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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Comprehensive study on the negative impact of the non- repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights

Report of the United Nations High Commissioner for Human Rights

Summary

The present report is submitted in accordance with Human Rights Council resolution 17/23 concerning the matter of non-repatriation of funds of illicit origin. Chapter II describes the main obstacles to the repatriation of funds of illicit origin, the process established for the return of assets by the United Nations Convention against Corruption and the mutual obligations imposed on States involved in the recovery process under the human rights framework. Chapter III discusses how the non-repatriation of funds of illicit origin impacts on States' capacity to fulfil their human rights obligations, in particular with regard to economic, social, and cultural rights. It analyses ways by which a human rights-based approach to asset recovery enhances existing procedures, by addressing its most problematic issues and existing barriers. The report concludes with policy recommendations directed at improving repatriation processes with a view to enhancing States' capacity to better fulfil their human rights obligations.

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I. Introduction

1. In its resolution 17/23, the Human Rights Council requested the United Nations High Commissioner for Human Rights to prepare a comprehensive study on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights, and to submit a report thereon to the Human Rights Council at its nineteenth session.

2. The present report is submitted in follow up to this request.

II. The main obstacles to the repatriation of funds

A. Funds of illicit origin: Estimated flows of funds of illicit origin and of funds not repatriated

3. As Human Rights Council resolution 17/23 refers to funds of illicit origin with regards to corruption, for the purpose of this report, “funds of illicit origin” and “proceeds of corruption” are used interchangeably. Both terms are understood as any property derived from or obtained, directly or indirectly, through the commission of a crime covered by the United Nations Convention against Corruption.¹

4. Proceeds of corruption are difficult to measure. The data is scarce and hard to collect. All methodologies resort to different assumptions and, when the task is of a global nature, the margin of confidence substantially decreases. Results are, therefore, rough estimations.² For example, global bribery – both petty and grand – has been estimated at between US\$ 600 billion and \$1.5 trillion, that is to say, a median estimate of US\$ 1 trillion.³

5. Annual estimates for international flows of the proceeds of corruption range between US\$ 30 and \$ 50 billion with a median estimate of US\$ 40 billion and for flows out of developing and transition economies estimates range between US\$ 20 and 40 billion for a median estimate of US\$ 30 billion.⁴ This figure represents half of the official development

¹ See General Assembly resolution 58/4, annex, United Nations Convention against Corruption, art. 2(e).

² United Nations Office on Drugs and Crime, “Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes” (2011), available at http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf

³ Daniel Kaufmann, “Myths and Realities of Governance and Corruption” (2005). Available at <http://ssrn.com/abstract=829244>

⁴ Raymond Baker, *Capitalism’s Achilles Heel* (New Jersey, John Wiley & Sons, 2005). According to Baker, proceeds of corruption represent around 3 per cent of the estimated illicit financial flows. Flows originating in organized crime activities – drugs, counterfeit goods and currency, human trafficking, illegal arms trade, smuggling and racketeering - amount to 33 per cent, and flows originating in illegal commercial activities - mispricing for tax evasion, abuses of transfer pricing, and commercial fraud- to 64 per cent.

assistance for 2000 – when global attention to asset recovery began⁵ – and still represents more than 25 per cent of ODA reported for 2010.⁶

6. By contrast with illicit financial flows originating in organized crime or commercial activities, where around 50 per cent of the money flows between developed countries, in the case of proceeds of corruption 80 per cent of the money is believed to be outflow from developing countries. Given the relative weight of diverted funds in each economy, the impact of outflows of proceeds of corruption substantially increases in the developing world. For instance, in 2002 the African Union estimated the direct and indirect costs of corruption at US\$ 148 billion, which at that time amounted to 25 per cent of the continent's GDP.⁷

7. Most of the estimated annual outflow of US\$ 20-40 billion goes undetected, and even less is repatriated to the countries of origin. Though not intended to be exhaustive, a recent database launched by the Stolen Asset Recovery Initiative shows that less than US\$ 2 billion had been repatriated since 1990.⁸ More than 70 per cent of these repatriation efforts took place after the United Nations Convention against Corruption entered into force in 2005, and around US\$ 1 billion is currently frozen in ongoing investigations, a figure pointing out a growing rate of detection.⁹

8. Despite progress made since the United Nations Convention against Corruption entered into force, only around 2 per cent of the estimated funds of illicit origin annually leaving the developing world are repatriated to their countries of origin.¹⁰

B. Legal and factual obstacles to repatriating funds of illicit origin

9. There are multiple legal and factual obstacles to the repatriation of proceeds of corruption.¹¹ Many legal barriers are associated to difficulties in implementing and enforcing the legal framework for preventing and detecting the transfer of proceeds of corruption. For instance, in order to detect these flows, a fundamental standard set by article 52, paragraph 1, of the United Nations Convention against Corruption requires State Parties to “take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction... to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of

⁵ General Assembly resolution 54/205, of 27 January 2000, on “Prevention of corrupt practices and illegal transfer of funds”.

⁶ Organization for Economic Cooperation and Development, Development Assistance Committee, available at <http://www.oecd.org/dac> .

⁷ African Development Bank Group, “Proceedings of the regional learning workshop on combating corruption in Africa” (2003). Available at: <http://www.u4.no/helpdesk/helpdesk/queries/queryattach/q44Addisreport.pdf>.

⁸ Stolen Asset Recovery Initiative launched Asset Recovery Watch in October 2011. Available at http://www1.worldbank.org/finance/star_site/stararw.html .

⁹ Asset Recovery Watch. Available at <http://assetrecoverywatch.worldbank.org/> .

¹⁰ These figures do not consider the funds frozen and/or returned to Egypt, Tunisia, the Syrian Arab Republic and Libya in 2011, a process that has renewed asset-recovery efforts.

¹¹ Stolen Asset Recovery Initiative, “Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action” (Washington D.C., 2011), available at http://www1.worldbank.org/finance/star_site/publications/barriers.html .

reporting to competent authorities”. The rate of compliance with this standard remains low, both in the developed and the developing worlds.¹²

10. Even if flows of illicit origin are reported or otherwise detected, additional legal obstacles can be found in the subsequent stages of the process. Most of them take place in the context of mutual legal assistance in criminal matters between the originating and the recipient jurisdictions. Many cases fail at the tracing phase due to exigent requirements imposed by requested jurisdictions in a stage where the requesting jurisdiction is in a weak position for collecting evidence. Typical examples include requiring the originating jurisdiction to provide an exact link between the assets and the offence, the names of bank account holders or to identify the assets with an extreme degree of accuracy. These requirements, which are usually higher in jurisdictions applying strict bank secrecy laws, are difficult to meet at early stages of the investigation. Chapters IV and V of the United Nations Convention against Corruption, which oblige requested jurisdictions to assist in the tracing stage, should be sufficient to overcome this barrier. Nonetheless, the central authorities of many State parties either do not resort to these rules as a legal basis for cooperation or read them in accordance with their preexisting domestic legislation and practices, reducing their scope and innovative broad approach.¹³

11. The success of most recovery efforts depends upon timely adoption of provisional measures to freeze or restrain the assets. Although the risks of dissipation are inherent to the context, many jurisdictions impose important burdens on the requesting State for freezing assets, even when the rights of the accused are restricted on a rational and proportional basis. Some jurisdictions give ample rights to the asset-holder, allowing for long lasting parallel proceedings in the requested State, when the rights of the asset-holder – being a defendant or not – should be exercised before the Courts of the requesting jurisdiction. When these measures take place in the tracing stage, they usually lead to the dissipation of the assets.¹⁴

12. When confiscation depends on obtaining a criminal conviction, as is the case in most jurisdictions, the requesting country might need to reach that stage within time constraints imposed by the legislation of the requested jurisdiction, for example the lifting of provisional measures and/or the statute of limitations. Many jurisdictions do not provide for an alternative when conviction is impossible to reach, for example when the defendant enjoys immunity, is a fugitive, dies, or when the case reached the statute of limitation. This obstacle could be overcome by following article 54, paragraph 1 (c), of the United Nations Convention against Corruption, which recommends de-linking confiscation from conviction for the purposes of providing mutual legal assistance.

13. If proceeds of corruption are confiscated, requested States need to have legislation allowing for their repatriation. It has been reported that “only a very limited number of jurisdictions have the legal authority to return 100 percent of stolen assets”¹⁵, even when article 57, paragraph 2, of the United Nations Convention against Corruption requires State Parties to adopt such measures.

14. While variances in legal traditions increase the obstacles, differences in experience, technical resources and even in the risks faced by the authorities in requesting and requested jurisdictions can play an important role. In 97 per cent of the cases included in

¹² Stolen Asset Recovery Initiative, “Politically Exposed Persons: Preventive Measures for the Banking Sector” (Washington D.C., 2010), available at http://www1.worldbank.org/finance/star_site/publications/politically_exposed.html.

¹³ Stolen Asset Recovery Initiative, cited in note 11 above.

¹⁴ Ibid.

¹⁵ Ibid.

the Asset Recovery Watch database, the requesting country is a developing one. Out of these requests, 83 per cent were addressed to members of the Organization for Economic Cooperation and Development and 17 per cent to other developing countries, most of which were offshore financial centres.

15. Legal barriers are exacerbated by factual and institutional obstacles; the most salient being the lack of will to cooperate. Requested jurisdictions, especially financial centres, “often maintain an unresponsive and inefficient mutual legal assistance regime and systems that are known to be arduous, discouraging states from submitting requests for assistance”, prioritize domestic cases over foreign requests and rarely take a proactive approach, even though they do have the expertise, capacities or resources to provide better assistance. It has been suggested that this institutional behavior is reinforced by the perception that “some requests from developing jurisdictions are submitted simply as a ‘smoke screen’, contrived for domestic and international political reasons in a case that would never be seriously prosecuted”, and that “developing jurisdictions do not always respond positively when developed countries inform them of the discovery of assets believed to be illegally obtained”.¹⁶

16. While this perception might sometimes be correct, there are cases where there is a failure in adequately distinguishing between the State authorities and the society suffering the consequences of corruption. When this distinction has been taken into account, a more proactive intervention of the requested State was able to unbalance the field in favor of seriously prosecuting cases.¹⁷

C. The legal framework for the realization of human rights in the context of the asset-recovery process

17. The international human rights framework primarily establishes the relationship between individuals and States in terms of rights and duties. Typically, the human person is identified as a rights-holder, while States are duty-bearers. The Committee on Economic, Social and Cultural Rights describes the specific obligations of States as the responsibility to respect, protect and fulfil human rights.

18. The nature of States’ human rights obligations has been debated at length, particularly their alleged differential nature with regards to civil and political rights, on the one hand, and economic, social, and cultural rights on the other.

19. It has been recognized that all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent consideration should be given to the implementation, promotion and protection of all civil, political, economic, social, and cultural rights, that States have the duty to respect, protect, and fulfill all human rights, comprising both negative and positive duties.¹⁸

20. The Committee on Economic, Social and Cultural Rights has stressed that the International Covenant on Economic, Social and Cultural Rights establishes obligations of both conduct and result, and that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes

¹⁶ Ibid., pp. 25-26.

¹⁷ Tim Daniels and James Maton, “The kleptocrat’s portfolio decision”, in Peter Reuter (ed.) *Draining Development: Controlling the Flow of Illicit Funds from Developing Countries* (World Bank Press, 2012).

¹⁸ E/C.12/1999/5, paras. 15 and 46; E/C.12/2000/4, paras. 33 and 39.

various obligations which are of immediate effect.”¹⁹ Thus, the Committee held that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.²⁰ Thus, the progressive realization of economic, social, and cultural rights “should not be misinterpreted as depriving the obligation of all meaningful content”.²¹

21. In addition, the Committee stressed that article 2, paragraph 1, of the International Covenant on Economic, Social, and Cultural Rights “must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question, ... it thus imposes an obligation to move as expeditiously and effectively as possible towards that goal [and that] any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.²² For this reason it is understood that States have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of every right, and that “in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”.²³

22. That corruption impedes States from complying with their human rights obligations has been increasingly emphasized.²⁴ It is believed that diversion of available resources due to corruption impacts the obligation to take steps, to the maximum of available resources, to progressively achieve the full realization of economic, social, and cultural rights.²⁵ Rights violation due to corruption-related diversion of funds is particularly apparent when States cannot fulfil their minimum core obligations regarding each right.

23. In this context, under certain conditions a successful procedure of asset repatriation might remedy the State's corruption-related failure to complying with human rights obligations. Being a component of any anti-corruption strategy, the asset-recovery process should be understood in light of the human rights framework, as part of the several efforts that States must make in order to comply with their human rights obligations.

24. These obligations apply to both countries of origin and recipient countries of funds of illicit origin due to the principle of international cooperation and assistance towards the realization of human rights, particularly economic, social, and cultural rights.²⁶ According

¹⁹ Committee on Economic, Social, and Cultural Rights, General Comment No. 3, para. 1.

²⁰ *Idem.*, para. 2.

²¹ *Idem.*, para. 9.

²² *Ibid.*

²³ *Idem.*, para. 10.

²⁴ CRC/C/COG/CO/1, para. 14; E/CN.4/2006/52/Add.4, paras. 80, 96; E/CN.4/2006/48, para. 44; E/CN.4/2001/53, paras. 69 and 75; CESCR E/C.12/1/ADD.91, 2003, para. 12. OHCHR organized two conferences linking anti-corruption work with human rights protection (Seminar on Good Governance Practices for the Promotion and Protection of Human Rights, 2004, Seoul; UN Conference on Anti-Corruption Measures, Good Governance and Human Rights, 2006, Warsaw). Moreover, Human Rights Council resolution 11/7 recognized effective anti-corruption measures and human rights protection as mutually reinforcing.

²⁵ CRC/C/15/Add.124, paras. 18 and 19.

²⁶ Charter of the United Nations, Arts. 55 and 56; International Covenant on Economic, Social, and Cultural Rights, art. 2, para. 1; Limburg Principles on the Implementation of the International

to this principle, States' obligations to respect, protect, and fulfil human rights are not only applicable in relation to their own domestic populations but do have an extraterritorial scope, applying to both countries in a position to assist and countries in need of assistance.²⁷

25. As with other forms of international cooperation, such as international cooperation for development and for the realization of economic, social, and cultural rights, mutual legal assistance implies a mutual responsibility. In the context of asset-recovery processes, on the one hand, countries of origin must seek repatriation as part of their duty to ensure the application of the maximum available resources to the full realization of economic, social, and cultural rights. On the other hand, recipient countries have the duty to assist and facilitate repatriation as part of their obligation of international cooperation and assistance.

26. Therefore, a human rights-based approach²⁸ to the asset-recovery process not only demands that countries of origin make every effort to achieve the recovery and repatriation of proceeds of corruption for implementation of their international human rights obligations, it also demands that recipient countries understand repatriation not as a discretionary measure but also as a duty derived from the obligations of international cooperation and assistance.

III. Impacts on States' capacity to fulfil their human rights obligations

A. The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights

27. On the surface, it seems apparent that any resource that the State is deprived of because of corruption has the same negative effect, regardless of whether it is exported or domestically retained.²⁹ Along the same lines, proceeds of corruption reintegrated into the State budget will, if invested in accordance with human rights obligations, positively impact these rights.

28. As recovered resources are not foreseen or public income included in the budget, States must allocate them in accordance with their obligation to devote the maximum of available resources to the fulfilment of economic, social, and cultural rights. This is the starting point with regards to the measures that must be taken with repatriated funds.

29. There is no straightforward answer about how money is best invested in order to realize economic, social, and cultural rights. While the duty to allocate restituted funds in

Covenant on Economic, Social and Cultural Rights, principles 28 and 29; Convention on the Rights of the Child, art. 4; Declaration on the Right to Development, arts. 3.1, 3.2, 3.3 and 4.2; Vienna Declaration and Programme of Action, arts. 1, 4, 10, and 11.

²⁷ Committee on Economic, Social and Cultural Rights, general comment No. 3, para. 13; general comment No. 14, para. 45; general comment No. 15, paras. 37-38; general comment No. 17, paras. 36-38; general comment No. 18, paras. 29-30; Limburg Principles, principle 26.

²⁸ Office of the United Nations High Commissioner for Human Rights, "Frequently asked questions on a human rights-based approach to development cooperation", United Nations, New York and Geneva, 2006.

²⁹ This is, however, a matter of debate, as resources domestically retained, if domestically laundered and productively invested, might increase domestic wealth and potentially human welfare. Mick Moore, "The practical political economy of illicit flows", in Reuter (ed.), cited in note 17.

conformity with the “maximum available resources” principle must govern allocation decisions, no general one-fits-all rule can be suggested, since claims are dependent on the particular situation of each country. However, the human rights-based approach provides important guidance to take into account.

30. In the first place, it requires that the decision-making process complies with both principles of transparency and participation. Decisions over resources allocation cannot be made behind closed doors, but publicly and openly, with due attention to civil society’s demands. In some cases, lack of transparency and participation in the allocation decisions can end up in the use of the recovered assets to ends different from those sought by human rights principles.³⁰ Moreover, publicity for and accessibility of budget information, which should be compiled in easy-to-monitor categories, is essential in order to notice spending priorities and make the right allocation decisions.³¹ Lastly, the allocation decision-making process would benefit from comparing actual budget allocations against human rights indicators.³²

31. On the other hand, the allocation decision-making process should also be informed by the human rights-based approach principle of providing effective remedies, including the creation of conditions for avoiding new human rights violations in the future. Applied to the context of repatriation agreements envisaged by article 57, paragraph 5, of the United Nations Convention against Corruption, this principle could be used as a framework for these usually difficult negotiations. The human rights-based approach requires that repatriated funds be appropriately used in the creation of conditions for complying with human rights obligations and for avoiding new corruption-based diversions. There are national precedents that show a path for future reference in search of matching both the needs of the society harmed by the consequences of corruption and the recipients’ concerns about the final destination of the returned funds.

32. Additionally, managing and oversight mechanisms can be as important as making the correct decision for the final destination of the funds. These include establishing the procedures and the authorities that will be accountable for guaranteeing that the allocation decisions will be strictly followed. Well-designed tracking arrangements facilitate oversight activities and continuous monitoring, particularly by civil society organizations.

33. These management arrangements are enhanced when they are in line with the human rights-based approach, since transparency, participation and accountability are three main pillars of any scheme devised for pursuing proper and efficient administration, including public recordings of receipts, public declarations of intended use of funds and public budgeting, public reporting on actual expenditures and on the achieved results, proper mechanisms of auditing, and official response and measures to correct identified weaknesses or mismanagement. The need for transparency in budget spending is a lesson that has been learned from situations in which the recovered assets transferred to an off-budget fund gave rise to a number of questionable transactions.

³⁰ Ignacio Jimu, “Managing proceeds of asset recovery: The case of Nigeria, Peru, the Philippines and Kazakhstan”, Basel Institute on Governance, Working Paper Series No. 06, 2009, pp. 11-12. Examples from the cases of Nigeria, Peru, the Philippines and Kazakhstan in this section are also based on this article.

³¹ Balakrishnan and others, “Maximum available resources & human rights: analytical report”, Center for Women’s Global Leadership, Rutgers, 2011, p. 9.

³² HRI/MC/2008/3.

34. Finally, it is remarkable that such transparency measures seem consistent with the commitments endorsed by both developed and developing countries in point 24 of the Accra Agenda for Action.³³

B. The impact on the rule of law in the country of origin

35. Beyond the relationship between available economic resources and human rights obligations, the non-repatriation of funds of illicit origin has an impact on the rule of law in the country of origin. As recalled by Council resolution 17/23 mandating this study, “the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law”.

36. Where both the incentives for and opportunities to export illicit wealth are significant, as it seems to be the case in many developing countries, it is very likely that the damage to the rule of law be exacerbated. It has been pointed out that “the potential to hide illicit capital securely in tax havens is a direct stimulus to corruption and other illicit activities like transfer mispricing. It decreases the chances of detection and therefore increases the likely returns. Especially in polities characterized by high degrees of socio-economic inequality and little or no effective institutionalized popular control of the actions of political elites (“democracy”), those fractions of the political elite that are able and willing to participate in this nexus of corrupt internal accumulation and illicit capital outflows are also motivated or able to create or change the rules of the game, in order to ensure that they can continue playing it in a rewarding way. In practice this is likely to mean: tax agencies collect enough money to run basic government services but have overall low capacity, especially in dealing with complex international issues like transfer pricing; police services lack investigatory powers; court systems are vulnerable to corruption; weak public audit offices lack independent authority; legislatures lack collective cohesion and authority; fragile, unstable political parties are motivated by money and patronage; and public services lack a collective, professional ethos. Indirectly, these processes may further weaken the protection of property rights through their incentive effects on political elites. Powerful groups that control considerable (illicit) capital but locate much of it overseas do not have strong incentives to strengthen property rights at home (for everyone)”.³⁴

37. In other words, the opportunities to export funds of illicit origin generate perverse incentives against building a democratic society. The non-repatriation of funds of illicit origin increases the conditions leading to this kind of institutional damage. By requiring obligations to both countries of origin and recipient countries, a human rights-based approach to the asset recovery process contributes to remedying that negative impact.

C. How a human rights-based approach to the asset-recovery process contributes to reducing the negative impact of non-repatriation

38. The relevant role that recipient countries play in the asset-recovery process should not only be associated with the fact that the assets are located within their jurisdiction, but also that, regardless of the capacities, resources and willingness of the requesting State’s institutions and authorities, there is a victim society suffering the consequences of public corruption. An important number of the barriers to asset recovery that were outlined above in chapter II are a consequence of insufficient understanding of this reality. By focusing on

³³ Designed to strengthen and deepen implementation of the Paris Declaration on Aid Effectiveness. 3rd High Level Forum on Aid Effectiveness, 2008, Accra, Ghana.

³⁴ Moore, cited in note 32 above.

the whole population as rights-holders and on States as duty-bearers, a human rights-based approach to the asset recovery process will contribute to remedying some of these barriers.

39. Undoubtedly, there are many instances in which competent agencies from recipient jurisdictions lack the capacity or the legal authority to cooperate without information from the victim country. There are many others, however, where “the interests and perspectives of authorities of recipient countries may be poorly aligned with those of the societies affected by corruption. Consequently, they may either fail to implement portions of the regime, or implement them in ways that are incompatible with the interests of the affected societies”.³⁵ While many of the barriers described in chapter II are related to the failure of both developing and developed countries to make every effort to comply with their obligations under the United Nations Convention against Corruption, it should not be neglected that anti-corruption authorities in developing countries usually face more constraints than those in requested jurisdictions. Thus, while it is not possible to make progress in asset-recovery cases without political will in both the country of origin and the recipient country, the latter country’s authorities are generally in a better position to lower or address the obstacles for the recovery of assets, by taking into account the domestic constraints existing in countries of origin.

40. The following section will outline how this argument applies to the different stages of the asset recovery process.

Preventing and detecting

41. Article 52 of the United Nations Convention against Corruption establishes the rules for preventing and detecting transfers of funds of illicit origin. It relies on the legal framework designed to prevent the laundering of the proceeds of crime. This system expects that private financial institutions will organize themselves to comply with “know your customers” rules, perform “ongoing due diligence” on clients that show specific risks, keep records of the transactions, and report suspicious transactions to the financial intelligence unit, a centralized agency usually empowered with unrestricted access to financial information. This agency must analyze the reported transactions and, if suspicions are confirmed or raised, derive the analysis to law enforcement authorities.

42. However, detection fails when financial intelligence units in developing jurisdictions do not enjoy autonomy, since gatekeepers may be afraid of formal or informal retaliation if reporting transactions of elite members or, in some cases, they may simply find cost-effective to launder their money.³⁶ Thus, as gatekeepers in recipient jurisdictions are less dependent on the political processes of the countries of origin, they are usually more likely to report proceeds of corruption than such a country’s gatekeepers. Nonetheless, as reports are a first sign, even in these cases either the financial intelligence unit or a prosecutor at the recipient country will need to resort to its respective peer in the country of origin in order to collect evidence for supporting a prima facie case that will eventually lead to the restraint of the assets. In a “low-intensity” democracy, such requests may remain unanswered or only answered in order to reject suspicions when referring to a current public official or a well connected member of the elite. This is why it has been said that “anti-money laundering controls that matter more for developing countries are those that operate in the destination countries”.³⁷

³⁵ Kevin Davis and others, “Transnational responses to political corruption”, forthcoming, 2012.

³⁶ Michael Levi, “How well do anti-money laundering controls work in developing countries?”, in Reuter (ed.), cited in note 17.

³⁷ Peter Reuter, “Policy and Research Implications of Illicit Flows”, in Reuter (ed.), cited in note 17.

43. However, this will only be true if the authorities at the destination country make every possible effort to reduce the conditions under which a case might be started. Currently, recipient countries do not usually take ownership over the cases, even when they are in a good position to move the process forward. The human rights-based approach to the asset-recovery process, which emphasizes the recipient country's duty to cooperate and be accountable, reinforces the argument for proactive investigation.

44. Indeed, the framework for the prevention and detection of illicit flows under the United Nations Convention against Corruption enshrines human rights principles. By increasing oversight over public officials' transactions, it strengthens accountability. In addition, the principles of participation and transparency, which are enshrined in chapter II of the United Nations Convention against Corruption on preventive measures, cover all required measures related to the implementation of the anti-money laundering framework in both the public and private sectors.

45. Finally, the framework of the United Nations Convention against Corruption also reinforces business responsibility towards complying with applicable laws, an aim that has been pursued in the last decade by several initiatives focused on making companies respect human rights. The United Nations Global Compact, for example, aims to make companies embrace 10 principles in the areas of labour, environment, anti-corruption, and human rights. In the same vein, the "Guiding Principles on Business and Human Rights" (see A/HRC/17/31, annex) set a framework based on (a) the State duty to protect against human rights abuses, (b) the corporate responsibility to comply with and respect all applicable laws and human rights, and (c) the need for greater access to effective remedies by victims in order to achieve "the effective prevention of, and remedy for, business-related human rights harm".³⁸ These complementary initiatives should reinforce the implementation of the United Nations Convention against Corruption.

Freezing or restraining and confiscating

46. The adoption of measures aimed at freezing, restraining and confiscating funds of illicit origin need not be detrimental to due-process rights, neither to defendants nor to asset holders, being in criminal or civil procedures. Some provisions recommended by the United Nations Convention against Corruption have been previously challenged on a human rights basis. Article 31, paragraph 8, recommends requiring an offender to demonstrate the lawful origin of not only the alleged proceeds of crime but also of other property liable to confiscation. Similar provisions were analysed in a set of precedents that established the conditions that must be met in order not to violate due-process rights. Such precedents held that the right to be presumed innocent is not an absolute right,³⁹ and that legal presumptions in criminal law are not per se restrictive to such right as long as States take into account the importance of what is at stake, and respect the right to defense.⁴⁰ Thus, as far as in employing presumptions State parties conduct a balancing approach and so far as the means employed are reasonably proportionate to the legitimate aim sought to be achieved, challenges based on the presumption of innocence will not succeed.⁴¹ The possibility of non-conviction-based confiscations was also upheld on the grounds that, depending on how

³⁸ *Idem*, Introduction, para. 16.

³⁹ European Court of Human Rights, *Krumpholz vs. Austria*, 18 March 2010, para. 34; *Grayson and Barnham vs. United Kingdom*, 23 September 2008, para. 40; *Muller vs. Austria*, 18 September 2008, para. 40; *Phillips vs. United Kingdom*, 5 July 2001, para. 40.

⁴⁰ European Court of Human Rights, *Phillips vs. United Kingdom*, 5 July 2001, para. 40; *Salabiaku vs. France*, 7 October 1988, para. 28.

⁴¹ European Court of Human Rights, *Västberga Taxi Aktiebolag and Vulic vs Sweden*, 23 July 2002.

it is domestically regulated, confiscation of proceeds of crimes might not be a punitive sanction but rather a remedial measure.⁴²

47. Provided that provisional measures are taken within these limits, their successful adoption requires active cooperation between the country harmed by corruption and the country to which the proceeds of corruption were exported. While these measures may be adopted by any competent authority (art. 31), given their restrictive nature they usually take place within the framework of judicial proceedings. In the context of mutual legal assistance, taking such measures is conditioned upon the requiring jurisdiction having initiated a criminal investigation. This is coherent with State parties' obligations to criminalize several corruption-related offences,⁴³ to establish liability of legal persons,⁴⁴ set a long statute-of-limitations period for proceedings related to corruption offences and a longer statute of limitations – or its suspension – for cases in which the alleged offender has evaded the administration of justice,⁴⁵ and endeavour to ensure that any discretionary legal powers relating to the prosecution of these offences are exercised to maximize the effectiveness of law enforcement measures.⁴⁶

48. Thus, the process aimed at freezing or restraining and confiscating funds of illicit origin is grounded in two well-established human rights principles, that of international cooperation towards the realization of human rights, and that of the States' duty to investigate human rights violations.⁴⁷ The latter has been interpreted as applicable to corruption offences on the grounds that corruption directly, indirectly or remotely harms human rights.⁴⁸ The applicability of the former, on the other hand, is consistent with the United Nations Convention against Corruption. And both are consistent with the Accra Agenda for Action.

Returning proceeds of corruption

49. The United Nations Convention against Corruption envisages two major legal avenues for repatriating proceeds of corruption: direct recovery and international cooperation. Under the heading of "direct recovery", article 53 groups instances in which the victim country stands before the recipient country's courts. These instances do not present repatriation issues, as the country acts as a plaintiff and courts in recipient countries directly order restitution or compensation or recognize damages in their favor.

50. International cooperation, on the contrary, refers to cases where the victim country exercises jurisdiction to prosecute the crime of corruption and requests mutual legal assistance to the recipient country to trace, freeze, confiscate and repatriate its proceeds. The rules for the return of assets to the countries of origin are only established for cases where the victim country requests assistance.

⁴² European Court of Human Rights, *Welsh vs. United Kingdom*, 9 February 1995; *Phillips vs. United Kingdom*, cited in note 53.

⁴³ United Nations Convention against Corruption, arts. 15, 16, para. 1, 17, 23 and 25. The Convention also recommends criminalizing offences in arts. 16.2, 18, 19, 20, 21, 22 and 24.

⁴⁴ *Ibid.*, art. 26.

⁴⁵ *Ibid.*, art. 29.

⁴⁶ *Ibid.*, art. 30, para.3.

⁴⁷ Human Rights Committee, "Barbato vs. Uruguay", Communication No. 84/1981, 1983, para. 11; "Miango Muiyo vs. Zaire", Communication No. 194/1985, 1988, para. 11; General Comment No. 31, paras. 8 and 18.

⁴⁸ International documents have even considered large scale corruption to be a "crime against humanity". See the Seoul Findings, 11th International Anti-Corruption Conference, Seoul, 2003; the Nairobi Declaration, adopted at the Regional Conference on the Human Rights Dimensions of Corruption convened by the Kenya National Commission of Human Rights (KNCHR), 2006.

51. Mandatory provisions for repatriation follow the principle of prior ownership (ownership at the time of the offence).⁴⁹ According to article 57, paragraph 3, of the United Nations Convention against Corruption, the return of proceeds of embezzlement of public funds or of laundering of embezzled public funds – where prior ownership of the victim state is assumed – is mandatory, provided that property has been (a) confiscated, (b) this has been done at the request of the victim country and that (c) it was done on the basis of a final judgement in the requesting State party, a requirement that can be waived by the requested State party.

52. By contrast, return of proceeds of any other offence covered by the Convention against Corruption under both the mandatory and non-mandatory provisions, is conditioned by the requesting party's reasonable establishment of its prior ownership of such confiscated property. When this condition cannot be met, return is still possible, although not mandatory, if the requested State party is able to recognize damage to the requesting State party. In all other cases, State parties are required to give priority consideration to returning confiscated property to the requesting State party, returning such property to its prior legitimate owners or compensating the victims of the crime (art. 57, para. 3 (c)).

53. Lastly, article 57, paragraph 5, establishes that, where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

54. The more successful these procedures are in returning proceeds of corruption to their countries of origin, the more resources States will have for complying with their duties to respect, protect, and fulfil human rights, particularly economic, social and cultural rights, should the repatriated funds be spent in line with the human rights-based approach.

55. An example in this direction, going even beyond conventional requirements, is provided by the Swiss Restitution of Illicit Assets Act. This piece of legislation provides for the autonomous freezing, forfeiture and restitution of the assets of politically exposed persons in cases where a request for mutual legal assistance fails due to the impossibility of the requesting State to meet the standards required by the Swiss legislation. In such cases, the act allows Swiss courts to presume the illicit nature of the assets, provided that the patrimony of the politically exposed person is clearly disproportionate to its legal sources of income and that the degree of corruption of the State or of such person is notoriously high. In those cases, if the politically exposed person is unable to prove the legal acquisition of the assets, these will be confiscated and returned to the country of origin for investments in programmes directed at improving the living conditions of the population, strengthening the rule of law, and/or combating impunity.

56. Another important development is the recommendation that countries engage in a broader international policy debate about how assets-repatriation can be incorporated into the settlement agreements achieved in foreign bribery cases under the legislation implementing the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵⁰

57. As mentioned in paragraph 51 above, the rules governing the return of assets to the country of origin require that the assets had been confiscated at the request of the victim country. In other words, if confiscation did not occur at the request of the victim country or if the proceeds of corruption were recovered through a legal mechanism other than

⁴⁹ A/58/422/Add.1, para. 66.

⁵⁰ Development Assistance Committee of the Organization for Economic Cooperation and Development and the Stolen Asset Recovery, Meeting Accra's Anti-Corruption Commitments: A Call to Action.

confiscation, such instances are out of the scope of the obligation to return established by the United Nations Convention against Corruption.

58. The progress made in the last decade in enforcing the OECD Anti-Bribery Convention is of extreme importance in this regard. Almost all cases of foreign bribery have been settled in the jurisdictions where the company doing the bribery is headquartered or lists its shares. Settlements neither involve traditional confiscation procedures nor the participation of the victim country. Table 1 compares estimated amounts of proceeds of corruption repatriated to the countries of origin to estimated amounts recovered by members of the OECD Anti-Bribery Convention in foreign bribery cases since 2005, when the United Nations Convention against Corruption entered into force. The data is not meant to be precise, but illustrative for the purposes of the argument.

Table 1

Estimated proceeds of corruption repatriated to the countries of origin compared to estimated amounts recovered by parties to the Anti-Bribery Convention

Year	Assets repatriated to its countries of origin (in millions of United States dollars)	Combined penalties in foreign bribery cases (in millions of United States dollars)		
		Criminal fines	Disgorgement of profits	Total
2005	\$29	\$16.5	\$1.3	\$29.6
2006	-----	\$18.6	\$19.8	\$88.9
2007	\$856	\$33.3	\$38.5	\$106.8
2008	\$121.3	\$843	\$1,208.5	\$2,008.8
2009	\$66	\$435.3	\$205.3	\$664.5
2010	\$387.6	\$643.7	\$391	\$1,409
2011	-----	\$95.3	\$89	\$409.8
Total	\$1,460	\$2,086.9	\$1,965.4	\$4,717.3

Source: Elaboration based on Asset Recovery Watch and Trace Compendium⁵¹

59. Both criminal fines and “disgorgement” or surrender of profits exceed the total amount of funds of illicit origin repatriated to the countries of origin. Criminal fines are punitive in nature and therefore are imposed in order to deter the offender and/or the general population.⁵² By contrast, disgorgement of profits is a remedial measure that forces a defendant to “return” the profits of crime to the State, an objective aligned with the purposes of returning assets at the country of origin.

60. Disgorgement of profits is a remedy originally designed for domestic cases. However, when extraterritorially applies to foreign bribery cases it opens the question of

⁵¹ Asset Recovery Watch (<http://assetrecoverywatch.worldbank.org/>) was used to retrieve data about assets repatriated to their country of origin; the Trace Compendium (<https://secure.traceinternational.org/Knowledge/Compendium.html>) was used to retrieve data on combined penalties imposed in foreign bribery cases.

⁵² In many jurisdictions, criminal fines are not adopted with a punitive purpose but as a substitute of a confiscation. In such cases, criminal fines may also be subject to the procedures for return suggested in paras. 59-65. In order to decide when this should be the case, the definition of proceeds of corruption adopted by the United Nations Convention against Corruption as well as the precedents of the European Court of Human Rights for distinguishing punitive measures from remedial measures are good guidance.

whether the public treasury of the jurisdiction where the briber is head-quartered or lists its shares is the rightful destination for such funds. Neither the enforcement agency nor the society it represents has been the prior owner of such assets. On the contrary, in most cases of procurement of public goods and services, where foreign bribery usually takes place, it is the society where the contract was awarded who suffers from the consequences of corruption.

61. Pursuant to the United Nations Convention against Corruption, in foreign bribery cases, the State party should return the confiscated assets when the requesting State party reasonably establishes its prior ownership or when the requested State party recognizes damage as a basis for return. Foreign bribery usually takes place in the context of public procurement contracts. The bribe may be a form of reducing fair competition in the tender, overpricing the contract and arranging for underperformance of some services. In each case, the question of prior ownership and compensation should be open to discussion.

62. As a consequence, it is consistent with article 57, paragraph 3 (b), of the United Nations Convention against Corruption to require jurisdictions enforcing the Convention on Bribery of Foreign Public Officials in International Business Transactions. This is especially true when negotiating and settling cases, to include a procedure directed to allow victim countries to argue their prior ownership and, if successful, provide for the return of the disgorged profits to the country of origin. Given the obstacles to mutual legal assistance and the successful alternative ways to recover proceeds of corruption developed by the jurisdictions enforcing the Convention on Bribery of Foreign Public Officials in International Business Transactions, this solution is consistent with the objectives and purposes of the United Nations Convention against Corruption (art. 1). This procedure would further be enhanced if the recipient countries made the processes public, thus allowing for the human rights-based approach principle of participation to play a role, especially given the different interests that society and public officials of the country of origin may have.

IV. Recommendations

63. **In order to diminish the negative impact of the non-repatriation of funds of illicit origin to the country of origin on the enjoyment of human rights, especially on economic, social and cultural rights, the following measures are recommended:**

(a) All stages of the asset-recovery process should be understood as comprising mutual responsibilities of States, which should make every effort to achieve the return of funds of illicit origin to the countries of origin. Such efforts must be in line with international human rights law for the benefit of societies affected by corruption and should include:

- (i) Applying the human rights principles of accountability, transparency and participation in order to improve prevention and detection procedures at the countries of origin and the fair administration of justice;**
- (ii) Affirming States' obligation to investigate and prosecute corruption, and strengthening criminal proceedings directed at freezing or restraining funds of illicit origin at both countries of origin and recipient countries;**
- (iii) Lowering the barriers that recipient countries impose on requiring jurisdictions at the tracing stage, especially taking into account the risks of dissipation of funds; and**

(iv) When appropriate, recipient countries of funds of illicit origin should de-link confiscation measures from a requirement of conviction in the country of origin;

(b) Repatriated funds of illicit origin should be allocated to the realization of economic, social, and cultural rights in compliance with the maximum-available resources principle, through decision-making processes and implementation procedures that incorporate the principles of transparency, participation, and accountability;

(c) The human rights standard of providing effective remedies directed at creating conditions for avoiding new human rights violations should be applied to the context of repatriation agreements;

(d) A wide and participatory policy debate should be oriented to achieve a better articulation between the procedures implementing the Convention on Bribery of Foreign Public Officials in International Business Transactions and the obligations established by the United Nations Convention against Corruption with regard to asset recovery, so that countries of origin have the opportunity to claim prior ownership over remedial sanctions imposed by recipient countries of funds of illicit origin;

(e) Human rights-based policy coherence is of essential importance in the deliberations and actions by Member States at the Human Rights Council in Geneva and at the intergovernmental process of the implementation of the United Nations Convention against Corruption in Vienna.
