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Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting

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ETHICAL CONSIDERATIONS IN FINANCIAL (TAX) AND NON-FINANCIAL CORPORATE HUMAN RIGHTS REPORTING

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ABSTRACT

We test the assumption as to whether financial and non-financial reporting by multinational corporations (MNCs) voluntarily adhering to human rights standards are subject to ethical guidelines. In particular, the paper finds that neither the operators of human rights impact assessments (HRIAs) nor audited companies, at least in any manner that is publicly detectable, impose any ethical conduct on human rights auditors. Neither individual auditors nor human rights audit firms have set up independent regulatory bodies that would regulate auditors and audit firms. This has a detrimental effect on HRIAs and the process itself. The same assumption is tested against financial corporate reporting, specifically tax. It is found that corporations voluntarily subjecting themselves to HRIAs do not infuse human rights-based reporting standards into their tax audits and neither do tax professionals. No ethical duty is prescribed by tax auditor professional bodies or companies themselves. For the latter, this is incongruous given that ethical tax reporting is no less a human rights issue than any other human rights impact arising from the operations of a corporation in the host state. The absence of ethical audit standards in financial and non-financial human rights-related reporting distorts both processes and produces poor outcomes.

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1. INTRODUCTION

Corporate due diligence, chiefly in respect of human rights and environmental risks, is now a common feature of the operating cycle of large corporations. Developed states are increasingly starting to require human rights impact assessments from their multinationals,[1] particularly in respect to operations abroad. Impact statements are also common in the work of international financial

[1] *See* particularly UK Modern Slavery Act 2015. *See* 'Guidance for Reporting Entities', available at: https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf; Australia Modern Slavery Act 2018; Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at: https://www.legifrance.gouv.fr/affichTexte.do?cid Texte=JORFTEXT000034290626&categorieLien=id. For a useful English summary, *see* European Coalition for Corporate Justice (ECCJ). *See* Business and Human Rights Resource Centre (BHRRC) "France's Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Analysis in English" at https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english.

institutions (IFIs),[2] the United Nations (UN) bodies[3] and the European Union (EU),[4] among others. Besides the aforementioned public institutions, the majority of such assessments are the result of industry-wide self-regulation. HRIAs required by law or the inter-governmental organizations discussed above do not demand a particular format; at best, they set out some baseline requirements (e.g. that in respect of indigenous persons their free, prior, and informed consent be taken into consideration), and take it for granted that the results are not fabricated. Where an HRIA is not demanded by a public entity under law or contract, it is voluntary and the same is true of the contents and format of such assessments. The majority of audits are performed largely by for-profit commercial entities that have established themselves as key actors in human rights and environmental audits, including Global Reporting Initiative[5] and KPMG Banarra,[6] among others. These audit firms have set up their

[2] UN Doc E/C.12/2016/1 (22 July 2016) ¶¶ 4,11. *See* for example recent reports, UN Doc A/HRC/31/60/Add.2 (12 January 2016), ¶¶ 81(a), 83(b). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank's Inspection Panel and the Multilateral Investment Guarantee Agency (MIGA) Ombudsman, which are competent to hear complaints concerning violations of the Bank's internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. For an overview of the mandate and cases of the Inspection Panel, *see* http:// ewebapps.worldbank.org/apps/ip/Pages/Home.aspx.

[3] *See* Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements, UN Doc A/HRC/19/59/Add.5 (19 December 2011); Guiding Principles on extreme poverty and human rights, UN Doc A/HRC/21/39 (18 July 2012); CESCR, 'General Comment No. 24' (10 August 2017) ¶¶ 17, 21-22; CRC Committee, 'General Comment 19' UN Doc CRC/CG/19 (10 July 2016), ¶ 47.

[4] 'EU Commission Working Paper Operational Guidance on taking account of fundamental rights in Commission impact assessments', SEC (2011) 567 Final (6 May 2011). The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. *See Schecke and Eifert* v *Land Hessen*, Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662. HRIAs are also required through two EU instruments, namely: The Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights.

[5] *See* GRI, Sustainability Disclosure Database, https://database.globalreporting.org (last visited Feb. 9, 2021).

[6] *Human Rights & Social Impact-Banarra,* KPMG, https://home.kpmg/au/en/home/services/advisory/risk-consulting/climate-change-sustainability-services/human-rights-social-impact.html (last visited Jan. 29, 2021).

own standardized formats and procedures for undertaking HRIAs, although they do not necessarily see this process as a box-ticking exercise, and hence each audit may contain different types of information.[7] Internationally recognized frameworks for sustainability reporting include: the GRI Sustainability Reporting Standards, the OECD Guidelines, the UNGC's Communication on Progress,[8] the International Organization for Standardization ('ISO') 26000,[9] and the UN Guiding Principles Reporting Framework.[10] As companies vary in their size, operations and managerial control, among others, so do their human rights risks and the range of persons and entities affected.

Several important ethical considerations arise from the compilation and assessment of corporate human rights risks by external auditors.[11] Chief among these is respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participants right to withdraw, full disclosure of funding sources, no harm to participants, avoidance of undue intrusion, deception techniques, issues with anonymity, participants' right to check and modify a transcript, confidentiality in respect to personal matters, data protection, enabling participation, ethical governance, provision of grievance procedures, appropriateness of research methodology, full reporting of methods, conflicts of interest, moral hazard, and duty of care. Another that is largely ignored is that auditors either do not have, do not request, or do not understand the relevance of data and information that is not directly relevant to human rights risks. A typical example is corporate forum shopping by multinational corporations (MNCs) for countries

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[7] Human rights audits are undertaken also by auditors in an individual capacity. Although the discussion on ethics is pertinent to them, in all other respects this paper deals exclusively with auditing firms.

[8] *Participation*, United Nations Global Compact, https://www.unglobalcompact.org/participation/report (last visited Jan. 29, 2021).

[9] *ISO 26000 Social* Responsibility, ISO, https://www.iso.org/iso-26000-social-responsibility.html(last visited Jan. 29, 2021).

[10] UN Guiding Reporting Principles, https://www.ungpreporting.org (last visited Jan. 29, 2021).

[11] This article will only focus on the ethical duties of external, as opposed to internal, auditors. Internal auditors will be subject to the ethical by-laws, or codes of conduct of their corporation, as these are further regulated by the laws of the country of incorporation or effective seat.

with lax tax rules and detection systems,[12] or countries whose conflict of laws rules make it impossible for grievance tort claims to be litigated abroad.[13] None of these are *prima facie* human rights concerns, and it would be hard even for most lawyers to identify their linkages with human rights.[14] Yet, such forum shopping may be designed or destined to deny future victims of corporate human rights abuses of their right to effective access to justice, as well as fundamental socio-economic rights as a result of poor tax collection.[15] These observations obviously raise the question as to who is best suited to carry out HRIAs, in terms, at least, of the expertise required of auditors to carry out their task in a way that takes into account a holistic account of human rights risks in a manner that is independent from the audit firm and the appointing corporation.

The role of lawyers is critical in this regard, but they are not the key protagonists in the relevant industry.[16] This observation is

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[12] Such a choice may be predicated, among others, on cost considerations (e.g. low or no pension contributions; light environmental compliance; light health and safety requirements), tax avoidance, or avoidance of public scrutiny by civil society organizations, especially in autocratic states. *See* Press Release, Conference on Trade and Development, Increasingly Complex Ownership Structures of Multinational Enterprises Poses New Challenges for Investment Policymakers, U.N. Press Release *UNCTAD/PRESS/PR/2016/016* (Jun. 21, 2016).

[13] L*egally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, art. 4(5), art. 6(4)* (Open-ended Intergovernmental Working Group (OEIGWG), Revised Draft, Jul. 16, 2019). *See also* Ilias Bantekas, *The Linkages between Business and Human Rights and their Underlying Causes*, 43 HRQ 118 (2021).

[14] Human rights linkages to trade, investment, sovereign debt, privacy and other areas of commercial regulation or self-regulation have only been studied thoroughly in the last two decades and are generally the domain of specialists. *See* Sovereign Debt And Human Rights 169-185 (Ilias Bantekas & Cephas Lumina eds., 2018).

[15] In 2019, GRI adopted, following public consultation, the GRI 207/Tax 2019 Standard, with a view to promoting tax transparency in financial audits. Like all other standards mentioned in this article, this too is of a voluntary nature. *GRI 207: Tax 2019 Fact Sheet*, Global Reporting Initiative, https://www.globalreporting.org/media/sfcpcrt4/gri-207-tax-standard-2019-factsheet.pdf?id=1616 (last visited Feb. 1, 2021). *See also* Ilias Bantekas, *The Human Rights and Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L. L. 339 (2020).

[16] There are no professional standards requirements for becoming a human rights auditor. The HRIA industry providers simply require qualifications relevant to the task undertaken and GRI views auditors as being self-regulated.

even more compelling from the fact that human rights have been viewed by several liberal Western states as a "tool" of non-state (usually alleged terrorist) actors to gain benefits and avoid justice.[17] However, as will be demonstrated in the case study on the Chad-Cameroon pipeline, HRIAs require expertise that is broader from human rights law, such as anthropology, sociology, and others and hence human rights auditing is not and should not be the exclusive domain of lawyers or legal experts.

If one looks at the major international due diligence/HRIAs initiatives, there is generally no reference to any ethical guidance or code by which to compile and assess human rights risks, whether from the perspective of the auditing firm or the appointed auditors. There is a clear conflation of ethics — probably best to call it a confusion because of the lack of ethical rules — with the compilation process and contents of human rights audits. A good example is offered by the 2018 OECD Due Diligence Guidance for Responsible Business.[18] Although there is some overlap between ethics and ethical audit compilation, there are also notable differences. The most notable is the absence of auditor duties and responsibility. Such an outcome would be unthinkable for lawyers and in fact there is even a growing body of professional rules regulating lawyering before transnational and international courts, despite the fact that: A) the statutes of these courts

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[17] In *Holder et al.* v. *Humanitarian Law Project et al.* 561 US 1, the plaintiffs had sought to provide human rights training, advocacy and peacemaking to the Kurdistan Workers' Party (PKK) in Turkey and the LTTE in Sri Lanka, both of which had already been designated terrorist organisations in the USA. Under a federal US statute, it was a crime to 'knowingly provide material support or resources to a foreign terrorist organisation'. The term 'material support' meant, among other things, 'training, expert advice or assistance'. The US government construed the statute as prohibiting all types of training to designated terrorist organisations, including human rights training that is meant to promote non-violence within these organisations, the submission of an *amicus* brief in their favour by a lawyer, as well as helping a proscribed organisation to petition international bodies to end violent conflicts. The Supreme Court declared that the provision of intangibles such as human rights training allowed a proscribed organisation to free resources for other illegal purposes (fungibility), which it was in the interests of the executive to curtail. As a result, the prohibition of free speech was justified under the circumstances.

[18] *OECD Due Diligence guidance for Responsible Business Conduct,* OECD, https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf (last visited Feb. 9, 2021).

did not originally envisage such ethical regulation;[19] and B) these rules are not grounded in any particular legal order. The hypothesis in this article is that there are at least three reasons for this glaring omission of human rights auditor-specific ethical rules. The first has to do with the fact that human rights due diligence, with the few exceptions mentioned above, is voluntary. It is perhaps the case, therefore, that it would dissuade companies from partaking in this voluntary process if audits were 'burdened' with ethical rules. The second concerns cost and professionalization of the HRIA business itself. The ethical regulation of the process requires a regulated professional body, with entry requirements similar to those demanded of lawyers and certified accountants. Such requirements would be accompanied by higher fees, which many companies find far too excessive for what is already a costly voluntary exercise. Anything beyond ethical considerations regarding the content of an HRIA would entail professionally regulated duties for auditors themselves, which creates a paradox; namely a voluntary process, in which the process drivers are subject to binding regulation. The third reason concerns the freedom of auditors to reach subjective outcomes. While some human rights risks are clear and objective (e.g. demolition of houses and forced relocation), others are not (e.g. impact of tax avoidance on future socio-economic rights). It is not in the interest of human rights auditors to go out of their way and set out ethical guidelines that would objectify outcomes.[20] Where an audit is predicated on a contractual relationship and which is in the interest of the audit firm to be long-term, the objectivity of the audit is questionable, where the auditors are not independent from the audit firm. Put another way, it would be unthinkable for the state to employ all available lawyers yet ask them to represent accused persons fairly without confidentiality, professional privileges, or acting in their best interest. It would equally be unthinkable to allow an inter-

[19] *See International Code of Ethics for Professional Accountants (including International Independence Standards)*, Int'l Ethics Standard Bd. for Acct., 7-27 (Apr. 2018).

[20] This issue is even more pressing given the discussions in the UN concerning a business and human rights treaty. Human rights audits play a crucial role in this draft treaty, but the ethical regulation of the industry is not discussed at all. *See* Ilias Bantekas, *The Emerging UN Business and Human Rights Treaty and its Codification of International Norms*, GEO. MAS. INT'L. L. J. forthcoming (2021).

governmental trustee to use funds provided by states at the sole discretion of the trustee and in violation of international law.[21]

The question of tenuous linkages is especially true since the concept of a human rights audit is broader than an HRIA. While an HRIA is quite focused on human rights risks, not all such risks are encompassed within the confines of an HRIA. As already stated, human rights auditors may simply not possess the expertise to ascertain the linkages between a corporation's long-term tax or conflict of laws planning, which may ultimately produce acute human rights impacts. Hence, if a company claims adherence to human rights standards, such as the OECD Guidelines on Multinational Enterprises, its human rights audit should go beyond an HRIA, but should extend to all its other audits, particularly its financial audits. From an ethical perspective, this means that financial auditors would be subject to the ethical rules of their professional body for failure to identify human rights risks.[22] Besides criminal conduct, such as money laundering or fraud,[23] accountants' ethics rules are silent on a duty to assess human rights risks in the process of a financial audit. The same is true regarding lawyers' professional duties.[24] As a result, despite the likelihood of human rights risks ascertainable in financial audits, the auditors' ethical obligations do not extend over these. This is a significant gap that can only be remedied either by a radical amendment of the pertinent ethical rules, or through unilateral undertakings by a corporation's directors concerning the extension of human rights assessments to financial and other audits. Both suggestions are clearly difficult to materialize and are against the

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[21] *See* Ilias Bantekas, 'Effective Management of International Aid through Intergovernmental Trust Funds' (2021) 18 Loy U Chi Int'l L Rev forthcoming; Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, (2011) 81 BYIL 224, 231; Ilias Bantekas, 'The Legal Personality of World Bank Funds under International Law', (2020) 56 *Tulsa Law Review* 101-143

[22] Int'l Ethics Standard Bd, *supra* note 19.

[23] *Id.*

[24] Lawyers as gatekeepers are already burdened with a significant amount of duties, in addition to their ethical obligations. There are no additional human rights duties on the legal profession, other than compliance with human rights law as this applies to legal professionals. Some feeble attempts have been made to show the role of lawyers in the implementation of the UNGPs. *See* IBA Draft Guidance for Legal Professionals on the Meaning and Implementation of the Guiding Principles (2014).

interests of directors and pertinent professional bodies (lawyers and accountants).

This article is organized into two main parts, each involving a theoretical analysis, followed by a long case study. The first discusses how the content requirements of HRIAs are conflated with the ethical requirements of the assessment itself. This, narrow and inadequate species of HRIA ethics is quite different from the extensive body of legal ethics that regulates legal professionals.[25] To illustrate the case, we provide a case study of a World Bank-related impact assessment, which gives rise to legal and non-legal ethical issues and which is meant to demonstrate that the absence of concrete human rights-centered ethical guidelines in HRIAs can, even with the best of intentions, lead to outcomes that effectively violate fundamental rights. The second part examines the role of human rights-based ethics in the financial reporting obligations of multinational corporations. If such corporations consent to be subjected to voluntary HRIAs, then they should have no objection infusing the same human rights standards in the assessment of their taxes and finances. In this connection, we examine the ethical regulation of tax professionals, and whether their professional duties provide space for making human rights-based tax assessments. Our findings are supported by a case study involving MNCs in the mining sector.

2. AUDITOR ETHICS IN HUMAN RIGHTS IMPACT ASSESSMENTS

Despite the variety of framework instruments employed to carry out HRIAs, they are all predicated around some common, inescapable features.[26] These include: A) *Materiality* and *salience,* which concerns the human rights risks that are more critical to the operations and business relationships of the assessed corporation. No doubt, such a definition of materiality is not only subjective, but it tells us nothing about who decides[27] what is material to a corporation, why, and most importantly, critical to whom? The general industry understanding is

[25] *See* J Herring, *Legal Ethics* (OUP 2016).

[26] *See* C Ferraciolli, J Parkhomenko, 'Addressing Human Rights Impact in Sustainability Reporting', in I Bantekas, MA Stein (eds), *Cambridge Companion to Business and Human Rights* (Cambridge UP 2021) forthcoming.

[27] Oddly enough, this is to be decided by the reporting organisation. *See* GRI 101: Foundation, principle 1.1.

that as far as the last question is concerned (to whom) this encompasses primary stakeholders (materiality) and those groups or persons most likely to be worst impacted (salience).[28] B) *Boundary*, which examines where human rights risks occur, or are likely to occur. This may require, and usually does, a holistic examination of the entire supply chain. C) *Impacts*, on particular individuals, communities, the economy, the environment, sustainable development, and others.

The survey of HRIA-related instruments examined by the authors reveal that only rarely do these instruments set out traces of what might resemble ethical considerations on the part of the assessors; and even then, they are not framed as ethical duties but merely as pre-requisites for a solid, fair assessment. This is true, for example, with respect to GRI Standards, such as 'GRI 412: Human Rights Assessment'. The onus there is on the reporting organization to provide as much relevant information as possible to the auditors. This focus on auditors making use of all available information (scoping) and asking the right questions is evident in all assessment frameworks.[29] However, such quality controls hardly confer any ethical duties on individual auditors or auditor organizations as they assume that auditors are independent, skilled, and follow particular terms of reference (ToR), that are guaranteed to produce ethical outcomes. Exceptionally, the Danish Institute for Human Rights' Guidance points to some ethical considerations, although it does not frame them as such, in the form of the following questions (to auditors):

- Is detailed information provided regarding the skills and experience of the HRIA team, i.e. including human rights and other necessary expertise, language skills, local knowledge, etc.? — Are provisions made for the involvement of translators and local interlocutors as necessary?[30]

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[28] Corporate Reporting Dialogue, *Statement of Common Principles of Materiality of the Corporate Reporting Dialogue* (2016) https://corporatereportingdialogue.com/wp-content/uploads/2016/03/Statement-of-Common-Principles-of-Materiality.pdf.

[29] *See* Danish Institute for Human Rights (DIHR), 'Scoping Practitioner Supplement: *Human Rights Impact Assessment Guidance and Toolbox'*, at 4-5 (2016), https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-toolbox/phase-1-planning-scoping (Scroll down and click to download the file).

[30] DIHR, *Human Rights Impact Assessment Guidance and Toolbox: Terms of Reference, Practitioner Supplement*, at 4 (2016), https://www.humanrights.dk/sites/

Regarding the auditing team's particular expertise, it poses the following question:

- Is detailed information provided regarding the skills and experience of the HRIA team, i.e. including human rights and other necessary expertise, language skills, local knowledge, etc.?[31]

With respect to governance and reporting, the Guidance requires that the auditing team enjoys independence and that a plan is laid out in advance so that stakeholders can be meaningfully engaged.

- Is the governance structure for the HRIA clearly outlined, i.e. the role and independence of the HRIA team, the role of the company contact(s) and counter-part(s) (both at headquarters and subsidiary-level), the role of any advisory panel or peer review mechanism etc.?

- Are the requirements for reporting clearly stipulated, including publication of the HRIA report, but also other modes of reporting back to rights-holders and other stakeholders regarding the impact assessment findings (e.g. community meeting involving those who participated as well as the impact assessment team and company to share and discuss findings and mitigation measures to be implemented; reporting back to rights-holders through the company community liaison officers etc.)?[32]

It is clear that all the HRIA Standards purposely conflate due diligence requirements expected of audits and auditors with ethics. This is, however, achieved at the expense of any ethical duties of auditors towards the stakeholders for whom the audit is performed, nor indeed in observance of an ethical code of conduct. That the audit should comply with some requirements that, if applied to individuals, would have resembled ethical duties is irrelevant because the non-observance of such requirements does not necessarily invalidate the HRIA and at best may constitute a breach of contract by the auditing firm against the reporting organization. Ethical duties may well be imposed or assumed unilaterally even in the absence of a regulatory/professional body, whether unilaterally, by contract or by reference to a pertinent code of conduct. Concerned stakeholders,

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humanrights.dk/files/media/dokumenter/business/hria_toolbox/phase_1/phase_1_tor_prac_sup_final_jan2016.pdf.

[31] *Id*.; *see also* OECD Due Diligence Guidance for Responsible Business Conduct (2018), particularly Q26 at 67, which addresses the qualities of auditors on the basis of qualifications and skills, without mentioning any ethical duties.

[32] *Id*.

including civil society organizations (CSOs) would be able to point out violations of ethical rules with a view to demonstrating whether the outcomes of a particular HRIA have been tarnished by bias or other unethical conduct, or whether they are contrary to the fundamental teachings of a relevant discipline.

Non-lawyers working on or interested in HRIAs may find the discussion on ethical regulation of little practical significance perhaps even a luxury. To understand why this is not so, it is perhaps instructive to briefly examine the key justifications for the regulation of lawyers, namely: the *cynical*, the *client protection*, and the *public interest* perspectives. In one of the major reviews of the legal profession in England and Wales in 2004, Sir David Clementi identified the roles justifying regulation of the legal profession, namely: access to justice, maintenance of the rule of law, protection of consumer interests, promotion of healthy competition among well trained lawyers, and promotion of a public understanding of citizen's rights.[33] Readers will not fail to realize that some of these objectives are central to HRIAs, particularly rule of law, consumer (as well as investor) interests, and enhanced stakeholder participation. It is, therefore, important that auditors be subject to some degree of regulation. Unlike lawyers whose direct duties are owed to their clients, however, human rights auditors' duties have never seriously been defined. While it is true that they owe client-like duties to the corporations that have contracted their services, the function of said services are not to simply act in the best interests of their client, but to assist the client in conforming with its human rights commitments. This is different to the nature of duties owed by lawyers. Even so, given the wider public interest function of HRIAs, just like the legal profession, human rights auditors can only serve said public interest if subject to some regulation, not least because of the benefits of regulated professions[34] as articulated in the beginning of this paragraph by reference to the legal profession.

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[33] *See* D Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report*, at 15-17 (2004), http://www.avocatsparis.org/Presence_Internationale/Droit_homme/PDF/Rapport_Clementi.pdf.

[34] *See* Austin Sarat, *The Profession versus the Public Interest: Reflections on Two Reifications*, 54 Stan. L. Rev. 1491 (2002); *see also* Institute of Chartered Accountants for England and Wales (ICAEW), *Acting in the Public Interest: A Framework for Analysis* (2012) (provides helpful insights while being skeptical that it may be used as a smokescreen for advocating in one's self-interest).

There are several models of regulation for the professions and it is assumed in this article that human rights auditing is indeed a profession.[35] These models consist of: *rules-based*, enforced by a regulatory body; *outcomes-based*, which relies significantly on personal discretion to achieve fair outcomes (premised on consequentialism and rule-consequentialism); *self-enforcement*, where the profession develops ethical rules and procedures that must meet the approval of a regulator; and *competitive regulation*, which is grounded on enhanced regulation following consultation with the profession.[36] Although it is not suggested here that human rights auditors undergo the extensive regulation of the legal profession,[37] or that in the absence of transnational regulation states should regulate territorially,[38] the industry itself should move towards the adoption of common ethical rules and self-regulation that encompasses all stakeholders in one way or another.

Self-regulation is fundamental to the organization of industries across borders, such as the banking, construction, and other sectors, although none set out ethical criteria for work undertaken, nor do they serve as regulatory bodies.[39] The key reason is that they are not meant to regulate a profession or the conduct of professionals. It is assumed that professionals, e.g. lawyers and accountants, will be subject to the ethical rules of the territorial state. It is uncommon for a professional activity to not be subject to ethical regulation in any jurisdiction and yet, like in the present instance, to raise so many ethical issues. While industry-based self-regulation offers no paradigms of professional regulation, international entities, particularly courts and tribunals, have discovered that although their drafters made no reference to the ethical regulation of legal professionals (counsel, judges, prosecutors),

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[35] *See* Andrew Abbott, The System of Professions (1998); *see also* European Union Directive 2005/36/EC on Recognition of Professional Qualifications (defines liberal professions as "those practiced on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public").

[36] Herring, *supra* note 25, at 76.

[37] *Id*. at 77-9.

[38] This would turn out to be disastrous, as it would allow for forum shopping in the less regulated jurisdictions.

[39] This is different to the ethical regulation of the industries and their employees under domestic laws, e.g. UK Chartered Bankers Institute. *See* F Bell, *Culture, Conduct and Ethics in Banking: Principles and Practice* (Kogan Page 2018).

it was important that such regulation be provided through broad consultation with direct participants.[40] The same is also true of international commercial arbitration, where several empirical studies have shown a consistency among counsel as to the acute ethical issues, such as delay and guerrilla tactics.[41] Arbitration resembles human rights auditing because persons appearing as counsel on behalf of parties need not be lawyers and are not regulated by the bar (professional legal association) of the seat of arbitration. Unlike ethical codes for arbitrators there is no equivalent for counsel, even though the IBA adopted in 2011 a set of Principles on Conduct for the Legal Profession. However, these Principles apply to all types of legal proceedings and has not yet received universal approval.[42] Some arbitral institutions have drafted relevant guidelines, such as the London Court of International Arbitration's (LCIA) General Guidelines for the Parties' Legal Representatives which are binding on the parties – and by implication their legal representatives – because they are an integral part of their arbitration rules which are binding on the parties, but not their legal representatives. The parties are obliged to ensure that their representatives have agreed to comply as a condition of representation.[43] Although in practice tribunals are reluctant to remove counsel for improper behavior, they possess an inherent right to both rebuke and remove in situations where they threaten the integrity and operation of proceedings.[44] Advanced jurisdictions, such as New York, have begun a trend whereby counsel

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[40] Int'l Ethics Standard Bd., *supra* note 19, at 7-27.

[41] Edna Sussman & Solomon Ebere, *All's Fair in Love and War*, 22 AM. REV. INT'L ARB. 611, 614-15 (2011) (discussing a survey of international arbitration counsel here a significant number of respondents reported experiencing unfair guerilla tactics in arbitration proceedings). Ethical gaps are evident in processes driven by states or powerful non-state actors, such as the World Bank, against weak, fragile or distressed states. See Ilias Bantekas, R Vivien, 'The Odiousness of Greek Debt in Light of the Findings of the Greek Debt Truth Committee' (2016) 22 *European Law Journal* 539; Ilias Bantekas, 'A Human Rights-Based Arbitral Tribunal for Sovereign Debt', (2018) 29 American Review of International Arbitration 52.

[42] *See* Catherine A. Rogers, *Ethics in International Arbitration* (Oxford Univ. Press 2014).

[43] The London Court of International Arbitration (LCIA), Arbitration Rules Art. 18.5 (3d ed. 2020), www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2018.

[44] *See Id.* at art. 18.6.

is sanctioned for frivolous applications to set aside awards.[45] It is beyond the scope of this narrow article to analyze the precise contours of a possible regulatory framework for human rights auditors.

The pitfalls in the absence of ethical rules and professional responsibility for auditors undertaking HRIAs will become evident in the following section on the work of the World Bank. Some scholars have gone as far as arguing that HRIAs constitute a 'governmentalization' of human rights, where 'the individual diminishes as a source of concern and certainly as an active agent and is replaced by a primary focus among the powerful on monitoring, measuring, and manipulating the population for benign ends.'[46]

3. ETHICS IN WORLD BANK POLICIES ON INDIGENOUS PERSONS

The International Bank for Reconstruction and Development (IBRD) is a member of the World Bank Group (Group). The IBRD does not undertake broad HRIAs, albeit it requires that borrowers execute relevant operational policies (OP) in the implementation of the funded project. In the execution of some policies, e.g. with regards to indigenous people or relocation, social and environmental impact assessments are necessary. Only content-related guidance is offered for these by the IBRD's OP, as well as perhaps some foundational principles, and hence the borrower is free to establish terms of reference with an ethical dimension. Since 1991, the World Bank has required borrowers to mitigate any adverse effects from the financed project on indigenous populations.[47] To this end it has devised a layered process that is designed not only to protect indigenous peoples but also to enhance their developmental advancement. This is important because, in theory, the Bank is in an ideal position to implement indigenous rights since both the investor and the local government are dependent upon its approval of the loan. The Bank's OP 4.10 on indigenous peoples requires the borrower to engage in a

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[45] *DigiTelCom, Ltd v Tele2 Sverige AB,* 12 Civ 3082 (S.D. N.Y., 2012).

[46] D McGrogan, *The Population and the Individual: The Human Rights Audit as the Governmentalization of Global Human Rights Governance,* 16 Int'l Con Law 1703 (2019).

[47] *See* Ilias Bantekas, *Sociological Concerns Arising from World Bank Projects and their Impact on Sub-Saharan Indigenous Peoples*, 1 INT'L J. OF L IN CONTEXT 143, 145-50 (2005).

process of 'free, prior, and informed consultation', also known as FPIC (which is now part of customary international law) with the affected indigenous group. FPIC must yield 'broad community support' for the project in order for it to be financed.[48] This is subject to a five-prong process, which consists of the following:

1. Screening by the Bank to identify whether indigenous peoples are present in, or have collective attachment to, the project area;[49]
2. A social assessment by the borrower;[50]
3. A process of free, prior, and informed consultation with the affected indigenous peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project;[51]
4. The preparation of an indigenous peoples' plan (IPP) or an indigenous peoples' planning framework (IPPF);[52] and
5. Disclosure of the draft IPP or draft IPPF.[53]

In the screening process the Bank, or the borrower, seeks to determine the existence of indigenous people in the project area and their attachment to it. To this end, it consults qualified social scientists, particularly anthropologists with expertise in the project area. In addition, the Bank also consults the indigenous group and the borrower.[54] Where the Bank determines the existence of indigenous peoples, it is then incumbent on the borrower to undertake a social assessment study to evaluate the project's effects. Where potentially negative effects are detected the social impact assessment (SIA) must propose alternative measures. The SIA, which is a much narrower HRIA, may determine the impact on variables, such as community structures and institutions, changes in social behavior, local norms, customs and activities, changes in social control mechanisms, creation

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[48] Para. 1, Operational Policy (OP) 4.10 (as revised in April 2013).
[49] *Id*. at ¶¶ 6, 8.
[50] *Id*. at ¶¶ 6, 9.
[51] *Id*. at ¶¶ 6, 10–11.
[52] *Id*. at ¶¶ 6, 12–13.
[53] *Id*. at ¶¶ 6, 15.
[54] This is chiefly in order to localize indigenous rights, rather than offer general solutions, which may be alien or impractical. *See* Eleni Polymenopoulou, *Localizing Intellectual Property and UNESCO Claims*, 6 CAN. J. OF HUM. RTS. 87 (2017).

of employment opportunities, and others. It is not untypical of borrowers in general – and governments for that matter – to manipulate the SIA as a political rather than as a planning tool. This may be done in order to justify a particular policy, rather than as a tool to mitigate the effects of the policy on the affected population. The Bank's only guarantee against manipulation is the consensus of the affected people, which itself is subject to manipulation, as will be demonstrated in the following section. Further, the borrower may well demonstrate an increase in income in respect to the group's households, which he may then interpret as a determinant in the rise of livelihood. In many cases, this increase is artificial since it is the result of lump sum compensations paid to affected persons whose effects are of a limited duration.[55] Following the drafting of the social assessment plan, the borrower must next engage in direct consultation with the indigenous peoples on the basis of three principles: (1) an appropriate gender and inter-generationally inclusive framework encompassing broad civil society representation; (2) employment of appropriate consultation methods to the cultural and social values of the affected people, with special attention to the concerns of women, youth, and children, and their access to development opportunities; and (3) providing full access and disclosure to the relevant reports and information.[56] Before the Bank can go ahead and approve the loan, the borrower must demonstrate that the project has received broad community support on the basis of the FPIC.[57] It is natural, however, at this stage for the affected group

[55] As a result, Ashley and Hussein emphasize that poverty reduction is not necessarily reflected in a sudden increase of income, but should be approached from a study of food security, vulnerability, social inferiority, access to productive means and an understanding of the objectives of each household (i.e. in the sense of what is important to them – education for their children, land security, etc. C. Ashley and K. Hussein, *Developing Methodologies for Livelihood Impact Assessment: Experience of the African Wildlife Foundation in East Africa* (Overseas Development Institute Working Paper 129, 2000), 14.

[56] OP 4.10, *supra* note 48, at ¶ 10.

[57] This is not a mere condition imposed by the Bank. Rather, it has been endorsed as a customary principle by human rights treaty bodies in relation to the taking of indigenous lands, whatever their form of land tenure. *See Poma Poma* v. *Peru*, (HRCtee) (2009), ¶ 7.6; Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on Colombia, UN Doc. E/C.12/Add.1/74 (30 November 2001), ¶ 33; *Dann*, *Mary and Carrie*, (IACHR) (2002), ¶ 131.

and civil society organizations to barter with the borrower for further concessions, knowing full well that their agreement is necessary for the continuation of the project. This is certainly welcome, because it ensures that indigenous concerns are voiced and heard throughout the process and that indigenous social and cultural demands are met, even if the local government is opposed to them. Any special agreement must be communicated by the borrower to the Bank.[58]

On the basis of the social assessment and in consultation with the affected communities, the borrower prepares an IPP that sets out appropriate measures ensuring that the affected group will receive culturally appropriate social and economic benefits and that any adverse effects are avoided, mitigated, or compensated.[59] The role of civil society in the consultation process is critical, because indigenous peoples' access to information and their level of education may lend itself to manipulation by the borrower. By way of illustration, in the absence of civil society the borrower may paint an idyllic picture of the project without emphasizing any of its social and environmental evils. Equally, the borrower may attempt to negotiate only with persons of influence and thus ignore the community's broader aspirations.

It has not always been abundantly clear in the Bank's policies on indigenous peoples whether its focus should be directed at preserving the group's cultural and social status quo, or whether it should also be open to the possibility that the group may wish to radically alter this traditional status. Paragraph 7 of Operational Directive 4.20 of 1991, which has now been replaced by OP 4.10, raised this issue as a dilemma for Bank management as follows:

How to approach indigenous peoples affected by development projects is a controversial issue. Debate is often phrased as a choice between two opposed positions. One pole is to insulate indigenous populations whose cultural and economic practices make it difficult for them to deal with powerful outside groups. The advantages of this approach are the special protections that are provided and the preservation of cultural distinctiveness; the costs are the benefits forgone from development programmes. The other pole argues that indigenous people must be acculturated to dominant society values and economic activities so that they can participate in national

[58] OP 4.10, *supra* note 48, at ¶ 11(e).
[59] *Id*. at ¶ 1.

development. Here the benefits can include improved social and economic opportunities, but the cost is often the gradual loss of cultural differences.

Paragraph 1 of OP 4.10 addresses this issue by requiring that all Bank-financed projects impart culturally appropriate social and economic benefits. The Policy goes even further by stressing that the Bank may, *at a country's request*, support development policies that help to strengthen local laws in favour of indigenous groups, set up poverty-reduction programmes and projects owned by indigenous peoples, as well as address gender and intergenerational issues,[60] among others.

The ethical implications up to this point of the exercise are immense since there is no guarantee that the borrower's auditors are independent, free of any conflicts, possess sufficient expertise, or are subject to any control regarding the best possible culturally sensitive suggestion.[61] Unlike HRIAs, a SIA of this nature determines the livelihood of an indigenous group, including policy questions on relocation and displacement. Even so, the Bank provides no ethical guidance to the borrower and its auditors. One is at pains to find any ethical regulation of external auditors whatsoever. The Bank's Ethics and Conduct Business Department[62] is only concerned with intra-bank ethical conduct (i.e., of its employees)[63] and does not attempt to address any of the ethical issues identified above.

In practice, this process is expensive and cumbersome for borrowers and to a certain degree intrusive for the target states. Moreover, vulnerable and marginalized indigenous groups are typically exploited for their labor and lands by local elites, including timber and natural resources corporations, non-indigenous farmers, and corrupt local government officials. Thus, there are many actors who are averse, if not outright hostile, to the enhancement of the status

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[60] WORLD BANK GROUP, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.20: Indigenous Peoples (1991), *at* http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument.

[61] *See* David Calvey, The Art and Politics of Covert Research: Doing 'Situated Ethics' in the Field, (Sociology, 2008).

[62] *Ethics and Business Conduct Department*, The World Bank, https://www.worldbank.org/en/about/unit/ethics_and_business_conduct (last updated Nov. 20, 2020).

[63] *Id*.

of indigenous peoples, in terms of legal, social, and financial status. Hence, the Bank should not simply strive to accept an IPP because it has received broad consensus from the indigenous group in the project area. Rather, it must make every effort to eliminate any possible hostility against the group following the completion of the project and avoid the temptation of temporary financial benefits.

In the late 1990s, the Group proceeded to provide US $115 million towards financing the Chad–Cameroon pipeline project, which was meant to transport Chadian oil to the Cameroonian coast. The construction of the Cameroon portion of the pipeline was to traverse the country's Atlantic forest zone, part of which is inhabited by the Baka/Bakola indigenous peoples. These groups are also known as pygmies, but the term carries a pejorative connotation, and the Bakola themselves do not accept it, despite the fact that it appears heavily in the literature.[64] They maintain a traditional lifestyle that is distinct not only from that of the general population of Cameroon, but also from neighboring tribal and semi-tribal peoples.[65] Unlike other groups they are principally engaged in hunting, trapping, and fishing, and only recently began to cultivate as an alternative;[66] yet, farming is only of secondary financial importance to them not only because of their cultural identity, but also because they are not land owners.[67]

The traversal of the pipeline through traditional Baka/Bakola lands gave rise to two interrelated issues. The first concerned the social impact of the project on this community, whereas the second involved the potential realignment of inter-ethnic relations with neighboring groups and the state itself. The IPP foresaw that the project would bring progress to the area and proposed both individual and collective

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[64] *See* CS Abega, *Pygmées Baka, Le Droit à la Différence* (Presses de l'Université Catholique d'Afrique Centrale 1998).

[65] *See* Ngambouk Vitalis Pemounta, *Forest Conservation, Wildlife Preservation and the Baka Pygmies of Southeast Cameroon*, 84 GeoJournal 1035 (2019).

[66] *See* Koji Hayashi, *Hunting Activities in Forest Camps Among The Baka Hunter-Gatherers of Southeastern Cameroon*, African Study Monographs, 29(2): 73-92 (Jul. 2008).

[67] Such a lifestyle has given rise to a distinct scholarly literature that seeks to determine the conservationist role of indigenous communities. *See* Janis B. Alcorn, *Indigenous Peoples and Conservation*, Vol. 7 No. 2 Conservation Biology (Jun. 1993); Serge Bahuchet, *Spatial Mobility and Access to the Resources Among the African Pygmies*, in Mobility and Territoriality: Social and Spatial Boundaries Among Foragers, Fishers, Pastoralists and Peripatetics, Berg. Publ., (Mar.7, 2008).

compensation which consisted of the construction of huts and the provision of tools and compensation for destroyed crops and farmland. There was also provision of a limited supply of electricity, access to health care, and education.

The project was bound to disrupt the Baka/Bakola traditional lifestyle, given that the pipeline was destined to pass through forestland used for their principal activities of hunting and crop gathering. Such an eventuality would necessarily have entailed relocation within a more confined forest space or adjustment to agriculture as the Baka/Bakola exclusive livelihood. Both alternatives involved some social adaptation whose consequences the borrowers and the Bank failed to address. The most serious problem was that of land ownership. Under Cameroonian law, customary title to land has been available since 1974 as long as the land is occupied or exploited.[68] Land is deemed occupied where the user has constructed buildings and dwellings, whereas exploitation is demonstrated in cases of farming and grazing. The guiding principle for customary title to be granted is therefore a 'man's clear control of the land and evident development.'[69] Given the Bakola's hunting and crop gathering livelihood, they can never expect to possess any customary law rights under the existing law. They fare no better in Cameroon's forests. The law there distinguishes between non-permanent forest domains, which may be converted for agricultural use, and permanent forest domains that are reserved for conservation.[70] Forest laws have imposed severe restrictions on Bakola hunting and crop gathering rights because forest products are limited only to personal use. Moreover, because the Bakola do not technically 'occupy' or 'exploit' converted forestland they have never been able to claim any pertinent rights. This has driven the Baka/Bakola to poverty because they traditionally barter with wild game and forest crops, which is their primary source of income. Moreover, it has forced them to become

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[68] *See* Samuel Nguiffo, Pierre Ètienne Kenfack, and Nadinee Mballa, *L'incidence des lois foncières historiques et modernes sur les droits fonciers des communautés locales et autochtones du Cameroun.* Forest Peoples Programme (2009). Available at: www.forestpeoples.org/sites/fpp/files/publication/2010/05/cameroonlandrightsstudy09fr.pdf.

[69] Cameroon, Ord. No. 74–1, art. 15(1) (July 6, 1974) (laying out the land tenure system).

[70] Nguiffo, *supra* note 68, at 13-17.

subservient to other groups which have acquired land ownership. Equally, although Cameroonian law envisages annual proceeds from a logging tax that are to be distributed to local village communities, in practice the Baka/Bakola are excluded by rival groups because they are not recognized as having resident status.[71]

As a result of the legal impediments restricting their primary (hunting and crop-gathering) and secondary (agriculture and farming) financial activities, the Bakola have become subservient to neighboring groups, namely certain Bantu tribes.[72] This situation has been exacerbated by the fact that the Bantu are farmers, and therefore have come to own land. This stark inequality between the two groups has not been addressed by Cameroon, despite the obvious vulnerability of the Bakola and has led many of them to be considered Bantu serfs. This inequality has curtailed the Bakola's access to markets to sell or barter their forest products, which has in turn forced them to barter with the Bantu who naturally exploit them. Neither the borrowers nor the Bank thought it wise to alter their subservient and serf (economic and social) status, despite the fact that they desired to escape this cycle of exploitation through the acquisition of land, educating their children and improving their standard of living, while retaining much of their traditional lifestyle. Without delaying the project the Bank should, in similar circumstances, oblige the host state to accept legislative changes alleviating the subservient condition of vulnerable people. In the instant case, this could have been achieved by granting the Bakola land rights and rendering them recipients of the logging tax.

3.1 ETHICAL ISSUES NOT CONSIDERED BY THE WORLD BANK

This SIA clearly necessitated expertise in both land law (customary and other), as well as anthropology of the Baka/Bakola. Paragraph 8 of OP 4.20 simply requires the 'technical judgment of qualified social scientists with expertise on the social and cultural

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[71] Centre for Environment and Development (CED) Réseau Recherches Actions Concertées Pygmées (RACOPY), *The Situation of Indigenous Peoples in Cameroon: A Supplementary Report Submitted to CERD*, Doc. CERD/C/CMR/19 21, (27 January 2010).

[72] *See* G. Ngima Mawoung, *The Relationship between the Bakola and the Bantu Peoples of the Coastal Regions of Cameroon and their Perception of Commercial Forest Exploitation*, 26 African Study Monographs, 209 (2001).

groups in the project area.' While the presence of customary law experts was crucial, they were viewed as irrelevant.[73] That anthropologists are called upon to provide judgment on 'poverty reduction,' 'sustainable development,' 'human rights,' and 'social and economic benefits that are culturally appropriate and gender and inter-generationally inclusive,'[74] is absurd. This is not only far beyond their expertise, but calls into question judgments of a personal nature that are not subject to further control.[75] It is not even clear how anthropologists can evaluate and ensure FPIC under the particular circumstances of their mandate. The SIA did not, to the best of our knowledge, specify if the auditors were compelled to follow a particular set of ethical guidelines. In fact, this is something the World Bank itself could require in its operational policies with borrowers.

In the case at hand, there are numerous codes of conduct, including those adopted in 2012 by the American Anthropological Association (AAA),[76] as well as the 2009 International Association of Impact Assessment.[77] The literature has identified several ethical issues in SIAs, and by extension HRIAs,[78] conducted by anthropologists and social scientists, namely:

respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participant right to withdraw, full disclosure of funding sources, no

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[73] This is inexcusable, given that culture has become an inextricable aspect of international law and hence cannot be excluded from SIAs or other assessments involving people. *See* Eleni Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, 27 LEIDEN J. INT'L. L. 447 (2014).

[74] OP 4.20, *supra* note 60, ¶1.

[75] Dr. Robert Fisher, *Anthropologists and Social Impact Assessment: Negotiating the Ethical Minefield*, The Asia Pacific Journal of Anthropology, 231 (29 Aug. 2008); Richard Howitt, *The importance of process in social impact assessment: Ethics, methods and process for cross-cultural engagement*, Ethics Place and Environment, 209 (10 Oct. 2010).

[76] AAA, *The AAA Principles of Professional Responsibility and the AAA Handbook on Ethical Issues in Anthropology*, Nov. 1 2012, http://ethics.americananthro.org/category/statement/.

[77] *Vision, Mission, Values, Professional Code of Conduct, and Ethical Responsibilities*, January 2009, https://www.iaia.org/pdf/Code-of-Ethics.pdf.

[78] There is even a peer-reviewed journal dedicated to the study of impact assessments, namely *Impact Assessment and Project Appraisal*. IAIA'S Quarterly Journal, *IMPACT ASSESSMENT AND PROJECT APPRAISAL*, https://www.iaia.org/iapa-journal.php.

harm to participants, avoidance of undue intrusion, no use of deception, the presumption and preservation of anonymity, participant right to check and modify a transcript, confidentiality of personal matters, data protection, enabling participation, ethical governance, provision of grievance procedures, appropriateness of research methodology, full reporting of methods … conflict of interest, moral hazard and duty of care.[79]

4. THE CONCEPTUAL FRAMEWORK OF HUMAN RIGHTS ETHICS IN TAX REPORTING

In our analysis of HRIAs, it became evident that while human rights auditors apply standardized formats to the audits, there is no use of ethical codes or guidelines and, because this is an unregulated profession, there exists no professional body to monitor the ethical conduct of the auditors. This is detrimental to the legitimacy of human rights auditing. This second part of the paper seeks to ascertain to what degree ethics play a part in financial reporting, with a focus on tax reporting. Tax reporting is different in at least two ways with regards to human rights reporting/auditing. Firstly, tax professionals, chiefly certified accountants and lawyers, are subject to ethical rules as part of their profession, whether nationally or internationally.[80] Secondly, tax reporting is not voluntary, but part of a mandatory process for all corporate entities. What is unique about the linkage between corporate tax reporting and human rights is that the same corporations that subject themselves to voluntary HRIAs should, in theory, accept the same human rights standards in their tax reporting as they do in their

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[79] Franck Vanclay, James T. Baines & C. Nicholas Taylor, *Principles for Ethical Research Involving Humans: Ethical Professional Practice in Impact Assessment Part 1*, 31 Impact Assessment & Project Appraisal 243 (2013), https://www.tandfonline.com/doi/pdf/10.1080/14615517.2013.850307?needAccess=true.

[80] For instance, the American Institute of CPAs (AICPA) subjects its members to standards contained in the AICPA Code of Professional Conduct. *See* AICPA Online Professional Library, *Code of Professional Conduct* https://pub.aicpa.org/codeofconduct/Ethics.aspx (last visited Jan. 28, 2021); *see also*, AICPA, *Statements on Standards for Tax Services 1-7*, https://www.aicpa.org/content/dam/aicpa/interestareas/tax/resources/standardsethics/statementsonstandardsfortaxservices/downloadabledocuments/ssts-effective-january-1-2010.pdf (last visited Jan. 28, 2021).

non-financial reporting.[81] After all, if a corporation agrees to become human rights compliant, surely this encompasses all its operations, including its tax conduct.[82]

If this is the case, then corporations should accept or infuse HRIA standards in their tax reporting. However, to the best knowledge of the authors, there is no 'standard' in the sense described in the first part of this paper, whether designed by a human rights auditor or other that is currently available for use by MNCs and other corporations. Were such a 'standard' to be adopted by an auditor, such as KPMG or GRI, it might have the undesired effect of MNCs choosing not to undergo any further voluntary human rights reporting, for fear of double and unethical standards applied to their reporting. Ethics plays, or should play, a significant part in tax reporting, far more than in human rights reporting. Tax auditors/professionals, in balancing their duty of care to their clients and states, generally strive to report by reference to what is legal under the laws of the territorial state. As is shown elsewhere, legality in this sense is tantamount to taking advantage of means and processes in the law to achieve the greatest degree of tax avoidance. However, if a corporation prides itself in being human rights compliant, tax legality hardly suffices. Tax practices such as the "permissible" erosion of tax bases and shifting of profits to other jurisdictions through creative tax planning and reporting,[83] while generally legal under particular circumstances, lack ethical value where they strip a poor, developing, nation and its people

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[81] *See* Grace Zhao, *How Tax Abuse and Human Rights are more Closely Related Than You Think*, Global Financial Integrity (Jun. 30, 2014), https://gfintegrity.org/tax-abuse-human-rights-related/; Lloyd Lipsett, *Tax Abuse as a Business and Human Rights Issue*, Shift (Oct. 2013), https://www.shiftproject.org/resources/viewpoints/tax-abuse-business-human-rights/.

[82] *See* Reuven S. Avi-Yonah & Gianluca Mazzoni, Taxation and Human Rights: A Delicate Balance, U. of Michigan Public Law Research Paper, No. 520 (2019); *See also* Sebastien Lopez Nieto, Taxation as a Human Rights Issue, International Bar Association Human Rights Law Committee Publications (2019); *See also* Kalmen Datt, Tax and Human Rights - Much Ado About Nothing, eJournal of Tax R. (2018); *See Rachel Noble, Taxing Human Rights?* Inst. Hum. Rts. and Bus. (May 1, 2013), https://www.ihrb.org/focus-areas/finance/commentary-taxing-human-rights.

[83] *See International Collaboration To End Tax Avoidance*, Org. for Econ. Co-operation and Dev., https://www.oecd.org/tax/beps; Richard Collier & Joseph L. Andrus, Transfer Pricing and the Arm's Length Principle After BEPS (Oxford UP 2017).

from much-needed tax revenues. Such practices are clearly antithetical to the values espoused by the same corporation in its non-financial reporting, wherein it may proclaim its adherence to human rights and the SDGs, among others.

It is, therefore, imperative that non-financial and financial reporting be subject to similar, if not identical, human rights standards, even if through distinct reporting processes. Several benchmarks and pre-requisites must first be put in place. In the absence of formal state laws, corporations must unilaterally infuse ethical human rights-related standards when they order their tax affairs. This must be expressly recorded in their internal instruments and by-laws and pertinent instructions be provided to their tax consultants and auditors. Ideally, tax professionals must, through their regulatory bodies, assume an ethical duty to report beyond the principle of legality, but in such a manner that a corporate tax audit is human rights and SDG-compliant. Both authors agree that we are far from such an eventuality, as it is fiercely resisted by tax professionals, their regulatory bodies, and corporations. In all likelihood it would also be resisted by industrialized states because a significant amount of revenues that would otherwise be repatriated (and re-invested in the home state) would necessarily remain in developing host states. It is clear, therefore, that in order for ethical tax reporting to occur it behooves MNCs, whether individually or collectively, to adopt ethical standards in their tax reporting and instruct their tax consultants to adhere to these standards.

5. ETHICAL ISSUES IN TAX PLANNING AND REPORTING

Increasingly, the role of taxes in achieving the Sustainable Development Goals (SDGs) has been recognized in recent literature.[84] Some SDGs are intrinsically tied to the enjoyment and exercise of human rights bestowed on persons both by international law and applicable national laws. This linkage between taxation and the SDGs has seen long-needed global attention on the international tax system and the activities of tax practitioners. Tax justice advocates have, for

[84] Alexander Ezenagu, *New Thinking on SDGs and International Law – Unitary Taxation of Multinationals: Implications for Sustainable Development*, Ctr. for Int'l Governance Innovation (Nov. 2019), https://www.cigionline.org/sites/default/files/documents/SDG%20PB%20no.4_0.pdf.

years, beamed the light on the activities of multinational enterprises to take advantage of gaps in tax treaties and national laws to erode tax bases and shift profits to low-tax jurisdictions or countries with preferential tax regimes. The professionals behind these schemes have also come under scrutiny and reprobation. The Paradise Papers chronicle the activities of MNEs and tax practitioners who scheme to take advantage of tax systems, and their global network.[85]

However, a debate which has been around for decades is which activities of MNEs and tax practitioners are condemnable, and which are permissible, even if not necessarily praised. This debate has often led to the division of these scheming activities into tax avoidance and tax evasion. The definition and treatment of tax evasion would appear straightforward. Tax evasion is understood by all as the willful, illegal activities of persons to not pay taxes or dues or to pay a lower sum.[86] Tax evasion denotes fraudulent declarations or intentional acts of non-declaration of tax returns by persons that owe taxes in a jurisdiction.[87] Tax avoidance presents a more difficult situation.[88]

Agreeing on the scope of tax avoidance presents great conflict for all stakeholders, whether holding the position of a tax authority, tax practitioner, tax justice advocate, or by-stander. Steenkamp characterizes tax avoidance "by open and full disclosure, where a taxpayer has arranged affairs in a perfectly legal manner so that he has either reduced his income or has no income on which tax is payable."[89]

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[85] *See Paradise Papers: Secrets of the Global Elite*, Int'l Consortium of Investigative Journalists (ICIJ), https://www.icij.org/investigations/paradise-papers/. Notable publications include: Will Fitzgibbon, *Tax Haven Mauritius' Rise Comes at the Rest of Africa's Expense*, ICIJ (Nov. 7, 2017), https://www.icij.org/investigations/paradise-papers/tax-haven-mauritius-africa/; Will Fitzgibbon, *Africa's Satellite Avoided Millions Using a Very African Tax Scheme*, ICIJ (Feb. 20, 2018), https://www.icij.org/investigations/paradise-papers/africas-satellite-avoided-millions-using-african-tax-scheme/.

[86] *See* José L. Escario Díaz-Berrio, *The Fight Against Tax Havens and Tax Evasion: Progress Since the London G20 Summit and the Challenges Ahead*, Observatorio De Politica Exterior Espanola (2011), https://www.fundacionalternativas.org/public/storage/opex_documentos_archivos/e6bf4cecc9006abb8c528869ce93e9e2.pdf.

[87] Zoe Prebble & John Prebble, *The Morality of Tax Avoidance,* 43 Creighton L. Rev. 693, 702 (2010).

[88] *See id.*, at 703.

[89] Lee-Ann Steenkamp, *Combating Impermissible Tax Avoidance throuh Efficient Administrative Approaches: What SARS can Learn from its Canadian Counterpart,* 45 Comp. & Int'l L.J. of S. Afr. 227, 227 (2012).

Diaz-Berrio, offering a more expansive definition, defines tax avoidance as, "although legal, involves the abusive exploitation of loopholes in national and international laws that allows multinational corporations ((MNCs) to shift profits from country to country, often to or through tax havens with the intention of reducing the amount of taxes they pay."[90] Oguttu sees tax avoidance by MNEs, as the use of gaps in the "interaction between different tax systems to reduce taxable income artificially or shift profits to low-tax jurisdictions in which little or no economic activity is performed."[91] She views it as the use of legal methods to arrange one's affairs in order to pay less tax. This, according to Oguttu, is achieved by "using loopholes in tax laws and exploiting them within legal parameters."[92]

Given the overwhelming support for tax avoidance by tax practitioners, one is forced to question where the support for tax avoidance emanated from? As far back as 1935 in the case of *Inland Revenue Commissioners ("IRC") v. Duke of Westminster* ("The Duke of Westminster Doctrine"),[93] Lord Tomlin had held, to wit:

Every man is entitled, if he can, to order his affairs so as that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

This judgment in *Duke of Westminster* re-echoed an earlier decision in *Partington v. Attorney-General* where Lord Cairns ruled:

As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the matter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.[94]

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[90] Díaz-Berrio, *supra* note 86, at 16.
[91] Annet Wanyana Oguttu, *Tax base erosion and profit shifting in Africa – part 1: what should Africa's response be to the OECD BEPS Action Plan?*, (2015) 48 Comp. & Int'l L. J. of S. Afr. 516, 516-17 (2015).
[92] *Id*. at 517.
[93] Inland Revenue Commissioners ("IRC") v Duke of Westminster [1935] All ER 259.
[94] Lord Cairns in Partington v. Attorney General [1869], HL 100 at 122.

These decisions lend support to persons and tax practitioners to creatively order their affairs to pay minimum tax. Though, it would appear that these decisions in the Duke of Westminster's case and the Partington's case have been departed from by subsequent decisions of courts, even though they remain the biggest support for taxable persons and tax practitioners. In England, in the case of *W.T. Ramsay Ltd. v. IRC*,[95] clearly departing from the *Duke of Westminster* doctrine, the House of Lords decided that

> . . . while the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still." The court held that to "force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. . ..

This approach by the English court was recently followed in the Tanzanian case of *African Barrick Gold Plc*[96] by Tanzanian Tax Revenue Appeals Tribunal (the Tribunal).

For tax practitioners and taxable persons, complying with and implementing tax laws present ethical dilemma. Particularly, for tax practitioners, balancing the duty owed to the client and the duty owed to the society walls one into a difficult space. For taxable persons, the enjoyment of one's private property—a tenet of one's fundamental human rights—persuades one to order one's affairs to pay as little or no tax, as legally permissible.

This section discusses the ethical issues in tax planning and tax reporting by tax practitioners. It focuses on tax practitioners who represent corporate entities.

5.1. Tax Practitioners

The network of tax practitioners includes tax accountants and lawyers, bankers, auditors, and regulators, who interact with taxation at different levels. Hereunder, we consider the ethical dilemma of tax lawyers and accountants who advise clients on ordering their tax affairs and, in many instances, implement the advice on behalf of the clients. To help discuss the ethical dilemmas tax lawyers and

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[95] WT Ramsay Ltd. v Inland Revenue Commissioners [1981] All ER 865.

[96] *African Barrick Gold Plc v Commissioner General, Tanzania Revenue Authority* [2013] TZCA 1754 (CA).

accountants deal with, we introduce a case study as anecdotal evidence of the outcome of tax advisory.

5.1.1. African Barrick Gold Plc v Commissioner General, Tanzania Revenue Authority[97]

In *African Barrick Gold Plc. v. Commissioner General, Tanzania Revenue Authority,*[98] the Tribunal held that African Barrick Gold Plc. (ABG) failed to withhold taxes from payment of dividends to its offshore shareholders and engaged in tax evasion.[99] ABG is a United Kingdom-incorporated company, whose majority shareholder is Barrick Gold Corporation[100], a Canadian company registered on the Toronto Stock Exchange.[101] ABG has subsidiaries in Tanzania and elsewhere. However, as reported by the judgment, only its Tanzanian subsidiaries were actively engaged in business at the time.[102] In 2012, the Tanzanian Revenue Authority opened an inquiry into the tax position of ABG, determined that it was resident in Tanzania for tax purposes, and concluded that it was required to withhold tax on dividends paid to its shareholders. The revenue authority's position was that since only the Tanzanian subsidiaries were engaged in business, ABG's dividend distribution must have come from the profits of these Tanzanian subsidiaries. The Tanzanian subsidiaries had all declared losses for the same period (years 2010, 2011, 2012, and 2013) in which ABG distributed the dividends in question.

ABG, in its defense, stated that the dividends paid to its shareholders for the period were paid from "distributable reserves

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[97] *Id*.

[98] *Id.* at 1. Acacia Mining Plc, *Annual Report & Accounts 2017* 9 (2018), http://www.acaciamining.com/~/media/Files/A/Acacia/Reports/2018/2017-acacia-annual-report-accounts.pdf. (African Barrick Gold Plc is now known as Acacia Mining Plc, after changing its name in 2014 from African Barrick Gold Plc.).

[99] This is one case where the tribunal used tax evasion and avoidance, interchangeably. For the distinction between tax evasion and avoidance, *see* Allison Christians, *Avoidance, Evasion, and Taxpayer Morality* 44 WASH. U.J.L. & POL'Y 39 (2014).

[100] African Barrick Gold, *supra* note 96 (Barrick Gold Corporation holds 63.9% of the shares of Acacia Mining Plc.).

[101] *See* BARRICK GOLD CORP., FIRST QUARTER REPORT 71 (2018), https://barrick.q4cdn.com/788666289/files/quarterly-report/2018/Barrick-2018-Q1-Report.pdf.

[102] African Barrack Gold, *supra* note 96, at 1.

created after reduction of the appellant's capital and IPO proceeds"[103] and not from the undeclared profits of its three subsidiaries in Tanzania. On the issue of tax residence, ABG argued that it was not tax resident in Tanzania, since to be tax resident in Tanzania, a company had to be incorporated or formed under the laws of Tanzania.[104] ABG argued that the words "incorporated" and "formed" meant the same thing and as such, a company had to be incorporated in Tanzania to be tax resident.[105] Relying on the Oxford Advanced Learners Dictionary (8th edition) and the Black's Law Dictionary (9th edition), ABG called for the literal interpretation of the words "incorporated" and "formed"[106] to give both the same meaning.

The Tribunal rejected both claims by ABG. On the issue of tax residence, the Tribunal, adopting a purposive approach rule in construction of statutes,[107] held that the word, "formed" must be construed to include the registration of the company under the Act. The Tribunal further held that, given that ABG had obtained a Certificate of Compliance, pursuant to section 453 of the Companies Act of Tanzania, ABG was duly formed in Tanzania as a foreign company, and as such was tax resident.

On the issue of payment of dividends, the Tribunal held that it was inconceivable that ABG could pay out significant dividends to its shareholders over four consecutive years when its only assets consisted of the three loss-making entities incorporated in Tanzania, which had themselves declared losses and paid no dividends to ABG.[108] Agreeing with the submission of the revenue authority, the Tribunal held that the "transactions were simply a design created by the appellant aimed at tax evasion. . . ."[109] Though the judgment did not provide details of the transactions between ABG and its subsidiaries, it could be referring to a common tax planning structure where subsidiaries in high tax jurisdictions are structured to continuously declare losses while their earnings are stripped out

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[103] *Id*. at 19.
[104] *Id*. at 7. (ABG relied on the provision of § 66 (4) (a) of the Income Tax Act of Tanzania, 2004).
[105] *Id*. at 8.
[106] *Id.*
[107] *See* Vanclay, *supra* note 79, at 21
[108] *Id*. at 18.
[109] *Id*. at 20.

through management service debts, high interests, technical fees, and other earnings stripping measures.[110] By focusing on the spirit of the law and adopting the purposive approach to rule interpretation, the tribunal departed from earlier practices which elevated tax evasion over tax avoidance. The tribunal went further to equate both terms, blurring further the thin line between them.

Discussing tax avoidance practices of tax practitioners without highlighting the economic consequences and impacts on achieving the SDGs presents a narrow image and undermines the connection with ethical dilemmas that tax practitioners undergo. Zucman, et. al, argue that close to forty percent of multinational profits are shifted to tax havens, reducing corporate income tax revenue by more than $200 billion, or ten percent of global corporate tax receipts. The authors claim that in 2017 MNEs shifted more than $700 billion in profits to tax havens, reducing global corporate tax receipts by close to ten percent.[111] These numbers feed into the larger discussion of illicit financial flows, particularly, the commercial aspects of illicit financial flows. Rex McHenzie argues that the corruption component of illicit financial flows accounts for three percent of the global total; the criminal component accounts for thirty to thirty-five percent of the global total and the commercial component takes up to sixty to sixty-five percent of the global total.[112] The commercial component of IFFs includes tax avoidance activities.[113]

Highlighting further the extent of tax avoidance, especially using the African continent as case study, a 2008 study by Ndikumana and Boyce put illicit flows from forty sub-Saharan African countries between 1970 and 2004 at USD$420 billion in 2004 dollars.[114] The

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[110] Torslov et al., *The Missing Profits of Nations*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 24701, 2018).

[111] *See* Vanclay, *supra* note 79.

[112] *See generally* Rex. A. McKenzie, *The Africa Rising Narrative – Whither Development?*, Discussion Paper No. 9 (Kingston U. London, School of Econ., June 2016).

[113] The components of IFFs are commercial and manifested in trade mispricing, transfer mispricing, other base erosion and profit shifting activities, such as thin capitalization, and tax evasion; criminal component- drugs, arms and human trafficking, oil and mineral theft; and the corruption component.

[114] Léonce Ndikumana & James K. Boyce, *New Estimates of Capital Flight from Sub-Saharan African Countries: Linkages with External Borrowing and Policy Options* 6 (U. Mass. Pol. Econ. Rsch. Inst., Working Paper No. 166, April 2008).

Mbeki Report puts the yearly value of IFFs out of Africa at USD$50 billion.[115] As a percentage of gross domestic product (GDP), sub-Saharan Africa sustains the biggest loss, with IFFs averaging 5.5 percent of GDP, in excess of the global average of 3.9 percent.[116]

Adopting the claim by the Mbeki Report that Africa loses conservatively, US$50 billion per annum to illicit financial flows and applying the lower rate of sixty percent stated by McKenzie,[117] to the US$50 billion, US$30 billion is lost to the commercial component of illicit financial flows. If twenty percent of the US$30 billion is as a result of tax avoidance practices by companies, which is a conservative estimate, US$6 billion would be lost yearly out of Africa as a result of transfer mispricing.

Focusing the conversation on a country, Nigeria accounts for a large percentage of the IFFs out of sub-Saharan Africa.[118] For example, Global Financial Integrity (GFI) in 2010 reported that illicit financial flows out of Nigeria were: USD$6.3 billion in 2000; USD$5.4 billion in 2001; USD$5.1 billion in 2002; USD$9.7 billion in 2003; USD$15 billion in 2004; USD$18.7 billion in 2005; USD$23 billion in 2006; USD$34.7 billion in 2007; and USD$51.7 billion in 2008.[119] At the 2008 estimate of USD$51.7 billion, transfer mispricing out of Nigeria may amount to more than USD$6 billion a year. This is significant for a country whose total yearly budget is under USD$30 billion. Where twenty percent of potential tax revenue is lost to tax avoidance activities implemented by tax practitioners, it becomes obvious why meeting the SDGs is difficult for some countries, notwithstanding their efforts.

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[115] UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, ILLICIT FINANCIAL FLOWS: REPORT OF THE HIGH-LEVEL PANEL ON ILLICIT FINANCIAL FLOWS FROM AFRICA (2015),https://repository.uneca.org/bitstream/handle/10855/22695/b11524868.pdf?sequence=3&isAllowed=y.

[116] Dev Kar & Joseph Spanjers, *Illicit Financial Flows from Developing Countries 2003-2012*, 46 (2014).

[117] McKenzie, *supra* note 112, at 11

[118] Ndikumana & Boyce, *supra* note 114; Léonce Ndikumana & James K. Boyce, *Public Debts and Private Assets: Explaining Capital Flight from Sub-Saharan African Countries*, 114 (2003).

[119] Dev Kar & Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development* 40 (2010).

5.1.2. Ethical Considerations for Tax Practitioners

As tax practitioners go about offering advisory services, ethics play a key role in determining how companies report their tax liabilities. The ethical underpinnings of tax practitioners influence tax morale and it is important that this connection is made. Two ethical principles are of particular relevance to the activities of tax practitioners. These are: deontology and virtue ethics.

5.1.2.1. Deontology

Deontology denotes a rule-based ethical consideration. This ethical principle pays less attention to the consequences of one's actions[120] and elevates one's adherence or application to a set of rules. Thus, a deontologist will be justified to act immorally if the action is backed by rules. For tax practitioners, this provides justification for carrying out the instructions of their clients, even if those instructions are immoral and result in grave consequences, where they can justify compliance with a set of rules.

For instance, the Statement of Taxation Standard (STS) issued by the Chartered Institute of Taxation of Nigeria (CITN) provides that when acting for a client, a tax practitioner places his professional expertise at the disposal of that client and in so doing the member assumes a duty of care towards the client.[121] The STS further provides that, in addition to the duty owed to the client, the tax practitioner owes a duty to the tax system. However, it swiftly counters the duty owed to the tax system by providing that is well established that the taxpayer has no obligation to pay more tax than legally owed and a tax practitioner has a duty to assist in achieving that result,[122] reinforcing the Westminster Doctrine. Thus, deontology will justify tax avoidance activities implemented by tax practitioners on behalf of clients, given

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[120] *See* Pe Bryne, *Consequentialist Moral Theory", in The Philosophical and Theological Foundations of Ethics*, (Palgrave Macmillan 1999); *see also* Paul J. Zwier, *The Consequentialist/Nonconsequentialist Ethical Distinction: A Tool for the Formal Appraisal of Traditional Negligence and Economic Tort Analysis*, 26 B.C.L. Rev. 905, 909 (1985).

[121] Statement of Taxation Standard (STS 1-8), pursuant to the Chartered Institute of Taxation of Nigeria Act (2013), Cap. (C10) (Nigeria).

[122] *Id*. at C12.

that your primarily and utmost duty is to the client. While this will appear acceptable to a deontologist, it goes against other ethical principles such as consequentialism and utilitarianism.

Having said that, recent policies by governments of some countries in light of the coronavirus pandemic may question such a narrow view of the scope of the duty to client primacy by tax practitioners. Countries in the European Union—Poland, Denmark, etc.— and others outside the EU decided against giving bailout funds to companies registered in tax havens.[123] Considering that one tool of eroding tax bases and shifting profits out of countries where they are due is to incorporate the otherwise tax-liable entity in a tax haven, one would be right to question if it is not in the best interest of the client for tax practitioners to place the duty to the tax system ahead of the duty to the client. This is further relevant given that most tax laws have a general anti-avoidance provision, which covers artificial transactions and incorporating entities in tax havens to take advantage of loopholes in the tax laws; as such, making such practices unlawful.

On the other hand, will taxpayers who are unable to benefit from the bailouts be justified to sue their tax advisers whose advice encouraged them to incorporate entities in tax havens and has now led to disqualification from bailouts? Could the tax practitioners be liable for damages for the breach of contract, professionalism, and negligence, where their advisory services have resulted in the bankruptcy of their clients and eventual winding up? This potential for liability could influence the future acts of tax practitioners when advising clients. Probably, what is needed going forward is a broader perspective on the primacy of the duty to the client.

5.1.2.2 Virtue Ethics

Beyond the regard for rules or the concern for consequences of one's acts, an important ethical consideration is the moral character of

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[123] Jo Harper, *EU Split over Halting Bailouts for Tax Haven Firms*, DW (Apr. 4,2020) https://www.dw.com/en/eu-split-over-halting-bailouts-for-tax-haven-firms/a-53278756; *Scotland Joins Wave of Countries Blocking Tax Haven-tied Corporations from Receiving Covid-10 Bailouts* TAX JUSTICE NETWORK (May 21, 2020) https://www.taxjustice.net/2020/05/21/scotland-joins-wave-of-countries-blocking-tax-haven-tied-corporations-from-receiving-covid-19-bailouts-tax-justice-network-responds/.

the individual and its constitution.[124] At the center of the determination of the justification of the acts of the tax practitioner is the good character or otherwise of the tax practitioner.[125] However, this good character is not natural to man, but a product of nurture.

Where one is not born virtuous and virtue must be acquired through developing the right habits, then it is arguable that both the socio-economic environment and the legal system play important roles in forming a virtuous person. Appreciating the motivation of good character provides a better understanding of the acts of tax practitioner as they advise taxpayers.

West, examining MacIntyre's contemporary virtue ethics, makes the connection between tax avoidance and Donald Cressey's 'fraud triangle'.[126] The fraud triangle, per West, stipulates three factors that must cumulatively be present to influence the character of one: perceived opportunity, perceived pressure, and rationale. Opportunity refers to encouraging circumstances to act in a certain way, for instance, access to accounting records, knowledge that the tax authority lacks the technical capacity to adequately audit the accounts of companies as observed in the Mopani's case where parties to a dispute had to seek the opinion of Messrs Deloitte and Touche on whether the transactions between a subsidiary and the parent company were at arm's length (discussed below). Pressure refers to external forces influencing one's need and can be pecuniary or driven by firm competition. Rationale implies the intellectual justification for acting by the tax practitioner, which could be that the act is legal, protects private property, or is an acceptable global standard. In the absence of contravening influences, it becomes justifiable to develop unethical habits which are defensible. And in a world filled with controversies of what is wrong or right, defining with certainty, what virtue is in tax practice becomes a difficult task. A question that remains is what role can law play in establishing virtue ethics in tax practice?

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[124] Lars Lofquist, *Virtue Ethics and Disasters in* DISASTERS: CORE CONCEPTS AND ETHICAL THEORIES, ADVANCING GLOBAL BIOETHICS 203, 203-04 (O' Mathuna D., Dranseika V Gordijn ed.,2018).

[125] *See* Joseph Grcic, *Virtue Theory, Relativism and Survival,* 3 INT'L J. SOC. SCI. & HUMANITY 416 (2013).

[126] Andrew West, *Multinational Tax Avoidance: Virtue Ethics and the Role of Accountants*, 153 J. BUS. ETHICS 1143 (2018).

Law plays a key role in shaping the habits of all, and in this context, tax practitioners. However, legislative enactments on taxes have not been helpful in forming the virtuous character for tax practitioners. This, as a result of the ambiguous nature of tax laws, leaves room for ambiguity of which tax practitioners take advantage. In recent times, the courts have been relied upon to help mold the character of tax practitioners, through judicial decisions with far-reaching implications for tax practice and tax practitioners. A case of importance is that of *Mopani Copper Mines Plc v. Zambia Revenue Authority*.[127]

In May 2020, the Supreme Court of Zambia, in upholding the decision of the Tax Appeal Tribunal, held that Mopani Copper Mine had engaged in abusive transfer pricing with its parent company, Glencore International AG (GIA) and fined Mopani Copper Mine the sum of US$13 million for engaging in abusive transfer pricing. This abusive transfer pricing, Mopani achieved by colluding with its parent company, GIA, to undervalue the price of copper sold to the parent company, thereby breaching the arm's length standard expected of transactions between related entities. The Supreme Court of Zambia described the appeal before it as "archetypical of the problem posed to the fiscus of many developing economies by multinational corporations engaged in the extractive industry."[128] Identifying the absence of technical capacity among revenue authorities, which provides opportunities for tax practitioners to take advantage of gaps in tax laws for the benefits of their clients, the Supreme Court of Zambia rejected the argument by the appellant that a report by a firm of tax practitioners should be binding on the revenue authority. The court ruled that, "it would be incongruous for a tax authority such as the respondent to be content with an audit report requested for by a party so closely related to the taxpayer in a relationship which naturally arouses suspicion."[129]

The decision in *Mopani* gives further support to the judgment in the Tanzanian case of African Barrick Gold, where the court ruled that tax avoidance practices, which may have been considered legal in the past, would now be deemed to be tax evasion, and as such considered illegal. The implications of these cases for tax practice are

[127] Mopani Copper Mines Plc v. Zambia Revenue Authority (2020) ZLR J1.
[128] *Id.* at J2.
[129] *Id.*at J53.

worth mentioning briefly. First, is the court's impatience for the cosmetic distinction between tax avoidance and tax evasion, but clear conclusion that base erosion and profit shifting schemes designed by tax practitioners for the benefit of their clients, are against the law and as such, are illegal with attendant consequences for the taxpayers. This poses a clear departure from the Duke of Westminster doctrine. Second, is the court's conclusion that activities of tax practitioners for their clients should be treated with suspicion, thereby, implying that the burden of proof in tax matters should be on the tax practitioner. Third, is the growing judicial activism by courts in African countries, and other developing countries, which seeks to fill in the gap left by ambiguous legislative enactments. This judicial activism may be key to achieving sustainable development by many countries far off the mark and facing individual and corporate captures, in addition to weak laws.

Therefore, while a tax practitioner may find rationale to engage in tax avoidance activities and firm pressure may provide extra motivation, law can serve to limit the opportunities for such activities, thereby molding the good character of the virtue ethics proponent. In the absence of legislative direction, judicial decisions may rise to fill in the gap.

6. CONCLUSION

The absence of ethical rules and regulation for all those involved in human rights impact assessments is detrimental to the process itself and effectively undermines it. It is clear that the human rights audit industry may wish to avoid any professionalization, or adding extra layers of professional regulation, because of its fear of losing control,[130] as well as because ethical regulation entails a higher degree of cost. However, these are hardly sufficient reasons for the absence of even the slightest ethical regulation and guidance for the emerging profession of human rights auditing. The conflation of an

[130] If human rights auditors became a liberal profession subject to particular standards and regulation, it would have to be subject to a self-regulated regulatory body, which would have to be independent from the audit firms that employ its members. In the process, audit firms would not be able to control the qualifications, fees and ethical limitations of auditors and in addition the latter would perhaps find it expedient to form trade unions as a means of promoting their interests against audit firms.

audit's terms of reference with ethics is no doubt not only the result of misunderstanding of the role of ethics in the process, but also a deliberate act that allows audit firms to provide a service to a client rather than operate in the public interest.

This is one of the major problems with HRIAs. The assessment of human rights risks was not meant to be profits-driven, or a tool to weed out risks to the corporation; on the contrary, it was and still is meant to be rights-oriented and hence serve a public purpose.[131] The absence of ethical guidelines renders auditors complicit in what might ultimately turn out to be a 'soft' box ticking exercise. Where an audit is predicated on a contractual relationship and which is in the interest of the audit firm to be long-term, the objectivity of the audit is questionable where the auditors are not independent from the audit firm. Put another way, it would be unthinkable for the state to employ each and every lawyer on its territory yet ask them to represent accused persons fairly but without confidentiality, professional privileges, or acting in their best interest. Yet, this is exactly the context in which human rights auditors perform their duties. We are not suggesting that there is no place for self-regulation in corporate accountability or human rights auditing; quite the contrary. Rather, sensible and best practices from other professions are imperative if human rights outcomes are to be taken seriously and the aim of audits is to be aligned with the broader public interest. It is high time that a task force is established to set out an appropriate code of ethics, as well as a regulatory entity that monitors adherence to the code for all human rights auditors.

Tax practitioners, on the other hand, faced with conflicting rules and absence of legislative clarity, must assume greater responsibility. This means that it is no longer sufficient to hide under the cover of legality, but they must consciously seek to comply with the spirit of law and particularly in light of the human rights standards voluntarily employed by the corporation in its human rights audit. It may also be argued that tax practitioners may have to take a utilitarian approach to their practice, caring more for the collective good,[132] as

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[131] *See* Bjorn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk* 2 Bus. & Hum. Rts. J. 225, 228 (2017).

[132] Utilitarianism represents seeking the collective good of a tribe, country or mankind, and resisting any threat to the collective good. *See* JOHN STUART MILL, UTILITARIANISM 10-19 (Batoche Books: Kitchener 2001) (1863). It encourages actors

opposed to just the strict interests of their client. Finally, if there is any lesson we have learned from the financial crisis, and now pandemics, is that everyone looks to the government for a bailout. Thus, when tax practitioners put their duty to the tax system over that of their clients, they are not only contributing to the sustainable development of the jurisdictions where they operate, but also protecting the private property of their clients.

to act always to promote the greatest good for the greatest number of persons. *Id.* As a form of consequentialism, utilitarianism assesses the acceptability of an act by its benefit to the community or a larger population, not by its conformity to rules. *See* Klaus Mathis & Deborah Shannon, *Jeremy Bentham's Utilitarianism, in Efficiency Instead of Justice?*, *in* 84 LAW AND PHILOSOPHY LIBRARY 103, 104 (2009).