CURTAILING ILLICIT FINANCIAL FLOWS: THE HUMAN RIGHTS OBLIGATION OF STATES TO MOBILISE THE MAXIMUM AVAILABLE RESOURCES

POLICY BRIEF

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- The state obligation to fulfil its human rights obligations to the extent of its maximum available resources entails both mobilising and allocating maximum available resources.
- The obligation to mobilise maximum available resources entails expanding both tax and non-tax revenue streams and combatting all forms of illicit financial flows.
- Human rights treaty monitoring bodies need to provide states with clear guidance on their obligation to mobilise maximum available resources.

1. Background

The COVID-19 pandemic placed a spotlight on the link between public finance management, economic policy and human rights in a way that nothing else was able. Reports a decade ago regarding the loss of vast sums of much needed revenue as a result of illicit financial flows simply did not have the desired impact on policy makers across the globe in the way that COVID-19 did.

Today, the link between the loss of revenue through illicit financial flows and human rights is obvious. At the heart of the human rights discourse on the subject lies the state obligation to fulfil its human rights obligations to the extent of the maximum available resources (MAR). Human rights bodies at the UN level, and at the Continental level acknowledge that their prior focus on how states allocate resources does not address all the dimensions of the MAR obligation. As will be seen below, there are two sides to MAR – the allocation of MAR but even before allocation, is the mobilisation of maximum available resources (MMAR). States need to understand, in tangible terms, what is expected from them and what are the limits of MMAR?

Similarly, non-state actors need to understand what MMAR means in terms of their obligations to do no harm and respect human rights. This policy brief focuses on MMAR and makes specific recommendations regarding the practicalities of the state obligation to consolidate and expand revenue streams, both tax and non-tax revenue as key components of MMAR.


2. The human rights obligation of states to mobilise maximum available resources

A report of the UN Independent Expert on Extreme Poverty concluded that a state breaches its “international obligation wherever its actions or omissions are not in conformity with a specifically determined conduct required of it by that obligation”. Actions or omissions that diminish state coffers by turning a blind eye to large-scale tax evasion or not taking appropriate action to stem large-scale tax evasion and avoidance has a disproportionate impact on the poorest segments of the population and could constitute violations of human rights obligations, particularly the obligation to allocate the maximum available resources to the enjoyment of economic, social and cultural rights or to eliminate discrimination.

The obligation to mobilise maximum available resources (MMAR) is intrinsic to the MAR obligation and requires state parties to review their fiscal policies and taxation regimes and to take steps in law and in practice to collect all the tax revenues due and to prevent money from leaving their countries illicitly. Thus states are required to ensure that their focus is firstly on ensuring that the pie is as big as it should be (mobilisation) and secondly on how the pie is divided (allocation).

Human rights bodies generally compare what states spend on defence as opposed to on health care for example. They look at how the state allocates and spends resources and then they make recommendations for a greater percentage of the budget to be allocated to social services such as education and health care. In other words they have traditionally focused on how the pie is divided – the allocation side of MAR. However, in the context of the massive leakage of revenue through illicit financial flows, human rights bodies have come to realise that they also need to know whether a state is taking all necessary steps to mobilise the domestic resources that are actually available and whether the state is ensuring that the pie is as big as it could be.

Currently, guidelines from human rights treaty bodies are consequently limited to the allocation of resources through budgeting processes. Human rights civil society organisations, likewise focused their attention on what they termed pro-poor budgets. Ultimately, states received limited guidance on what their obligation to MMAR tangibly entails and the information required by the human rights treaty bodies to monitor their compliance. This policy brief aims to fill that gap.

What follows are a series of detailed recommendations that provide guidelines aimed at states, civil society organisations, non-state actors and at human rights treaty bodies. These recommendations are largely modelled after the ECA HLP Report (2015), FACTI Panel Report (2021) and the FfD Report (2021).
3.2 Tax revenue streams

The UN Independent Expert on the effects of foreign debt highlighted the vicious cycle phenomenon in circumstances where there is a weakened tax base as it is accompanied by poor social services and greater inequality and in the end it leads “to the erosion of trust in government and to low taxpayer morale, which further weakens the tax base.” He emphasised the threat posed to classic civil and political rights and political participation, “since outsize political influence by the rich can undermine democratic processes” and thereby threaten the equal participation of citizens in political and public life. In such circumstances, the state obligation to MMAR through expanding its tax base requires that states:

- adopt fair and redistributive taxation policies;
- ensure progressive taxation of all individuals, companies and other private actors;
- review and change policies that lower the individual or corporate tax rate with the sole objective of attracting investment; and
- ensure that their revenue administrations develop data management capabilities. Particularly, that they devise a data strategy and reliable methods to access, integrate, cleanse, govern, store and prepare data for analytics and risks mitigation. This approach will improve domestic revenue collection and lay the groundwork for international exchange of information as tax transparency and exchange of information generates additional revenues.

3.3 Country by country reporting to address tax abuse by multinational corporations

States should robustly address tax abuses by multinational corporations and other private actors and ensure that tax laws require multinational corporations to publicly report, on a country-by-country basis. Information should be universally accessible for all countries, cover a greater number of entities and as much as possible be made public while respecting reasonable security and confidentiality needs. Country by country reporting should include:

- the name of each country where they operate;
- the financial performance of the corporation or group (including sales, purchases, labour costs and profits, and distinguishing between sales within the group and to other companies) revenue, profit/loss, tax paid and number of employees, disaggregated by jurisdiction;
- the value of all their assets in that country and the cost to maintain them;
- full details of tax liabilities (including amounts paid and owed); and
- breakdowns of how and where their business model generates economic value, where that value is taxed, and the amount of tax paid as a result.

3.4 Combat financial crime and money laundering

States should:

- enact legislation providing for the widest possible range of legal tools to pursue cross-border financial crimes and prevent impunity on corruption offences and other financial crimes; and
- create a centralised registry for holding beneficial ownership information on all legal vehicles to combat international money laundering.

3.5 Regulate the enablers

States should develop standards and guidelines aimed at regulating the conduct of enablers of illicit financial flows for financial, legal, accounting and other relevant professionals providing services in tax, finance, legal vehicles, property and other related fields.

3.6 Investigate illegal practices and repatriate funds

Nationally designated authorities must undertake full-scale investigations into illegal financial practices, and ensure the prompt and unconditional repatriation of (funds) to the countries of origin.

3.7 Share information among states

States must:

- end information sharing asymmetries in relation to information shared for tax purposes,
- so that all states can receive information; and
- enable automatic exchange of information at the national and international level as standard practice to combat all forms of illicit financial flows.

3.8 Protect human rights defenders

States must develop minimum standards of protection for human right defenders, anti-corruption advocates, investigative journalists and whistle-blowers.

3.9 End Harmful tax practices

States have a duty co-operate with each other in solidarity to combat illicit financial flows by multi-national companies and thereby fulfill their obligation to MMAR while at the same time refraining from affecting the ability of other states to also fulfill their resource mobilisation obligation. This includes avoiding harmful tax competition such as:

- promulgating tax laws, banking laws, accounting laws and rulings, company laws, trust laws and other laws governing legal vehicles that promote secrecy, tax evasion and avoidance and facilitate illicit financial flows; and
- granting unjustified tax waivers to corporate entities or investors.

3.9 Develop an ethos of financial integrity for sustainable development

States must create robust and coordinated national governance mechanisms that efficiently reinforce the ethos of financial integrity for sustainable development and publish national reviews evaluating their own performance.

Within the framework of the obligation to promote human rights, states, through their national human rights institutions, education and training facilities and regulatory bodies should ensure that the ethos of financial integrity for sustainable development permeates the education and training of all professionals involved in the delivery of financial services, especially accountants, auditors, lawyers, bankers, real estate practitioners and art dealers among others.
4. Way forward

Human rights treaty monitoring bodies at the UN level and at the regional level should provide detailed guidelines to states along the lines described above.

Civil society organisations, particularly those that are involved in addressing economic, social and cultural rights should consult widely and advocate for human rights treaty bodies to develop normative guidelines for states on their obligation to MMAR.

States, particularly developing states, should request guidance from human rights treaty monitoring bodies on the state obligation to MMAR.

Non-state actors should take note of the norms listed above and review their practices to bring them in line with these standards.

Sources

4. CEDAW Committee ‘Concluding observations on the combined fourth and fifth periodic report of Switzerland’ UN Doc CEDAW/C/SUI/CO/4-5
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6. CRC Committee ‘Concluding observations on the first periodic report of Georgia’ UN Doc CRC/C/15/Add.124
11. UN Independent Expert on economic social and cultural rights and international financial obligations UN Doc A/HRC/25/52
13. UN Special Rapporteur on the right to education ‘Protecting the right to education against commercialization’ UN Doc A/HRC/29/30
"We work to see a united, just and prosperous Africa, built on the rule of law and good governance."