

ILLICIT FINANCIAL FLOWS, POVERTY AND HUMAN RIGHTS

feature

Lloyd Lipsett

Lawyers have played an important role in creating the offshore system. Lloyd Lipsett argues that they cannot wash their hands of responsibility for its impact on fundamental human rights.

In October 2013, the International Bar Association's Human Rights Institute (IBAHRI) published an innovative new study, *Tax Abuses, Poverty and Human Rights*. The publication was the result of over a year of research and international consultations by a Task Force on Illicit Financial Flows, Poverty and Human Rights. Although tax abuses have been rising in prominence on the global political agenda in recent years, the issues have rarely been framed in terms of human rights. From the early feedback on the IBAHRI Task Force's work, an explicit human rights analysis is a welcome contribution to the global debates on tax justice, and further research and discussion is required in order to provide more practical guidance to policy-makers and practitioners.

The Task Force found that tax abuses have considerable negative impacts on the enjoyment of human rights. Simply put, tax

abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights. Actions of states that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other states to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights.

In the context of the developing world, the tax abuses of greatest concern to the Task Force included transfer-pricing and other cross-border intra-group transactions; the negotiation of tax holidays and incentives; the taxation of natural resources; and, the use of offshore investment accounts. Secrecy jurisdictions are also a concern because of their role in facilitating tax abuses.

“Practical guidance can help policy-makers and practitioners to think through the human rights implications of their actions and advice.”

The Task Force's human rights analysis also underscores the link between human rights and extreme poverty. For instance, the UN Human Rights Council had recently adopted *Guiding Principles on Extreme Poverty and Human Rights* that describe how poverty is connected as a cause or consequence of violations of 14 different human rights and all the key human rights principles—ranging from the right to food, the right to health, the right to education, the right to social security, to the principle of transparency.

Building on its review of international human rights law, the Task Force's report presents a number of conclusions and recommendations for governments, business enterprises and the legal profession:

Conclusion #1: States have obligations to counter tax abuses at the domestic and international level, including through cooperation in transnational institutions. While it must be recognized that international human rights treaties do not address tax abuses in an explicit manner, the Task Force concludes that States' legal obligations related to economic,

social and cultural rights can be applied to the question of tax abuses, in terms of their actions at the domestic level, in their international cooperation efforts and in their participation in multilateral institutions.

Conclusion #2: Business enterprises have a responsibility to avoid negative impacts on human rights caused by tax abuses. The emerging human rights guidance for business enterprises suggests that all business enterprises, including corporate legal advisers and bankers, should exercise due diligence on the potential negative impacts of their operations—including with respect to the impacts of their tax planning strategies. Indeed, tax abuse is poised to become an important issue for business enterprises in terms of corporate social responsibility, reputational risk and human rights.

Furthermore, the estimated scale of corporate tax abuses also undermines some of the claims that foreign investment



“Lawyers must balance their obligation to defend their client’s interest with the underlying role of the tax system in society.”

and private enterprise are major drivers of sustainable development. While there is undeniable evidence that foreign investment and private enterprise is—and can be—a powerful force for development and positive human rights impacts, evidence about the extent of tax abuses by transnational enterprises serves to reinforce criticism and cynicism about the role of the private sector in development.

Conclusion #3: The legal profession has an important role in assisting states and business enterprises in confronting the negative impacts of tax abuses on human rights. There was widespread agreement in the interviews that lawyers must balance their obligation to defend their client’s interest with the underlying role of the tax system in society. One stakeholder stated that “we also need to encourage positive performance and the positive leadership role that lawyers can play in creating rules and regulations. Lawyers need to decide what is acceptable behaviour for their profession and to take the issue [of tax abuses] outside an individual decision for an individual lawyer.”

Early Reactions and Next Steps

Not surprisingly, the early reaction to the Task Force’s report has been varied. Tax justice advocates and human rights organisations have welcomed the linking of tax abuses and international human rights law—which

provides an additional rationale for action on these important issues. Tax practitioners have raised valid questions about the need for more precise criteria to delineate legitimate tax planning and the tax abuses that fall afoul of human rights standards. Some commentators have stressed the need for additional research to better understand the magnitude of tax abuses and their impacts on developing countries.

The IBAHRI Task Force welcomes these comments and is also encouraged to see new initiatives and conferences that are delving into different aspects of the issues raised by the publication. While the Task Force’s publication succeeded in providing a broad framing of issues and stakeholder feedback in terms of international human rights standards, the details of abusive tax schemes and practices also need to be analysed at a more microscopic level. The development of further case studies can help to provide concrete and nuanced illustration of the links between tax abuses and their negative impacts on human rights. The development of practical guidance can help policy-makers and practitioners to think through the human rights implications of their actions and advice.

The Task Force’s publication on tax abuses and human rights therefore should be viewed as a starting-point for a global conversation between states, business

enterprises, civil society organisations and the legal profession about ensuring that the human rights dimension of taxation is increasingly understood and more fully respected.

Lloyd Lipsett was the rapporteur for the International Bar Association Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights. He is an international human rights lawyer with over 15 years of experience working with leading companies, governments, national human rights institutions, civil society organisations and indigenous peoples.

This article is based on an article entitled “The Six Trillion Dollar Question” that appeared in the IBA’s Global Insights magazine in October 2013: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=E2915C5C-B70B-4A64-9D85-A0613827DF33>.

The IBAHRI Task Force’s publication can be accessed at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4A0CF930-A0D1-4784-8D09-F588DCDDFEA4>.