ActionAid, Christian Aid and Oxfam inputs to UNWG GA74 report on "Policy coherence in government action to protect against business-related human rights abuses"

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Please find below the joint response prepared by ActionAid, Christian Aid and Oxfam to the consultation of the UN Working Group on Business and Human Rights regarding the Working Group's 2019 Report to the General Assembly on *Policy coherence in government action to protect against business-related human rights abuses*. We have chosen to solely answer the questions that we have covered in previous reports and other publications within our area of expertise. Should you need any additional information, please do not hesitate to contact us.

1. **What do you consider to be the main challenges in achieving policy coherence at the national level in the implementation of the Guiding Principles? How have these challenges impacted on your work in the field of promoting business respect for human rights?**

In her 2014 report, former UN Special Rapporteur on extreme poverty and human rights Magdalena Sepulveda established a clear link between fiscal policy, and particularly taxation policies, as a major determinant in the enjoyment of human rights.

Indeed, there is a growing recognition across a wider community of stakeholders that corporate tax behaviour (like structuring of corporate investments, location of subsidiaries and the assets they own, sale of assets, operational decisions and sourcing decisions) can have impacts – for good or bad – on the realisation of fundamental human rights. In fact, tax evasion and tax avoidance by companies constitute a serious obstacle for the realisation of human rights, as they deprive governments of the much-needed resources to fund gender-responsive public services, address inequality and poverty, and realise human rights. For this reason, the UN Committee on Economic, Social and Cultural Rights made clear in 2017 that states should combat abusive practices by transnational corporations. As such, the obligations set out in the UNGPs should also be applied to the impacts – direct and indirect – of a company's tax behaviour on the rights (particularly economic and social) of its stakeholders and rights holders, from employees and consumers to the citizens of countries where it does business.

Tax abuses represent the most significant of the illicit financial flows out of developing countries, surpassing the amount of official development assistance received by these countries. In 2013, the International Bar Association's Human Rights Institute (IBAHRI) published a report addressing tax abuses from a human rights law and policy perspective. The report examined the types of tax abuses that are of greatest concern to developing countries including: transfer mis-pricing; tax holidays and other tax incentives; non-taxation of natural resources; the use of offshore investment accounts; and the use of secrecy jurisdictions which facilitate tax abuses. Further, the report found that countering tax evasion should be part of the strategy for developing countries in particular to reduce reliance on foreign aid (amongst other sources external financial support), combat poverty and fulfil international human rights obligations.

States are expected to use the maximum available resources to progressively realise human rights and this means that tax abuses that give rise to revenue losses need to be addressed as part of an effort to strengthen financial and tax governance for human rights. Coherence between tax law and policy and human rights is more necessary than ever. This coherence requires also to conceptualise corporates as single entities, that are responsible for the activities (including payment of taxes) of their subsidiaries. This requires framing company responsibility at the headquarter level based on ownership and management control, rather than a legalistic definition of separate legal entities that are assumed to be separately taxable for their activities that is applied currently in tax law.

Given the clear link between corporate tax behaviour and the realisation of human rights, the state has a duty to protect against tax evasion and avoidance, as per Pillar I of the Guiding Principles. Governments must ensure that their national tax systems and bilateral tax agreements do not leave room for abuse or encourage harmful tax practices and cannot be used by multinational corporations to dodge large amounts of taxes in the countries where economic activity is taking place. This concerns all countries, whether residence, source or conduit countries. However, awareness of the Guiding Principles and obligations derived from them, is low or non-existent among Finance Ministries and tax authorities. Efforts undertaken by governments on the UNGPs remain entrenched in a siloed approach and have yet to adequately involve relevant stakeholders deciding and implementing corporate taxation rules and related areas.

Especially the call for extraterritorial obligation in ensuring that human rights are not abused in third jurisdictions is not being robustly implemented beyond two or three countries doing so-called ‘spillover analysis’ of their international tax agreements with developing countries in accordance to methods developed by the EU, and analysis put forward by the IMF on international tax-related spillover effects. However, this definition and methodology should align better with human rights methods developed in extraterritorial analysis of the realisation of human rights.

Finally, besides adopting a human rights-based approach to corporate tax policy, the state should also promote responsible corporate tax practices as part of the implementation of the UNGPs as is discussed in Pillar 2 of UNGPs, where corporates also have specific responsibilities in terms of not obstructing States in realising human rights (e.g. through lobbying, or abusive practices in terms of their use of power and influence otherwise), while corporates should also conduct their own human rights due diligence that includes the assessment of tax responsibility.

Existing corporate human rights benchmarks, and human rights due diligence methods, ignore tax responsible behaviour despite this potentially having one of the largest impacts in the realisation of human rights in many countries. In the wake of numerous tax dodging scandals, there has been a proliferation of voluntary business initiatives providing guidance on responsible tax concerning the publication of tax strategies by many corporates (either mandatory or voluntary), and some levels of transparency over payment of taxes and their alignment with economic activity. However, much of the guidance is not aligned with human rights principles and processes; in particular there is a lack of analysis of the gendered impacts of tax avoidance and evasion, and of the gendered impacts of tax policies in general. Beyond state regulation, soft law and multilateral initiatives there has also been an increase in attention to responsible tax among investors, not least building on the PRI’s engagement guidance on responsible tax.

For more information, see:

ActionAid, Christian Aid, Oxfam, (2015), Getting to Good – Towards Responsible Corporate Tax Behaviour

ActionAid, Christian Aid, Oxfam, Eurodad, Tax Justice Network Africa et al. (2016), Development Finance Institutions and Responsible Corporate Tax Behavior

ActionAid, (2018), Stemming the Spills - Guiding Framework for National Tax Spillover Analysis

CSR Europe (2019), A Blueprint for Responsible and Transparent Tax Behavior

Report of the UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, (2014), A/HRC/26/28

5. Are there any linkages made to encourage policy coherence in promoting responsible business conduct as part of the efforts to engage the corporate sector in the implementation of the Sustainable Development Goals?

It is clear that the SDGs are underfunded, to the tune of trillions of dollars. Governments need sufficient and sustainable revenues from taxation to achieve the SDGs: to fund essential public services for their citizens, including healthcare and education, and to pay for the public infrastructure needed to raise living standards, increase gender equality and build well-functioning economies. From a rights-based perspective, transparent and accountable interactions between governments and their citizens are at the root of prosperous and fair societies. Taxes play a central role in this interaction as they embody the social contract between states and citizens, and represent key sources of investment in the progressive fulfilment of human rights. In addition, beyond overall financing for the SDGs, and SDG 17.1 on domestic resource mobilisation, taxes are also especially central with regards to SDG 10 on reducing inequalities and SDG 5 on Gender Equality.

Yet while we observe that states are going to great lengths to engage the corporate sector in the implementation of specific SDGs, it is remarkable how little states have been doing to promote responsible corporate tax practices as a fundamental element of these efforts. This is despite analysis from various international organisations, including the IMF in their corporate tax analysis of there being a $200 billion gap in MNCs paying taxes in developing countries, the EU's and many governments in the global North analysing tax gaps in hundreds of billions, and the OECD embarking on a new project to look at the gaps in taxing digital-based companies, and digitalisation more generally in value chains. Due to the rules not being clear, and still open to interpretation, there should be a continued emphasis on accountability, transparency and responsibility of corporate tax payments in view of realising the SDGs.

As highlighted by the EU's SDG Multi-Stakeholder Platform, tax responsibility is a crucial resource for the implementation of the SDGs. Indeed, the most significant contribution that businesses can make to the SDGs is to pay their fair share of taxes, so that governments have the resources needed to finance the provision of public services and the achievement of the SDGs overall. This business responsibility to *not harm human rights* through tax dodging and the depletion of governments' tax revenues must be observed along with any potential positive, additional business contribution to SDGs. Business should better align their practices with tax responsibility by a gradual process of respecting human rights, reporting publicly about their tax payments and its alignment with economic activities, and continuous improvement based on feedback and any complaints brought towards them.

For example, this is very clear in relation to achieving SDG 5 on Gender Equality: Large commercial corporations have been identified as the biggest culprits of the $50 billion illicit financial outflows from African countries each year. Women and girls are most severely affected when public services are starved of much-needed funding that also impact their gender responsiveness capacity, including through lack of access to education, lack of reproductive health services and increased unpaid care and domestic work. Corporate tax avoidance often also leads to countries scaling up taxes that tend to have a significant implicit gender bias, like VAT. It is welcome that companies are engaging in projects to advance gender equality, yet if they are engaging in illicit and avoidant tax behaviour they are outdoing any positive outcomes from their projects towards the achievement of SDG 5.

For more information, see: ActionAid, 2016, Making Tax Work for Women's Rights

7. **Please provide any other relevant information relating to policy coherence to protect against business-related human rights abuse that you think that the Working Group should take into account in its preparation of its report to the General Assembly.**

It is important to consider the new guidance titled "Gender dimensions of the Guiding Principles on Business and Human Rights" (A/HRC/41/43) issued by the Working Group on business and human rights. It is important that both States and business enterprises consider the gender framework and guidance that is set out in this document and the annex thereto in implementing the Guiding Principles. In particular, this new guidance recognises that gender responsive practices by large transnational corporations require looking at issues related to tax, trade and investment as dimensions of business and human rights due diligence. It states that: "Adverse impacts of the exploitation of natural resources, tax evasion, austerity measures and the privatization of public services are also experienced by women differently and disproportionately." And adds that:

"States should consider and address the differentiated impact of various laws on women, for example how laws on consumer safety, corporations, labour, human rights, environment, advertising, entertainment, investment, banking, finance, taxation and anticompetition affect women [...]"

The implication of this guidance is that tax issues are included as an aspect of potential business-related human rights violations - it is important to also assess tax-related human rights risks as part of wider due diligence processes. Therefore, tax issues should also be included in the discussions and proposals on mandatory human rights due diligence we currently see popping up in many European countries. Importantly, such legislation must go beyond reporting and impose substantive due diligence obligations and corporate liability for harm.

Voluntary measures for the implementation of the UNGPs are not enough. Complementing mandatory human rights due diligence at national or regional, a UN Binding Treaty on Business and Human Rights is needed to create a stronger global legal framework that can help to regulate issues related to corporate abuses in the field of human rights, including potential tax abuses.

For more information, see:

Christian Aid (2019), 'Engendering Business and Human Rights Applying a Gender Lens to the UN Guiding Principles on Business and Human Rights and Binding Treaty Negotiations'

Feminists4BindingTreaty (2018), Women's Rights Beyond the Business Case: Ensuring Corporate Accountability