



Submission

Zero Draft

UN Framework Convention on International Tax Cooperation

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HUMAN RIGHTS DEVELOPMENT INITIATIVE NPC

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Introduction

The Zero Draft includes human rights, particularly the right to privacy, to limit the requirements of transparency and accountability of all taxpayers.¹

This submission recommends that the international human rights framework be used to justify the requirements for transparency, accountability, fairness and equity within the international taxation regime. The submission makes seven recommendations on: 1) the right to self-determination; 2) the state obligation to mobilise maximum available resources for the fulfillment of its human rights obligations; 3) extraterritorial obligations of states to monitor and control conduct of corporations operating outside its territory but that are domiciled within its territory; 4) whistleblower protection; 5) the inclusion of periodic human rights impact assessment of corporate tax policy; 6) incorporation of language regarding the principle of solidarity and the state obligation to cooperate toward the achievement of a common community interest; and 7) the obligations of states outside the regime.

What follows is a table that details each recommendation and links it to a section of the Zero Draft. The last column of the table provides a justification for the recommendation based on existing norms, standards, rules and conclusions of the UN Treaty Bodies, the UN UPR mechanism and from leading scholars.

Recommendation	Justification
1: Right to self-determination for the section on Principles	
<p>The right to self-determination is set apart from and before all rights and is a necessary precondition for the effective guarantee and observance of individual human rights.</p>	<p>The UN Human Rights Committee in its General Comment 12² states that:</p> <p>The right to self-determination is set ‘apart from and before all’ the other rights in both Conventions because the state parties recognised that self-determination is a necessary precondition for the ‘effective guarantee and observance of individual human rights.’</p> <p>Self-determination is an inalienable peoples’ right. It entails being free to determine a peoples’ political status and to pursue economic, social and cultural development. This right imposes obligations on all state parties, particularly regarding the disposal of natural wealth and resources. The GC spotlights the phrase in the Article where it is stated ‘in no case may a people be deprived of its own means of subsistence’ and clarifies that it entails corresponding duties for all states in the international community.</p>

¹ See the last bullet point under the heading “Principles” of the Zero Draft

² UN Doc General Comment 12 HRC adopted during Twenty first session (1984) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F6626&Lang=en accessed on 13 June 2024 paras 3 and 5-6.

2. State obligation to mobilise maximum available resources for the section on Structural Elements	
<p>The state has the obligation to mobilise maximum available resources for the fulfillment of its human rights obligations.</p>	<p>The UN Committee on Economic Social and Cultural Rights in its General Comment 19³ and the Committee on the Rights of the Child in its General Comment 6 both address this issue. Below is an extract from CRC GC 6⁴:</p> <p>‘Ineffective taxation systems, corruption and mismanagement of government revenues from, among others, State-owned businesses and corporate taxation, can limit the resources available for the fulfilment of children’s rights in accordance with article 4 of the Convention. In addition to any existing obligations under anti-bribery and anti-corruption instruments, States should develop and implement effective laws and regulations to obtain and manage revenue flows from all sources, ensuring transparency, accountability and equity.’</p>
3. Extraterritorial obligations of states for the section on Specific priority areas to be addressed in early protocols	
<p>States have extraterritorial obligations (ETOs) to monitor and control conduct of corporations operating outside its territory but that are domiciled within its territory</p>	<p>ETOs are addressed extensively in the CESCR’s General Comment 24⁵ and in the UPR process:</p> <p>States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned.</p> <p>The GC clarifies that domicile includes incorporation under the state’s laws, or holding its statutory seat, central administration or principal place of business within national territory of the state.⁶</p> <p>The GC adds that allowing an entity over which a state party has control and authority to cause harm in the territory of another state is prohibited under customary international law.⁷</p>

³ UN Doc E/C.12/GC/19 4 February 2008 General Comment 19 CESCR.

⁴ UN Doc CRC/C/GC/16 17 April 2013 General Comment 16 CRC para 55.

⁵ UN Doc E/C.12/GC/24 10 August 2017 General Comment 24 CESCR.

⁶ n 5 above para 26.

⁷ As above.



4. Whistleblower protection for the section on Substantive Elements	
Whistleblower protection	<p>Whistleblower protection was dealt with extensively, particularly during the fourth cycle of the UPR. Below are extracts from recommendations made to Switzerland and Luxembourg in their fourth cycle as States under Review (SuR):</p> <p><i>Switzerland</i>⁸</p> <p>39.143 Introduce an appropriate legal framework so that the publication of information of public interest is not hindered and whistle-blowers are not criminalized (Germany); and</p> <p>39.144 Take steps to ensure freedom of the press so that dissemination of information in the public interest is not hindered in any way, including by removing penalties for whistle-blowers who disclose information exposing wrongdoing (Norway).</p> <p><i>Luxembourg</i>⁹</p> <p>135.15 Swiftly adopt and implement the law on the protection of whistleblowers, draft law No. 7945 (Germany); and</p> <p>135.16 Transpose European Union rules on whistle-blower protection, enabling the reporting of breaches of European Union rules in a confidential manner (France)</p>
5. Inclusion of periodic human rights impact assessment of corporate tax policy for section on Structural Elements	
The inclusion of periodic human rights impact assessment of corporate tax policy	<p>CEDAW included this proposal in its concluding observations on the Periodic Review of Switzerland.¹⁰ Some of the concluding observations justify other recommendations listed above.</p> <p>40. (c) The state party's financial secrecy policies and rules on corporate reporting and taxation having a potentially negative impact on the ability of other States, in particular those already short of revenue, to mobilize the maximum available resources for the fulfilment of women's rights.</p>

⁸ UN Doc A/HRC/53/12 Report of the Working Group on the Universal Periodic Review Switzerland 31 March 2023

⁹ UN Doc A/HRC/54/12 Report of the Working Group on the Universal Periodic Review Luxembourg 22 June 2023 page 11.

¹⁰ UN Doc CEDAW/C/CHE/CO/4-5 Committee on the Elimination of Discrimination against Women Concluding observations on the combined fourth and fifth periodic reports of Switzerland 25 November 2016 page 15.



	<p>41. In line with its general recommendation No. 28 on the core obligations of States parties under article 2 of the Convention, the Committee recommends that the state party:</p> <p>(a) Undertake independent, participatory and periodic impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality, ensuring that such assessments are conducted impartially, with public disclosure of the methodology and findings;</p> <p>(b) Ensure that the trade and investment agreements negotiated by the state party recognize the primacy of its obligations under the Convention and explicitly consider their impact on women's rights;</p> <p>(c) Strengthen its legislation governing the conduct of corporations registered or domiciled in the state party in relation to their activities abroad.</p>
<p>6. Incorporation of language on the principle of solidarity for the section on Structural Elements</p>	
<p>Incorporation of language regarding the principle of solidarity and the state obligation to cooperate toward the achievement of a common community interest</p>	<p>Effective cooperation is required in the field of international tax because a single state cannot address the problems associated with international tax evasion and avoidance on its own. It is in the interests of the international community, as a whole, to develop an obligation to cooperate within the international tax regime.</p> <p>Below is an extract from Wolfrum's book¹¹ that is easily adapted to the context of international taxation.</p> <p>‘The hallmark of cooperation is the effort of States to accomplish a particular objective by joint action where the activity of a single State cannot achieve the same result. The significance and value of cooperation depends upon the objective to be achieved; the ethical value of cooperation as such is neutral. The objective of cooperation can embrace several issues. It may envisage the promotion of the interests of all other States involved. However, cooperation also may serve the particular interest of one or more of the States involved, only. It also may serve the interest of the international community or a regional community as such. It is a central question of international law as to whether a general obligation to cooperate has already emerged in international law. If the</p>

¹¹ R Wolfrum *Solidarity and community interests* (2021) 58-59.

	<p>term cooperation is to be understood only as an obligation to enter into relations with other subjects or actors of international law, such an obligation is to be considered as being part of customary international law. The question is whether, on the basis of customary international law, an obligation exists to enter into a substantial cooperation such as to join a regime serving international community interests (e.g. against climate change), to participate in the efforts against terrorism or in efforts promoting and implementing human rights. Considering the nature of regimes dedicated to serve the interests of the international community it seems to be logical to develop an obligation to cooperate within such regimes or with them. Political requests have been frequently formulated advocating an obligation to cooperate for development.’</p>
<p>7. Inclusion of the obligations of states outside the regime for the section on Structural Element</p>	
<p>Inclusion of the obligations of states outside the regime.</p> <p>States should be required to respect the undertakings contained within this new regime even if they are not legally bound as parties to the Convention. This means that states outside the regime do not undertake activities which undermine those pursued in the Framework Convention.</p>	<p>Wolfrum has written extensively on this subject. Below is an extract from his work:¹²</p> <p>To require that States respect activities undertaken on the basis of a regime meant to serve community interests does not advocate that States outside the regime are being legally bound. It means that outside States do not undertake activities which undermine those pursued on the basis of the regime serving community interests. There is a subtle difference between being bound, which means the obligation to take positive action and the obligation from not undermining the efforts undertaken within a regime serving community interests. The latter only means an obligation of abstention. That regimes serving community interests may have implications for those not being members of such regimes has been acknowledged in public international law such as in Article 48 (1) (b) International Law Commission’s Articles on State Responsibility, in respect of Antarctica, concerning the implementation of the Montreal Protocol and concerning fisheries managed by regional fisheries organisations, to name but a few examples.</p>

¹² n 11 above 62.



Conclusion

As can be seen from the extracts from the UN Treaty Bodies and UPR process, human rights and international taxation is about much more than the right to privacy.

Often the powerful states of the Global North are credited with the development of international human rights norms and standards. However, the reality is that these powerful states, especially the US and the UK, actively opposed the first human rights resolutions in 1946 on the basis of non-interference in domestic matters under Article 2(7) of the UN Charter. It took a few maverick countries of the Global South, including Egypt, Cuba and India to push the General Assembly to address violations of the human rights provisions of the Charter thereby laying the cornerstone for the system of international human rights law that we enjoy today.¹³

May you be guided by our common ancestors as you deliberate on this game-changing instrument of international law.

¹³ W Schabas *The international legal order's colour line: Racism, racial discrimination, and the making of international law* (2024) 110-113.