in tax to the country where they operate and thereby undermine the inhabitants of that country’s ability to hold their governments responsible in coherence with the received tax revenues. In addition, the reality or perception that politically and economically well-connected corporations are not paying taxes can be principally harmful to levels of trust in the tax systems. Mittone argues that the observed levels of citizens’ tax compliance depend on the perceived or expected level of others’ compliance level.<sup>122</sup> If the system is seen by the general public as optional

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<sup>116</sup> Prichard (2009) p. 13

<sup>117</sup> Brautigam (2008) p.1

<sup>118</sup> *Ibid.*

<sup>119</sup> Moore (2007) In: Prichard (2009) P.21

<sup>120</sup> Levi (1988) In: *Ibid.*

<sup>121</sup> Heady (2004) In: Cobham (2007) p.3

<sup>122</sup> Mittone (2006) p.814

and open for avoidance by those who can afford to pay sophisticated tax advice, then this may lead to social discord and discourage compliance by other tax payers.<sup>123</sup> This entails that the real and perceived compliance is dramatically weakened by the lack of international measures to tackle tax evasion and avoidance by large TNCs. Hence, these TNCs' extensive tax minimization does not only undermine revenue, but also undermine public confidence in the legitimacy of tax systems.<sup>124</sup>

## 3.2 Extensive tax minimization

As noted in the introduction, this thesis uses the term “extensive tax minimization” to describe both illegal tax evasion and irresponsible but legal tax avoidance. However, this section will handle tax evasion and tax avoidance separately.

### 3.2.1 Tax evasion

#### 3.2.1.1 Definition and scope

Williams defines this term as:

“any criminal activity, or any offence of dishonesty punishable by civil penalties, which is intended to reduce the incidence of tax.”<sup>125</sup>

Tax evasion is thus by definition illegal, but almost every commentator will also agree that it is unethical, both because of the means used to accomplish it, and because of its consequences - that legally due tax is not paid.<sup>126</sup> It usually entails taxpayers purposely misrepresenting or concealing the true state of their affairs to the tax authorities in order to reduce their tax liability.<sup>127</sup> Examples of tax evasion are when companies do not declare all, or parts of their income, or when a company makes a claim to compensate an expense against its taxable income which did not take place or is of a type not endorsed for tax

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<sup>123</sup> Williams (2007) p.20

<sup>124</sup> Prichard (2009) p. 32

<sup>125</sup> Williams (2007) p.15

<sup>126</sup> *Ibid.*

<sup>127</sup> Kokke and Weyzig (2008) p.6

relief in the country concerned. Corporations may also make a tax claim that seems legal, but only because the relevant facts have been concealed.<sup>128</sup> Tax evasion has an enormous impact on states' ability to protect and fulfill their human rights responsibilities because it leads to massive loss of government revenue. It has been estimated that developing countries lose US\$500 billions every year as a result of illegal private outflows that are not reported to the authorities and on which no tax is paid.<sup>129</sup> To put this number in context it is estimated that foreign public aid from rich to poor countries consists of US\$50 billion annually. The Norwegian Forum on Environment and Development, a coalition of more than 50 Norwegian NGOs, has pointed out that bringing an end to illicit capital flight from developing countries as a primary objective for governments in order to receive higher revenues to finance development.<sup>130</sup>

It is estimated that 60% of the world's trade now takes place within, rather than between, TNCs.<sup>131</sup> According to several NGOs these transactions are carried out in an increasingly obscured way because figures to a larger degree are manipulated to reduce tax. Global Financial Integrity, a research institute based in Washington D.C., has estimated that the amount of money that left developing countries in 2006 as a result of transfer pricing consisted of between US\$ 471 billion and US\$ 506 billion.<sup>132</sup> A Christian Aid report from 2009 quantifies for the first time the damage done to individual countries by mispricing. The massive sums this study exposes are in fact just the tip of the iceberg, as it could only analyze publicly available data. Information held back by secrecy rules in tax havens would arguably reveal a much more serious picture. According to the data obtained from the Christian Aid study it is evident that much of the illicit capital made from mispricing flows into the European Union and the United States while the victims are often poorer countries where the revenue authorities have neither the expertise nor the resources to fight back.<sup>133</sup>

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<sup>128</sup> *Ibid.*

<sup>129</sup> Baker (2005) p.172

<sup>130</sup> [www.un.org/esa/ffd/doha/NorwegianNGO\\_submission.pdf](http://www.un.org/esa/ffd/doha/NorwegianNGO_submission.pdf) - 2009-02-17 Accessed 22. March 2010

<sup>131</sup> Neighbour (2002) p.1

<sup>132</sup> Action Aid (2009) p.5

<sup>133</sup> Christian Aid (2009) p.4-6



### 3.2.1.2 Tax havens

Many observers argue that most of the tax evading takes place secretly through tax havens. The OECD defines tax havens, or what they refer to as “harmful preferential tax regimes”, as having the following key features: no or only nominal tax rates, a lack of transparency and lacking effective mechanisms which opens for exchange of information. TNCs benefit from the offshore system both indirectly, as tax competition between countries is partly driven by the existence of tax havens, and directly, as they may obtain affiliates in these offshore jurisdictions which can be used for tax evasion.<sup>134</sup> Tax havens are said to be one of the most important aspect of the current globalization of financial business. It is assumed that banks, funds, companies and other arrangements in tax havens hold about 1/3 of the world Gross Domestic Product, even though they only represent 1 % of the world’s population. Some observers see the use of tax havens as beneficial in the battle for human rights protection and personal freedom, because they see these closed jurisdictions as a safe refuge for people trying to protect their assets from oppressive regimes.<sup>135</sup>

In Norway a Commission on Capital Flight was appointed by the Norwegian government to write a report about the relationship between tax havens and capital flight from developing countries.<sup>136</sup> A draft of their report was given to the Norwegian Minister of Environment and Development in June 2009 and has created recent media attention in Norway concerning tax havens’ secrecy rules and their harmful effects on tax competition all over the world. According to this report corporations are able to utilize illegal methods for evading tax through registering their business in another country than where they actually are from, in order to benefit from low tax or even non existing tax rates. Because of tax havens’ secrecy laws, which make it criminal for agents to inform outsiders about their clients, the people or firms that utilize these closed jurisdictions remain safe from outside scrutiny. On the one hand, tax havens can thereby argue that there is no evidence of them facilitating something illegal, but on the other hand it is questioned why these

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<sup>134</sup> Oxfam (2000) p.7

<sup>135</sup> Edwards and Michelle (2008). p.177

<sup>136</sup> Joly (2009)

jurisdictions should have secrecy rules if their clients have nothing to hide. Zimmer is one of those who have criticized this report. Though a consultative statement he questions the Commission's alleged assumption that the entitlement of taxation only falls upon the home-state concerning how tax agreements distribute tax payment between TNCs' home-state and host-state.<sup>137</sup> He argues that the report assumes that if a TNC is registered in a tax haven, this closed jurisdiction alone has the entitlement of taxation from this company. Zimmer points out that tax agreements most commonly give the host state - the country where the TNC perform their activity- considerable taxation entitlements. However, as this paper have illustrated there are many ways in which a TNC can dodge paying tax in a host-country. Many will nevertheless see nothing irresponsible in TNCs using tax havens in order to reduce their tax burdens, given that there is no illegality involved.<sup>138</sup> In addition, they might argue that if they do not make use of the possibilities available to them, TNCs would be failing their duties towards the shareholders in the company. The argumentation is that just because other corporations and individuals abuse these jurisdictions to evade tax, there should be no reason for them not to make legislative use of them. Contrary to this view, others argue that this is exactly why tax havens should not be employed to save tax, because they to some degree support economic activities which are at the very least morally doubtful because of their effect on tax competition, and are possibly even illegal.<sup>139</sup>

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[http://www.regjeringen.no/nb/dep/ud/dok/horinger/hoeringsdok/2009/nou200919\\_innspill/horingsuttalelser.html?id=575845](http://www.regjeringen.no/nb/dep/ud/dok/horinger/hoeringsdok/2009/nou200919_innspill/horingsuttalelser.html?id=575845) [Accessed 28.02.10]

<sup>138</sup> Edwards & Mitchell (2008) p. 187

<sup>139</sup> Williams (2007) p.31

## 3.2.2 Tax avoidance

### 3.2.2.1 Legality and ethics

Companies can be taxed by the state in different ways. The main form of direct taxation for TNCs is corporate tax, paid as percentage of profit. TNCs may also be subjected to taxes on imports and exports, on capital gain tax and withholding taxes.<sup>140</sup> TNCs have numerous possibilities to structure their activities and financial affairs in order to avoid these taxes. Above we have looked into some of the illegal tax minimization tactics, and below we will focus on legal tax strategies. It can be useful to distinguish between tax planning and tax avoidance. The term extensive tax minimization is used in this thesis in order not to include responsible tax planning, which is a taxpayer's right to adjust his or her economic affairs in order to obtain 'the best outcome' in response to the tax system.<sup>141</sup> Extensive tax avoidance on the other hand, occurs when one "uses artificial or contrived methods of adjusting tax payers' social, economic or organizational affair to reduce their tax liability in accordance with the law."<sup>142</sup> Which responsibilities TNCs should have when operating in a developing country is an ethical question, a question between right and wrong. This type of question is too often reduced to a discussion about law, about what is legal and what is illegal. Kolstad, Wiik and Larsen argues that this is unfortunate because there is no automatic coherence between what is legal and what is right or what is illegal and what is wrong.<sup>143</sup> Given the weak law structures in many countries one cannot agree that activities that are not illegal are accepted. Below we will introduce one harmful outcome of legal tax avoidance.

### 3.2.2.2 Race to the bottom

Countries with comparable economic, political and social situation may compete with each other in attracting foreign direct investment (FDI). Because of comparable circumstances and TNCs' increasing ability to shift their business activities across national borders, host-

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<sup>140</sup> Kokke and Weysig (2008) p.5, See this paper for further detail on what these taxes imply.

<sup>141</sup> Ulph (2006) In: Williams (2007) p.17.

<sup>142</sup> *Ibid.*

<sup>143</sup> Kolstad, Wiik and Larsen (2007) p.3

countries seeking to attract FDI need specific advantages through which they stand out to foreign investors. Tax competition means that countries compete against each other by using tax-related or financial incentives to attract FDI.<sup>144</sup> The incentives offered include lower tax rates on profit and capital, tax holidays which implies reduction or elimination of tax for a certain period of time, accelerated tax allowance for spending on capital assets and subsidies.<sup>145</sup> The main long-term incentive offered by developing countries is a reduction in tax rates for corporations. Africa's low income countries have reduced their average statutory corporate income tax rate by 0.8 percentage points per year since 1990.<sup>146</sup> A recent working paper from the International Monetary Fund (IMF) of 2009 states:

“Most likely, the impact [of tax incentives] is negative, with the beneficiaries likely to be the wealthiest individuals, often located in foreign countries.”<sup>147</sup>

As trade liberalization makes it easier to serve national markets from locations abroad, TNCs' decisions as to where to invest are more likely to be affected by tax considerations.<sup>148</sup> TNCs are able to pursue a strategy of global competitiveness to obtain optional conditions for profit.<sup>149</sup> Host governments can for example establish Export Processing Zones (EPZ) where TNCs producing for export are granted numerous concessions. ILO estimates that there are more than 3500 EPZs worldwide.<sup>150</sup> The spectrum of investment incentives used by governments to win the favor of foreign investors is illustrated by an advertisement for EPZs in Nigeria:

“The regulatory regime for EPZs in Nigeria is liberal and provides a conducive environment for profitable operations. The incentives available to operators in Nigeria's EPZs compare favorably with the most attractive elsewhere in the world and are the best in the region. They include one hundred percent foreign ownership of investments, “one stop” approvals, no import or export licenses, duty free import of raw materials, unrestricted remittance of capital profits and dividends, tax holidays and no strikes.”<sup>151</sup>

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<sup>144</sup> Tax justice website, “activities” + “tax competition”

[http://www.taxjustice.net/cms/front\\_content.php?idcat=102](http://www.taxjustice.net/cms/front_content.php?idcat=102) Accessed 10.02.2010

<sup>145</sup> Kokke and Weysig (2008) p.3

<sup>146</sup> Keen and Masour (2009) p.16

<sup>147</sup> Klemm (2009) p.14

<sup>148</sup> Keen and Masour (2009) p.4

<sup>149</sup> Endresen and Bergene (2007) p.2

<sup>150</sup> Boyenge (2007) p.2

<sup>151</sup> See <http://www.onlinenigeria.com/agriculture/?blurb=483> [Accessed 10.03.2010]

All these incentives are costly for national economies and repeatedly lead to failed investment with serious consequences. Some observers argue that tax avoidance allows corporations to become economic free-riders, as they are able to enjoy the benefits of corporate citizenship without accepting the cost, while at the same time causing damaging market distortions.<sup>152</sup> Others believe that tax avoidance is not harmful to national economy as they see tax minimization as favorable for investment and economic growth.<sup>153</sup> A study by Mc. Kinsey Global Institute on the impact of FDI in Brazil, China, India and Mexico provides some concrete evidence for the opposite.<sup>154</sup> The study shows that direct and indirect subsidies for foreign companies are costly for national economies. They place a burden on public funds and repeatedly lead to failed investments with serious consequences. A report by the Expert Group meeting on tax aspects of domestic resource allocation (hereafter the Rome report) recognizes this problem, arguing that certain projects might be so large or so influenced by political considerations, that tax incentives which have been competitively offered between countries, have negotiated away the need to pay tax in return for other benefits to the country, such as employment outcomes.<sup>155</sup> The alleged outcomes “may over time be proved to be overstated, non-existent or even distractions from other investments likely to provide greater sustained development over the long run.”<sup>156</sup>

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<sup>152</sup> Christensen & Murphy (2004) p.39

<sup>153</sup> Edwards & Mitchell (2008) p.110

<sup>154</sup> Mc.Kinsey Global Institute (2003) p.25-31

<sup>155</sup> The Rome report (2007) p.4

<sup>156</sup> *Ibid.*

### 3.2.3 Summary

The view on taxes' role in society varies in different economic schools. Some see tax minimization and tax competition as beneficial in the battle for human rights protection and personal freedom, and see the use of tax havens as a safe refuge for people trying to protect their assets from oppressive regimes.<sup>157</sup> According to this view, tax competition should be applauded, and not persecuted because it creates higher innovation and higher economic growth as tax is not wasted on ineffective governments. Others see tax revenues as the lifeblood of democratic government and the social contract, and vital to the infrastructure of justice that underpins liberty and the market economy.<sup>158</sup> This paper supports the latter and sees extensive tax minimization by TNCs as an obstacle to human rights compliance as scarce public resources hamper governments' ability to deliver to its populations on human rights issues.

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<sup>157</sup> Edwards and Michelle (2008) p.177

<sup>158</sup> Hutton (2002) p.72

### 3.3 How accepting extensive tax minimization by TNCs may violate state obligations towards the ICESCR : the fiscal dimension of article 2 (1)

States are entitled to decide how and where they want to allocate their resources and as funds always are limited, states need to prioritize.<sup>159</sup> Nevertheless, states undertake an obligation when ratifying human rights treaties, in particular the ICESCR which limits their discretion. When ratifying the ICESCR the state accepts certain duties according to the article 2.1. These include the following three obligations: firstly to take immediate steps to make sure that economic, social and cultural rights will progressively become available to all those who are under its jurisdiction; secondly to prohibit retrogressive measures; thirdly to devote a maximum of available resources to this purpose alone or in cooperation with the international community.

#### 3.3.1 Progressive realization

Article 2 (1) in the ICESCR is of particular interest when examining which obligations human rights law imposes on states concerning tax. The article reads:

“Each State Party to the present Covenant undertakes to *take steps*, individually or through international assistance or 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.”(my emphasis).

Hence, when states ratify this convention they accept a general legal obligation to take steps to the maximum of their available resources by all appropriate means, to progressively achieve the full realization of economic, social and cultural rights. In General Comment No. 3, the Committee of Economic, Social and Cultural rights (hereafter the Committee) elaborate upon what the various elements of this article imply.

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<sup>159</sup> ICHRP (2009) p.47

Concerning the notion of “taking steps”, the Committee comments in § 2 that such steps should be “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”. § 3 further states that the means which should be used in order to satisfy the obligations to take steps are put forward in article 2 (1) as “all appropriate means, including particularly the adoption of legislative measures”. The Committee recognizes that in many cases legislation is highly desirable and is in some cases even indispensable. What the Committee does not mention is that legislation can be insufficient. TNCs operating in developing countries with weak institutions and fragile state apparatus may be tempted to take advantage of an insufficient legal framework which allows them to, for example, to withdraw extractive resources without paying back to the societies in which they operate. This can be said to be the case in Zambia where millions of dollars are lost every year because of the government’s low taxation of transnational mining companies operating in the country.<sup>160</sup> Zambia is rich in mineral resources and despite the growing prices in the world market for the products which are mined out, the country remains one of the least developed countries in the world.<sup>161</sup> Reductions in mining royalties payments cost US\$ 63 million in foregone revenue between 2004 and 2006.<sup>162</sup> Agreements signed between the mining companies and the government has a tendency to give the mining companies huge concessional incentives which tend to disadvantage public revenues.<sup>163</sup> Even though extractive industries have the opportunity to contribute significantly to Zambia’s economic development and provide opportunities for foreign investment and private sector development, experience shows that the presence of transnational mining companies breed underdevelopment and violation of human rights.<sup>164</sup> Kangamungazi is the Economic Justice Programme Officer of Caritas<sup>165</sup> Zambia and presented the following statement at the UN Consultation on Business and Human Rights in Geneva in October 2009:

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<http://www.bistandsaktuelt.no/Nyheter+og+reportasjer/Arkiv+nyheter+og+reportasjer/Zambia+g%C3%A5r+glipp+av+skattemillioner.156914.cms> Accessed 12.04.2010

<sup>161</sup> Number 163 out of 179 countries on the Human Development Index.

<sup>162</sup> Action Aid (2009) p.41

<sup>163</sup> Kangamungazi (2009)

<sup>164</sup> *Ibid.*

<sup>165</sup> For information about Caritas: <http://www.caritas.org/about/index.html>



“one of the most important factors limiting the contribution of this important sector to the development of the country are the differential treatments through tax concessions (tax holidays) that the mining industries are given, and also the deliberate avoidance of these mine companies to pay their taxes.”

This case illustrates that even though host-state legislation is followed by TNCs, it does not necessarily lead to the company paying their share to the community where they operate.<sup>166</sup>

In General Comment No. 3 the Committee does emphasize that “the adoption of legislative measure [...] is by no means exhaustive of the obligations of State parties. Rather the phrase “by all appropriate means” must be given its full and natural meaning”. Further §7 states that: “Other measures which may also be considered “appropriate” [...] include, but are not limited to, administrative, financial, educational and social measures.” States’ implementation of a taxation system which hampers extensive tax minimization should according to this their count as these appropriate measures. The Concluding Observations on Angola from 2008 states:

“The Committee notes with concern that, in spite of the State party’s significant economic growth and huge natural wealth, the amount of resources allocated to social services and public infrastructure is far from adequate. The Committee urges the State party take all appropriate measures, including by allocating product of oil and diamond revenues, to accelerate the rehabilitation and reconstruction of public infrastructure and social services in both the urban and rural areas.”<sup>167</sup>

Assuring that TNCs pay taxes to the communities or countries where they extract their resources would, according to this thesis, count as an appropriate measures to progressively realize the rights set down in the convention. It is primary the responsible of the governments to design tax systems that will raise enough revenue to finance public investment. Governments should aim to strike a balance between raising revenue and attracting investment that will benefit its population as a whole, including poor people. It is clear that allowing extensive tax minimization implies that the state is not taking steps in the right direction to progressively realize the rights set down in the ICESCR. When states

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<sup>166</sup> For more information about this situation in Zambia see Dymond (2007). For same experience in Tanzania see Curtis and Lissue (2008)

<sup>167</sup> CESCR Concluding Observations on Angola (2008) §.26

fail to collect important tax revenues from TNCs, this thesis argues that states' resources are not being used maximally to realize economic, social and cultural rights.

### 3.3.2 The prohibition on taking deliberately retrogressive measures.

Under General comment no 3, § 9 the UN Committee has noted:

“Any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenanting and in the context of the maximum available resources”

In order to understand the Committee's statement, it is important to analyze what constitutes a “deliberately retrogressive measure”. However, the Committee has not provided a definition. The International Council of Human Rights Policy has found some guidance in General Comment number 4, §11, which states that a

“ a general decline in living and housing conditions, directly attributable to policy and legislative decisions by State Parties, and in the absence of any compensatory measure, would be inconsistent with the obligations under the Covenant”<sup>168</sup>.

The International Council of Human Rights Policy argue thereof that a “deliberate retrogressive measure” implies any measure which involves a step back in the level of protection according to the rights contained in the Covenant, resulting from an intentional decision by the state concerned.<sup>169</sup> Judging from this interpretation, a state's approval of extensive tax minimization by TNCs may constitute a deliberately retrogressive measure, as this implies a step back in the level of protection according to, at least, the rights contained in the ICESCR.

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<sup>168</sup> CESCR General Comment No.4. (1991) §.11

<sup>169</sup> ICHRP (2009)p.47

### 3.3.3 The responsibility of the international community

The view that the international community has a responsibility towards human rights contained in the ICESCR can be found in the General Comment no.3 of article 2 (1):

“the Committee notes that the phrase “to a maximum of its available resources” was intended by the drafters of the Covenant to refer both to the resources existing in the State and those available from the international community through international cooperation and assistance”.<sup>170</sup>

Having this in mind it is interesting to note that Pogge argues that most of the largest obstacles to human rights compliance in today’s world can be traced back to institutional factors. He includes both the national institutional level in many developing countries, where the political and economic elite bear the primary responsibility, and at the present global institutional level, where the governments and citizens of the wealthy bear the primary responsibility.<sup>171</sup> T. Pogge relies his arguments on article 28 of the UDHR which states:

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

He further interprets this article to imply that an institutional design *realize* human rights insofar as the human rights is fulfilled for the persons upon whom this order is imposed.<sup>172</sup> The long time objective of the international community should be to encourage and assist in developing institutions, managerial capacity and financial resources which are necessary to implement and enforce laws protecting human rights.<sup>173</sup> In other words, the international community needs to assist governments in applying national human rights law in a way that is consistent with their international obligations. The responsibility to avoid obstacles to human rights compliance does not only fall on the host government, but also of the international community. Tax is essentially a political issue, and all governments should take responsibility for changing a global system that benefits the rich at the expense of the

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<sup>170</sup> CESCR General Comment no. 3 (1990) §.13

<sup>171</sup> Pogge (2005) p.721

<sup>172</sup> *Ibid.*

<sup>173</sup> IOE, ICC &BIAC (2006) p.4

poor.<sup>174</sup> Combating extensive tax minimization in a way that benefit developing countries requires a forum that can create and enforce global rules designed to create a social and international order in which the rights and freedoms in the UDHR can be fully realized. Up till now there exist no global body that possesses the political mandate, legitimacy and technical expertise needed to do this.<sup>175</sup> The United Nations Committee of Tax Experts, for example, experiences a lack of political mandate and resources.

### 3.3.4 Summary

The view that individual states or the international community should be held responsible for not creating the conditions necessary for the realization of a fiscal policy which could lead to protection and fulfillment of rights in the ICESCR is very controversial and far from legally well settled. Finding no evidence that the Committee's concluding observations have reported back on country reports regarding fiscal matters, illustrates that the link between tax and human rights compliance is only in the cradle. This might partly be because the issue is politically defected because opposing political schools differ in their view on taxation. A state cannot be said to violate the human rights of the ICESCR by not hampering extensive tax minimization because there is not yet a universal acceptance of taxation being necessary in order to progressively realize the rights set down in the convention. Nevertheless, this paper argues that the state should have at least some responsibility to maintain its tax revenue from TNCs because of taxations potential role in promoting raised revenues, redistribution and representation.

When we discussed the human rights responsibility of TNCs, we saw that the only way this could be found within the human rights legal framework was indirectly though states being responsible for non-state activities. The human rights obligations undertaken by governments require it to use all appropriate means to ensure that TNCs operating within its territory and are subject to its jurisdiction comply with national legislation designed to

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<sup>174</sup> Action Aid (2009) p.9

<sup>175</sup> *Ibid.*

give effect to human rights. What then when TNCs are operating in a host country where national legislation is not designed to give effect to human rights? Or where the legislation is present, but the state consequently overlook TNCs' breaches, or give legally grounded exemptions from these laws because they are so desperate in the quest for foreign direct investment? And the home state of the TNCs decides to withhold from regulations because of the extraterritorial nature of the acts involved. Should not the TNC have any obligations towards the citizens in the country where it conducts its operations since it is on their land that they conduct their operations?

It must once again be emphasized that the primary responsibilities for the provision of the ICESCR fall upon states. However, when states fail to comply with their obligations according to human rights law because of insufficient resources, lack of political will or other inabilities, the TNCs can voluntarily take upon itself the duty to assist in the provision of certain economic, social and cultural rights. For the time being there is no binding legal instrument specifying the duties and the responsibilities of TNCs in this regard, but where national law is absent TNCs are expected to respect the principles of relevant international instruments.<sup>176</sup> The role taken by TNCs is still purely voluntarily which is either based on goodwill or long-term economic and social policies. All company responses should, nevertheless, be based upon a commitment to promote and support human rights.<sup>177</sup>

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<sup>176</sup> IOE, ICC & BIAC (2006) p.4

<sup>177</sup> *Ibid.*

### 3.4 The ethical responsibility regarding TNCs' tax policy from a human rights perspective

#### 3.4.1 Introduction

A report written by Kolstad, Wiik and Larsen about Norwegian CSR activities in developing countries addresses the issue of human rights and assigned responsibilities for corporations. One of the authors, Kolstad, elaborated upon some of the issues in this report in an article in *Human Rights Review*. This section will be based on their work. It is normal to divide between negative and positive responsibilities with regards to right realization. The former corresponds to what we have termed “do no harm” earlier in the paper, where one has the responsibility to avoid doing an action which harms other’s welfare, rights or freedoms. The positive responsibility or the responsibility to “do-good”, implies to act in a way which can ensure that rights of others are being looked after. TNCs are commonly thought to have negative duties to respect human rights, but strong disagreements remain on whether they also should have the positive duty to protect, promote and fulfill human rights.<sup>178</sup>

The report differs between the responsibility to protect others’ rights and to have the direct responsibility to fulfill others’ rights. This can be seen in connection with the three different levels of state obligations towards human rights introduced by Eide as noted earlier. However, the report differs from Eide in their distinguishing between two types of positive responsibilities, those of implementation and those of compliance. A key distinction here is between what Kolstad terms *unconditional duties* - which apply to every actor regardless of the action carried out by others, and *conditional duties*- which relate to tasks where there can be a division of moral labor.<sup>179</sup> It is Shue who has pointed out that for certain duties there can be a certain division of labor, where different agents fulfill different

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<sup>178</sup> Kolstad (2009) p. 570

<sup>179</sup> *Ibid.*

duties and that the sum of these actions will lead to full coverage in terms of rights realization.<sup>180</sup>

### 3.4.2 The positive implementation responsibility

The positive implementation responsibility implies to directly perform those actions that are necessary in order to protect and fulfill individuals' rights, such as creating social security, a system for redistribution of income and so on.<sup>181</sup> It is thereby different from the negative responsibility which is an unconditional duty, something everyone has to pursue regardless of the action carried out by others. Shue points out that negative duties "are, and must be, universal", meaning that they apply to everyone.<sup>182</sup> The positive implementation responsibility can quite the contrary be better off if accomplished by a certain actor in society and is thus a conditional duty. Through such a moral allocation one can achieve specialization and coordination, which will be followed by a more efficient realization of individuals' rights. The primary responsibilities for implementation would, according to the report, fall upon the actor who is best fit to carry it out. Normally one would count the state as the most natural actor to take this kind of responsibility, thus the primary responsibility to protect and fulfill rights through creating a system for poverty reduction or redistribution would generally fall upon a country's government. However, this view presupposes that a country's government will actually take the necessary responsibility, which is far from the truth in many developing countries. When the state is incapable or unwilling to take this responsibility, other actors in society would have to take it in order to protect and fulfill individuals' rights.<sup>183</sup> Kolstad points out that this cannot be the full story, however, as any division of moral labor relies on the actions of other agents other than the duty-bearer.<sup>184</sup> There are for instance many examples of foreign governments or TNC which have undermined the ability of a domestic government to address its functions.

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<sup>180</sup> Shue (1988)

<sup>181</sup> Kolstad, Wiik and Larsen (2008) p.4

<sup>182</sup> Shue (1988) p.690

<sup>183</sup> Kolstad, Wiik and Larsen (2008) p.4

<sup>184</sup> Kolstad (2009) p.573

### 3.4.3 The positive responsibility to comply

The positive responsibility to comply implies a responsibility to respect and make others capable of carrying out their positive implementation responsibility. This responsibility consists of unconditional duties, because it applies to every actor regardless of the actions carries out by others. States can only efficiently carry out their responsibility towards respecting, protecting and fulfilling individuals' rights if other actors do not undermine the state's role. The positive responsibility to comply thereby implies that one should not commit actions that undermine the state's possibility to carry out its tasks<sup>185</sup>, such as TNCs would do through extensive tax minimization.

### 3.4.4 Summary

According to Kolstad Wiik and Larsen TNCs have three types of responsibilities. Firstly, they have a negative responsibility not to make things worse where they operate, through for example contributing to increased poverty and breaches of human rights. Secondly, they have a positive duty to comply, which means that they have to abstain from undermining the state or other actors' possibility to carry out their duties, which they would do through extensive tax minimization. These two forms of responsibility are necessary regardless of which country one operates in, and actions by others and are thus unconditional. The third responsibility entails conditional duties as TNCs have a positive implementation responsibility in countries where the state does not protect or fulfill a population's fundamental rights.

However, neither the report, nor the article says anything about how to determine whether or not the state is able to take care of its obligations under human rights conventions. Nevertheless, it can contribute with several important aspects in the discussion of which responsibilities TNCs should have when operating in a developing country. According to the report and the article, TNCs should have a responsibility not to extensively minimize tax because this would breach their positive duty to comply. This is because by depriving

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<sup>185</sup> Kolstad, Wiik and Larsen (2008) p.6



developing states of their tax revenues, the TNCs hamper the host governments' possibility to deliver human rights related issues to its population. In a human rights perspective, extensive tax minimization should be illegitimate because of its damaging effect on the ability of the state to perform its positive duties of implementation.<sup>186</sup>

A company's positive implementation responsibility is more difficult to claim as it will be difficult to assess whether or not a state is able to protect and fulfill its citizens' fundamental interests. If the prospects are to implement these views on corporations' responsibilities in human rights law one should focus on the positive duty to comply, because the positive implementation responsibility will be too challenging towards the view on state sovereignty.

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<sup>186</sup> Kolstad (2009) p.576

#### 4. Utilizing an existing framework - the case of CSR

International human rights law is caught in a framework of state responsibility for human rights violations which is unable to deal fully with the changing role of the state in times of globalization.<sup>187</sup> As the world structure has evolved without the human rights regime managing to follow, a legal vacuum seems to have formed between nation states which today are open for TNCs to misuse. However, there is hope for this to change as international human rights law is not static, but evolves as international bodies, governments and national courts interpret them and set new standards.<sup>188</sup> As this issue remains unsettled the term “corporate human rights responsibility” seems to be replaced by the term “corporate social responsibility.”<sup>189</sup> The CSR agenda has reduced the attention to duties and to a considerable degree focused on economic argumentation, but is nevertheless an important issue that can put concerns on the agenda which have not yet gained support in international human rights law.

##### 4.1 Largely unexplored, growing interest

The CSR agenda is driven by a demand for an ethical approach to doing business.<sup>190</sup> There has recently been a growing interest from governments, the media and NGOs, about whether or not efforts to hamper harmful tax minimization by TNCs should be introduced on the CSR agenda. This recent attention has made the debate change from a narrow technical discussion for specialists to one that is more comprehensible for the general public.<sup>191</sup> Despite the current attention, the relationship between TNCs’ tax practice and CSR remains largely unexplored, a matter of concern which this thesis wants to highlight. Over the past decades the CSR agenda has moved from an initial focus on environmental issues in the 1970’s and the 1980’s, to embrace social issues such as child labor and employer’s right in the 1990’s. More recently the approach companies take to economic

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<sup>187</sup> Bexell (2005) p.88

<sup>188</sup> ICHRC (2002) p.143

<sup>189</sup> Høstmælingen (2007) p.91

<sup>190</sup> Christensen and Murphy (2004) p.39

<sup>191</sup> Beloe Cruickshank and Lye (2006) p.12

issues such as “fair trade” has received attention.<sup>192</sup> Judging by this, tax is simply the latest issue to emerge as part of a more thorough review of the economic impact TNCs have on the societies where they operate.<sup>193</sup> Owns, the Director of OECD’s Centre for Tax Policy and Administration has stated that “tax is where the environment was ten years ago.”<sup>194</sup> There has been some positive movement through the growing attention to issues of corruption and greater transparency regarding TNC payments to the governments. Anti-corruption is a core element in the OECD Guidelines for Multinational Corporations, and was added as the 10<sup>th</sup> principle of the UN Global Compact in 2004. It is also a central point in activist campaigns such as Publish What you Pay and Extractive Industries Transparency Initiative. While corruption has emerged as a CSR issue, taxation has not.<sup>195</sup> This is curious as paying tax is perhaps the most fundamental way in which corporations engage with their host societies and in some cases might be the principal element of their economic footprint. The report “Taxing Issues: Responsible Business and Tax” consulting firm and think tank SustainAbility, finds almost no evidence that companies have looked at tax planning through a corporate responsibility lens.<sup>196</sup> Christensen and Murphy argue that the fact that the CSR debate has scarcely discussed economic impacts has made it avoid considering tax obligations, the use of tax avoidance strategies, and the promotion of tax competition between the governments of developing countries.<sup>197</sup> The quest for profit and the ability to lean on a legal principle that emphasizes tax payers’ right to organize in order to avoid the most tax possible, have led to most TNCs being structured in a way that enables tax avoidance.<sup>198</sup> Instead of trying to pay the absolute minimum in tax, TNCs should recognize a responsibility to the communities where they operate and ensure that they make a contribution to the societies where the wealth is created in the first place.

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<sup>192</sup> *Ibid.* p.9

<sup>193</sup> Murphy, Christensen and Kimms (2005) p.45

<sup>194</sup> Houlder (2004)

<sup>195</sup> Utting (2007) p.708

<sup>196</sup> Beloe, Cruickshank and Lye (2006) p.1

<sup>197</sup> Christensen and Murphy (2004) p.38

<sup>198</sup> *Ibid.*

## 4.2 The potential value of adding concerns about extensive tax minimization to the CSR agenda

Although there is a growing interest in the issue of tax and CSR, legal distinctions are still essential for many TNCs in determining levels of responsibility. Nevertheless, this paper has shown that protecting and fulfilling human rights only through responsibilities on governments to implement national laws is insufficient in today's world, as states are often unable or unwilling to realize laws which lead to human rights compliance. TNCs should therefore have some sort of responsibility with regard to human rights, at least a positive responsibility to comply, which means as noted above, that TNCs should abstain from undermining the state's possibility to carry out its duties towards human rights compliance. Even though issues on the CSR agenda still rest voluntarily and self regulating, they offer a potential source of pressure from the civil society that can drive improvement in one company or industry. Since human rights often are important elements of CSR policies, a certain level of human rights compliance could become normal practice through the expectations of society in general. This again can entail a pressure towards regulation to ensure a minimum standard of behavior of all firms. In this way there can be a persistent cycle of progress of corporate behavior.<sup>199</sup>

Sen is known for valuing what Kant called "*imperfect obligations*", which are what one should do, the acts that are reasonable, even though they are not possible to enforce by using the legal framework. Sen acknowledges that the course through law would be appropriate in many cases, but even here he emphasizes the importance of social and political activism. This role includes both generating social pressure for undertaking legislation and providing monitoring and scrutiny to ensure the effectiveness of the laws when they are endorsed. Even when no laws exist there is still room for social and political action through naming and shaming and other methods of bringing public pressure on violators of human rights.<sup>200</sup> Informal social disapproval is often more powerful and effective than legal rules and can provide a more efficient and less expensive way to

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<sup>199</sup> Heard (2005) p.17

<sup>200</sup> Sen in Andreassen and Marks (2006) p.5-8

achieve widely desired social aims.<sup>201</sup> Bringing issues up on the CSR agenda is therefore important as it could to some extent determine what different stakeholders can expect from the TNCs and thereby offering a potential for pressuring them to act in compliance with human rights issues as they have said to do. If this pressure is strong enough, these expectations can lead to national legislation. If states become concerned, they can further generate pressure on the international level in order to put certain issues on the international agenda, which can be helpful in a process of legal development of international human rights law.

Some commentators argue that tax evasion is not an issue to which CSR principles are of any use, not because such behavior is ignored or tolerated, but because it is already ruled out by law. However, Fox claims that CSR does not only constitute of voluntary actions which go beyond compliance with legal requirements.<sup>202</sup> He argues that:

“voluntary and regulatory approaches have too often been treated as exclusive to each others, rather than options within a balanced approach to eradicating bad (socially irresponsible) behavior while encouraging responsible activities. Indeed, CSR practices are often embedded within the legal and regulatory environment, particularly when adherent to legal minima that are treated as a baseline for good practice.”<sup>203</sup>

This thesis has shown that just because something is considered legal, does not necessarily make it right. Voluntary initiatives may therefore be needed in order to, in Fox’s words, “eradicate bad, socially irresponsible behavior”.

Another reason why it can be useful to include the aspect of tax evasion on the TNCs’ CSR agenda is because of TNCs’ structure. CSR principles can be relevant to the difficulty of terminating the lengths to which the TNC should go, further than statutory reporting or withholding obligations, in an effort to exclude the opportunity for tax evasion by its suppliers, customers, contractors and employees.<sup>204</sup> One can argue that relating CSR

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<sup>201</sup> Holmes and Sunstein (1999) p.169

<sup>202</sup> Fox (2004) p.29. See Ward for (2003) for the importance of factoring legal issues into the CSR agenda, pointing to several aspects where CSR and law interact.

<sup>203</sup> *Ibid*: 30

<sup>204</sup> Williams (2008) p.15

consideration to tax evasion will enforce wider obligations in these circumstances, like obliging the TNCs to take at least some positive steps to maintain tax revenues of the state.

### 4.3 The business case for including tax on the CSR agenda

It would be naïve not to recognize that there are obstacles for TNCs that wish to undertake socially responsible activities. If they for example acquire costs which their competitors do not take on, they put themselves at risk of erosion of their competitive position.

Nevertheless, it is also important to emphasize the positive potential of putting these issues on the CSR agenda as corporations will be best off if the general condition stays permanent over time and if the framework condition is more or less the same for all within the same industry.<sup>205</sup> As noted above, demands from certain sections in society can drive improvement in one industry to become normal practice through the expectations of society in general. This again can introduce legislation or regulation to ensure a minimum standard of behavior of all firms.<sup>206</sup> In this way there can be an adjustment of corporate behavior since a corporation who does not adjust may risk a decrease in their competitive position. For many TNCs CSR and tax will be mainly a risk management issue based more on commercial factors and relative bargain power than the concept of fairness.<sup>207</sup> In the report by Sustain Ability they outline three main sources of risk attached to the TNC by not acting socially responsible.

#### 4.3.1 Reputational risk

The first risk arises from the possibility of negative press coverage of the company's tax planning. This dimension has been illustrated in Norway where a number of shipping companies have been widely criticized in the media for being “unpatriotic” in making use of technically legal steps in order to avoid tax by moving their headquarters to Cayman Island. In the United Kingdom some were shocked by the provocative comparison between

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<sup>205</sup> Høstmælingen (2007) p.91

<sup>206</sup> Heard (2005) p.17

<sup>207</sup> Williams( 2007), Beloe and Lye (2006)

drink driving and tax avoidance made by the country's Customs.<sup>208</sup> Nevertheless, the association obviously demonstrates the emotion which the debates now provoke. The importance of reputational risk can easily be undermined as it is difficult to measure a concrete sum for the value of a corporate reputation. However, it is an issue that corporate management takes very seriously. A survey by Price Waterhouse Coopers shows that 97% of corporations would be concerned about negative press coverage of their tax planning, and 40% cited CSR as the most important driver for measuring taxes paid.<sup>209</sup> It is becoming increasingly apparent that a narrow legal approach to tax planning is unlikely to protect companies from charges of irresponsibility and associated reputational damage. Focusing entirely on what is regarded as an illegal or legal approach, and following planning techniques which uphold the law, but do not take into account potential harmful consequences, is likely to be increasingly controversial in the eyes of different stakeholders.<sup>210</sup> Instead of focusing entirely on a complete boundary between illegal and legal approaches to tax, companies should focus on understanding what is responsible and what is irresponsible.<sup>211</sup>

Williams argues that a fair and responsible quantity of tax for a TNC to pay is what reflects the purpose of the fiscal legislation, even where the legislative process has failed to protect that intention accurately in nature.<sup>212</sup> However, he argues that in practice, difficulties frequently arise because there is genuine uncertainty as to what the intention of the legislature was. One should not only consider what the legislature intended by the provisions, but also which effect the provision would have had if it addressed the particular issues in question. In other words, it is necessary to go further than to determine what the lawmakers have done, to find out what they would have done in other circumstances.<sup>213</sup> In the light of these thoughts it may be argued that host states probably would have acted

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<sup>208</sup> Houlder (2004)

<sup>209</sup> Beloe, Cruickshank and Lye 2006: 16

<sup>210</sup> *Ibid.* p.12

<sup>211</sup> *Ibid.* p.14

<sup>212</sup> Williams (2007) p.22

<sup>213</sup> *Ibid.*

differently if they were not forced to minimize their legal standards in order to attract FDI, or in other words if they were not part of the “race to the bottom”. One should not just accept that corporations take advantage of this situation. TNCs should not see tax as a cost to be avoided, but as a legitimate payment for wealth created to the countries and communities that contributed to the wealth creation in the first place. These concerns has less to do with fairness in the sense of treating all parties equally, than with a sense that they have a responsibility not to take advantage of countries that don’t have the economic or political muscle to take care of themselves.<sup>214</sup> Even though TNCs may not see themselves as having any goodwill towards other nations, they may however be very alert of world opinion.

#### 4.3.2 Regime risk

A second danger is related to the important and increasing risk of litigation in the event of a company’s taxation policy being challenged by tax authorities examining its affairs. TNCs need to balance their desire to minimize tax in the shorter term, with the need to uphold good relation with tax authorities in the long term.<sup>215</sup> There is also an increasing risk of companies losing admission to government contract if they undertake their activities through a tax haven or other activities considered unacceptable by the government in the host-country.<sup>216</sup> Several efforts have been made in the United States for example, to limit contracts for companies which have moved their headquarters outside of the country for taxation purposes.

#### 4.3.3 Cash flow risk

Finally, having confidence of future cash flow is often in itself an important component for business. Extensive tax minimization can according to Beloe, Cruickshank & Lye reduce this confidence for company management through inevitable uncertainties about some taxation liabilities, possible impact on future cash flow and the diversion effort such cases require.<sup>217</sup>

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<sup>214</sup> *Ibid.* p.29

<sup>215</sup> Beloe, Cruickshank and Lye (2006) p.17

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*



#### 4.4 Summing up

It is important to emphasize that an aim of the CSR agenda is to give TNCs an ethical approach in doing business and that it would be very inconsistent to be ethical in one area and not in others. Avery's example of a company that advertises their philanthropic contributions such as building a school in a developing country, and the same company avoids paying taxes that could build 50 schools in the same country, shows a clear disconnection in the value of the company. Recent reports by NGOs have drawn particular attention to the damaging impacts of extensive tax avoidance in the developing world. To put it in Heard's words:

“If one accepts that a company should try to be socially responsible it would appear that tax policy should be in line with its other CSR policies.”<sup>218</sup>

Being better at CSR than one's competitors is going to be more and more advantageous as society's expectations from TNCs continue to change. Still it is important to note that if the latter were entirely true, then it is logic to assume that TNCs would be acting completely social responsible, which they do not. This is why it is important to examine which possibility the international community has to make TNCs act in compliance with the societies in which they operate. This section illustrated that there is a way for TNCs to deal with tax in a responsible manner towards the society where the corporation operates which is good for business. This will sometimes involve paying more taxes than the minimum required by law, even though the amount of tax paid to the host country could be reduced if all available opportunities were taken without considering their potentially harmful consequences.

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<sup>218</sup> Heard (2005) p.17

## **5. Conclusion**

### **5.1 Concluding remarks**

This paper has argued that extensive tax minimization by TNCs is an obstacle to the protection and fulfillment of human rights, but cannot be said to be a human rights violation since TNCs do not have legal responsibility under international human right law to abstain from extensively minimizing tax. A state cannot be said to violate the human rights of the ICESCR by not hampering extensive tax minimization because there is not yet a universal acceptance of taxation being necessary in order to progressively realize the rights set down in the convention. Nevertheless, this paper argues that the state should have at least some responsibility to maintain its tax revenue from TNCs because of taxations potential role in promoting raised revenues, redistribution and representation. By not paying taxes TNCs are depriving governments of essential revenues that they need to deliver to their people on health, education, housing, security and other human rights related issues. Tax offers a potential source of greater domestic revenue which could be invested in public services for the protection and fulfillment of a government's human rights obligations. It is also widely viewed upon as preferential to other forms of government income because of its relative stability, its link with better governance and accountability, and the prospect it creates for greater autonomy for developing countries.

The duality of obligations between state and non-state actors, such as TNCs, is expressed in far too general terms in the human rights treaties to be of any value when determining the precise practical nature of direct state legal responsibility for private actors' activities which hamper human rights compliance. International human rights law is thus caught in a framework of state responsibility for human rights violation which is unable to deal fully with the changing role of the state in times of globalization. However, there is hope for this to change as international human rights law is not static, but evolves as international bodies, governments and national courts interpret them and set new standards. The responsibility for reform does not only lie with the governments in developing countries, only together with governments in developed countries and TNCs is it possible to end the

worldwide race to the bottom and tax evasion to tax havens. Exactly as human rights law was initially developed as a response to the power of states, there is now a need to react to the growing power of TNCs which influence the lives of millions of people throughout the world.

In absence of an international system which can legally hold TNCs accountable for their actions which hamper human rights compliance, there is room for voluntary CSR initiatives. This thesis has illustrated that for the CSR agenda to uphold its superior frame of sustainable development and human rights there is a crucial need to implement strategies that hamper extensive tax minimization and its harmful consequences on developing countries. In a human rights perspective, extensive tax minimization should be illegitimate because of its damaging effect on the ability of the state to perform its positive duties of implementation, which implies to directly perform those actions that are necessary in order to protect and fulfill individuals' rights. Ideally, voluntary CSR initiatives (e.g. Global Compact) generate pressure from civil society and establish expectations of TNCs to act in compliance with human rights. If societal pressure is strong enough, such expectations can lead to national legislation. When states become concerned, they can further generate pressure on the international level in order to put certain issues on the international agenda, which can be helpful in developing international human rights law. In this way there can be a spiral process of legal development at the international level as a response to a need for development of human rights law in a world in constant change. Hopefully, the CSR agenda can create a coherence of standards for TNCs and facilitate the process of generating enough pressure which would make it possible to include important fiscal matters on the arena of international human rights law. As human rights law is evolving, the CSR agenda can help getting focus away from TNCs only being liable towards insufficient legal standards and towards considering what can be regard as responsible behavior towards the community as a whole.

## 5.2 Looking forward

Because the topic of tax as a human rights concern is a new and upcoming issue on the international community's agenda, there is a vital need for more research to facilitate this debate. A cautious debate around these issues may be helpful in order to establish a consensus on some basic principles which could hamper extensive tax minimization. A reasoned, rather than judgmental, approach may encourage TNCs to become more transparent with regard to their tax policy. Some research is already on its way, as for example The Committee of Experts on International Cooperation on Tax matters' work on observing the effects of tax competition in corporate tax and tax incentives that have worked and not worked in attracting FDI. Other initiatives, such as the proposed UN Code of Conduct on Cooperation in Combating International Tax Evasion and Avoidance and the OECD Global Forum on Tax Transparency and Exchange of Information, are also being elaborated upon. It might be difficult in principle to create universal rules to decide what is fair and what is responsible concerning tax related matters because of the complexity of the issue. In practice, however, it might be easier to distinguish, and avoid behavior that falls far from these goals. There is a need for a model capable of fighting extensive tax minimization which is neither so restrictive that it will only be effective in the worst scene scenario, nor so inclusive that it will be politically unacceptable except in the most ethical compliant states and corporations.

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- ICESCR            International Covenant on Economic, Social and Cultural Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (xxi) of 16 December 1966)  
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MDG United Nations Millennium Declaration  
(General Assembly Resolution 55/2, adopted without a vote 8  
September 2000.)  
Contained in UN Doc. A/55/L.2

UDHR Universal Declaration of human rights (Adopted and opened for  
signature, ratification and accession by General Assembly resolution  
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