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

### **The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights**

**Final report of the Independent Expert on the effects of foreign debt  
and other related international financial obligations of States  
on the full enjoyment of all human rights, particularly  
economic, social and cultural rights, Cephias Lumina\***

#### *Summary*

The present report, submitted in accordance with resolution 19/38, illustrates the negative impact of illicit financial flows on developing countries and in particular the extent to which the non-repatriation of funds of illicit origin have an impact on the implementation of human rights in the countries of origin. The Independent Expert finds that illicit financial flows, including those derived from corruption and embezzlement by public officials, have considerable negative impacts on the realization of human rights, particularly in developing countries and especially in a context where those countries face a financing gap of around US\$ 112 billion annually to meet the Millennium Development Goals aimed at delivering basic social goods such as education, health care, water and sanitation and food security. By reducing the resources available to States to establish the conditions for the realization of economic, social and cultural rights through investment in social programmes, and to create and strengthen the institutions that uphold civil and political rights, illicit financial flows compromise the ability of the affected Governments to devote the maximum available resources to the realization of human rights. An additional consequence of illicit funds is the further perpetration and promotion of criminal activities, including terrorism, which endanger democracy and the realization of human rights.

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\* Late submission.

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The repatriation of illicit funds makes available much needed additional resources for development, poverty alleviation and the fulfilment of human rights. The challenge is to ensure the efficient, accountable and transparent use of such assets. In that regard, the Independent Expert suggests that a human rights-based approach, with its emphasis on the key principles of non-discrimination, participation, accountability and transparency, can help ensure that repatriated illicit funds are better utilized and better targeted to sectors that can potentially benefit the victims of corruption and other illicit flows, who are usually the poor.

The Independent Expert concludes that, while official development assistance remains an important source of finance for poverty alleviation and development, the substantial amounts lost to illicit financial flows, estimated at \$946.7 billion in 2011, could help the efforts of developing countries to mobilize domestic resources for poverty alleviation, development and the realization of human rights, and to reduce their costly dependence on external financing.

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## I. Introduction

1. In its resolution 19/38, the Human Rights Council requested the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural 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 application by States of the maximum available resources to the full realization of all human rights, in particular economic, social and cultural rights, with special attention paid to developing countries and countries with economies in transition burdened by foreign debt, and to present a report thereon to the Council at its twenty-second session.

2. In follow-up to that request, the Independent Expert presented an interim report on the subject to the Human Rights Council in March 2013 (A/HRC/22/42 and Corr.1), in which he highlighted the scale of the problem, provided an overview of existing initiatives to curb illicit financial flows and briefly highlighted the impact of non-repatriation of illicit funds on the realization of human rights in the countries of origin.

3. In its resolution 22/12, the Human Rights Council requested the United Nations High Commissioner for Human Rights to assist the Independent Expert in convening an expert consultation on the topic. The Council also requested the Independent Expert to present a comprehensive study to it at its twenty-fifth session. The consultation, which brought together experts in human rights, anti-money laundering, trade and tax issues, as well as representatives of States, took place in Geneva on 20 and 21 June 2013. Participants shared their perspectives on the following key issues: (a) the impact of illicit financial outflows; (b) the main initiatives that had been taken in countries of origin and destination to return stolen assets and the main problems encountered in that regard; and (c) the main human rights issues relating to the outflow, seizure, freezing and return of stolen assets.

4. The Independent Expert is grateful to all the States that participated in the consultation, and to the Governments of Guatemala and Switzerland, in particular, for sharing information on their national and international efforts to address the problem of illicit financial flows. He also thanks the individual experts for sharing their perspectives on the content of the final report, and the Stolen Asset Recovery Initiative for its comments on his interim report.

5. The present report builds on the interim report. In order to avoid duplication, the present report focuses on the impact of the non-repatriation of illicit funds on the capacity of the States of origin to realize human rights and the importance of international assistance and cooperation in addressing the problem of illicit financial flows. The report does not attempt to be exhaustive in covering all possible types of impact of illicit funds.

6. In its resolution 19/38, the Human Rights Council refers to funds of illicit origin related to corruption. While corruption represents an important drain on the resources available to States for investment in infrastructure and social programmes, it is only a small component of the total amount of funds lost.<sup>1</sup> Furthermore, as noted in the interim report of the Independent Expert, those outflows stem from corruption, embezzlement and tax

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<sup>1</sup> See, for example, Raymond W. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System* (Hoboken, John Wiley and Sons, Inc., 2005), pp. 168–169. The author estimates that less than 3 per cent of illicit funds consists of the proceeds of bribery and theft by Government officials.

evasion through trade mis-invoicing and transfer mispricing, with trade mis-invoicing and transfer mispricing considered the prime drivers of illicit financial flows.

7. During the expert consultation mentioned above, a number of experts suggested that the issue of tackling the resource drain affecting many developing countries should be expanded beyond a narrow focus on corruption to incorporate illicit financial flows stemming from a variety of sources, including tax evasion. The Independent Expert agrees. Thus, for the purposes of the present report, the term “illicit funds” refers broadly to the proceeds of corruption, bribery, embezzlement, tax evasion and other crimes.<sup>2</sup>

## II. Estimates of illicit financial flows: an update

8. Estimates of illicit financial flows are a matter of debate.<sup>3</sup> Indeed, some have questioned the methods used to arrive at those estimates and the strong assumptions upon which they are based.<sup>4</sup> While the Independent Expert acknowledges that it is difficult to calculate the amount of illicit financial flows with any degree of certainty (see A/HRC/22/42 and Corr.1, para. 12), he considers that estimates play an important role in confirming that the scale of the problem warrants international policy attention.<sup>5</sup> Indeed, when viewed from the development perspective, the losses are substantial.

9. Recent estimates indicate that nominal illicit financial outflows from developing countries amounted to US\$ 946.7 billion in 2011, up 13.7 per cent from \$832.4 billion in 2010.<sup>6</sup> That represented an increase in real terms of about 10.2 per cent per annum.<sup>7</sup> Asia accounted for 39.6 per cent of total illicit outflows from developing countries. Developing Europe and the Western Hemisphere accounted for 21.5 and 19.6 per cent, respectively. Average outflows from Africa increased from 3.8 per cent in 2002, reaching a peak of 11.1 per cent in 2007, before falling to 7 per cent in 2011.<sup>8</sup> It is notable, however, that although Africa has the smallest nominal share of regional outflows over the period 2002–2011, it

<sup>2</sup> The term “illicit” should not be conflated with “criminal” or “illegal”, although in the majority of cases the funds in question will have been obtained in violation of domestic or international criminal laws.

<sup>3</sup> See United Nations Office on Drugs and Crime, “Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes”, research report (Vienna, 2011), p. 15. Available from [www.unodc.org/documents/data-and-analysis/Studies/Illicit\\_financial\\_flows\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf). See also Organization for Economic Cooperation and Development (OECD), “Measuring OECD responses to illicit financial flows”, issue paper, DAC Senior Level Meeting, held in Paris on 3 and 4 April 2013, p. 3.

<sup>4</sup> See, for example, Clemens Fuest and Nadine Riedel, “Tax evasion, tax avoidance and tax expenditures in developing countries: a review of the literature”, report prepared for the Department for International Development of the United Kingdom of Great Britain and Northern Ireland, Oxford University Centre for Business Taxation, p. vi. Available from [r4d.dfid.gov.uk/pdf/outputs/ecodev/60670\\_taxevasionreportdfidfinal1906.pdf](http://r4d.dfid.gov.uk/pdf/outputs/ecodev/60670_taxevasionreportdfidfinal1906.pdf).

<sup>5</sup> See Peter Reuter and Edwin M. Truman, *Chasing Dirty Money – The Fight against Money Laundering* (Washington, D.C., Institute for International Economics, 2004), p. 12.

<sup>6</sup> Dev Kar and Brian LeBlanc, “Illicit financial flows from developing countries: 2002–2011” (Washington, D.C., Global Financial Integrity, 2013), p. ix. According to the European Network on Debt and Development (Eurodad), developing countries lose between €660 billion and €870 billion each year in illicit financial flows, mainly in the form of tax evasion by multinational companies. Eurodad, “Giving with one hand and taking with the other: Europe’s role in tax-related capital flight from developing countries 2013” (Brussels, 2013), p. 6.

<sup>7</sup> Kar and LeBlanc, “Illicit financial flows”, p. 8.

<sup>8</sup> *Ibid.*, pp. ix and 10.

had the highest average illicit outflows to gross domestic product ratio (5.7 per cent), indicating that the illicit financial outflows had a disproportionate impact on the continent.<sup>9</sup>

10. It is also notable that the amount of illicit financial flows exceeds official development assistance and foreign investment inflows.<sup>10</sup> In 2009, for example, illicit financial flows out of Africa were more than three times the amount of official development assistance received.<sup>11</sup>

11. It is difficult to assess whether the rate of international recovery of stolen assets is satisfactory, since there is no mechanism to collect comprehensive information on all international asset recovery cases.<sup>12</sup> According to the Asset Recovery Watch database of the Stolen Asset Recovery Initiative, \$4 billion in stolen assets has been returned.<sup>13</sup> Most of this falls under the category of returned proceeds of embezzlement or misappropriation of public funds, the return of which is mandatory under article 57, paragraph 3 (a) of the United Nations Convention against Corruption. Other returned assets relate to other proceeds of corruption, mainly stemming from bribery and related cases (CAC/COSP/WG.2/2013/3, para. 88).

12. Asset Recovery Watch records about \$1.3 billion in total pending returns. However, as the Open-ended Intergovernmental Working Group on Asset Recovery notes, that figure needs to be viewed in context, as it includes more than \$400 million in restitution ordered in a single case where it is not known whether the defendants have the ability to pay and the \$356 million judgment awarded by a court in the United States of America to the victims of human rights violations that took place during the Marcos era, which is still under appeal by the Marcos family (*ibid.*, para. 91).

13. According to the United Nations Office on Drugs and Crime, less than 1 per cent of illicit financial flows around the world are seized and frozen.<sup>14</sup> However, the preliminary results of a 2012 survey by the Organization for Economic Cooperation and Development (OECD) and the Stolen Asset Recovery Initiative measuring the assets frozen and returned between 2010 and June 2012 show that there has been an increase in the volume of assets frozen and returned during that period: a total of \$27 billion was frozen and about \$4 billion returned or unfrozen/released. It is notable, however, that this increase was largely attributable to action taken in response to Security Council resolution 1970 (2011), which ordered the freezing of the assets of Muammar Gaddafi's regime held internationally, with a total of \$24 billion frozen and \$3.6 billion returned or subsequently released.<sup>15</sup>

14. The estimates of returned assets provided above are restricted to cases of corruption and embezzlement and do not cover other forms of illicit financial flows. In assessing progress made in asset recovery, however, it is important to understand that as used in the Convention against Corruption, the term "asset recovery" refers to the recovery of the proceeds of corruption and related losses. As such, it is much narrower in scope than the flows included under the term "illicit financial flows". It should also be mentioned that part of the second cycle of the review mechanism on the Convention, starting in 2015, will focus on the implementation of chapter V of the Convention and will thus provide more

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<sup>9</sup> *Ibid.*, p. 11.

<sup>10</sup> OECD, "Measuring OECD responses", p. 3.

<sup>11</sup> African Development Bank and Global Financial Integrity, "Illicit financial flows and the problem of net resource transfers from Africa: 1980-2009" (2013), p. 28.

<sup>12</sup> Note by the Secretariat on progress made in the implementation of asset recovery mandates (CAC/COSP/WG.2/2013/3), para. 88.

<sup>13</sup> See <http://star.worldbank.org/corruption-cases/arwcases>.

<sup>14</sup> United Nations Office on Drugs and Crime, "Estimating illicit financial flows", p. 7.

<sup>15</sup> OECD, "Measuring OECD responses", p. 10.

detailed information on the progress made in relation to the recovery of the proceeds of corruption.

### **III. Impact of illicit financial flows on the realization of human rights**

#### **A. Illicit funds and human rights: making the connection**

15. There is a clear link between illicit financial flows and human rights in that such flows diminish the resources available to States for investment in programmes that contribute to the realization of human rights, particularly economic, social and cultural rights. In essence, the failure to counter illicit financial flows and recover stolen assets is a denial of access to basic health care, education, safe water and sanitation, adequate housing and infrastructure,<sup>16</sup> all of which are basic conditions for the enjoyment of human rights.

16. Another way of understanding the link between illicit financial flows and human rights is to examine the link between the availability of resources and the capacity of States to address extreme poverty, which is generally considered a human rights concern.<sup>17</sup> The connection between illicit financial flows and poverty is evident from the guiding principles on extreme poverty and human rights, which state that: “States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.” Thus, the guiding principles establish a link between taxation and the mobilization of the maximum available resources.

#### **B. The obligation to use the maximum available resources**

17. The imperative to counter illicit financial flows and to ensure the recovery of stolen funds derives from the obligation of States to devote their maximum available resources to

<sup>16</sup> Ignacio Jimu, “Managing proceeds of asset recovery: the case of Nigeria, Peru, the Philippines and Kazakhstan”, Working Paper Series No. 6 (Basel Institute on Governance, 2009), p. 6. Available from [www.baselgovernance.org/fileadmin/docs/publications/working\\_papers/06\\_Managing\\_Proceeds\\_of\\_Asset\\_Recovery.pdf](http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/06_Managing_Proceeds_of_Asset_Recovery.pdf).

<sup>17</sup> This is the approach adopted by the International Bar Association. See International Bar Association, *Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association’s Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights* (London, 2013). The guiding principles on extreme poverty and human rights (A/HRC/21/39) underscore that poverty is a cause and a consequence of violations of human rights and the key human rights principles, as well as an enabling condition for other violations. The human rights at issue include the rights to: life and physical integrity; liberty and security of the person; equal protection before the law, access to justice and effective remedies; recognition as a person before the law; privacy and protection for home and family; an adequate standard of living; adequate food and nutrition; water and sanitation; adequate housing; the highest attainable standard of physical and mental health; work and rights at work; social security; and education; as well as to take part in cultural life and enjoy the benefits of scientific progress and its applications. Basic human rights principles affected by poverty include dignity and the universality, indivisibility, interrelatedness and interdependence of all rights; equal enjoyment of all human rights by persons living in extreme poverty; equality between men and women; the rights of the child; the agency and autonomy of persons living in extreme poverty; participation and empowerment; transparency and access to information; and accountability.

the fulfilment of economic, social and cultural rights.<sup>18</sup> Under article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, each State party has an obligation to take steps, to the maximum of its available resources, to achieve progressively the full realization of the rights enshrined in the Covenant.<sup>19</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights clarify that a State that does not allocate the maximum of its available resources to the realization of these rights would be in violation of its obligations (para. 15 (e)).

18. According to the Committee on Economic, Social and Cultural Rights, “the phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance”.<sup>20</sup> The Committee on the Rights of the Child has expanded the substantive meaning of resources to include human, technical, organizational, natural and information resources and underlined the obligation of States to contribute to the global or extraterritorial realization of economic, social and cultural rights.<sup>21</sup>

19. Government revenue, expenditure policy and international assistance are important considerations in assessing the obligation of States to use the maximum available resources to realize economic, social and cultural rights.<sup>22</sup> One study on the subject has drawn the following conclusions: (a) Governments must mobilize domestic resources to their utmost ability; (b) Government expenditures must be efficient and effective; (c) failure to tackle corruption constitutes a failure to comply with the obligation; (d) funds earmarked in the budget for economic, social and cultural rights must not be diverted to non-economic, social and cultural rights areas; (e) funds earmarked for economic, social and cultural rights must be fully expended for that purpose; (f) Governments that introduce regressive measures, such as spending cuts on economic, social and cultural rights, must demonstrate that they have used the maximum of available resources to avoid taking such a step; and (g) Governments must do all they can to secure international assistance where national resources are insufficient to realize economic, social and cultural rights.<sup>23</sup>

20. Nevertheless, whether or not a State is utilizing all resources at its disposal is difficult to assess. In assessing the compliance of States with this obligation, the Committee on Economic, Social and Cultural Rights has employed the following indicators: (a) comparing expenditures on realizing economic, social and cultural rights to expenditures not related to realizing those rights; (b) comparing expenditures in an area (such as health or education) with expenditures in the same area by countries at a comparable level of development; and (c) comparing Government expenditure with

<sup>18</sup> It is generally recognized that resources (including financial resources) are critical for the realization of human rights, particularly economic, social and cultural rights. However, as the present report shows, illicit financial outflows can have serious negative impacts on the level of resources available to States for the realization of human rights.

<sup>19</sup> See also the Convention on the Rights of the Child, art. 4; and the Convention on the Rights of Persons with Disabilities, art. 4, paragraph 2.

<sup>20</sup> General comment No. 3 (1990) on the nature of States parties’ obligations, para. 13.

<sup>21</sup> Radhika Balakrishnan et al., *Maximum Available Resources & Human Rights: Analytical Report* (New Brunswick, New Jersey, Center for Women’s Global Leadership, 2011), p. 3.

<sup>22</sup> See Balakrishnan et al., *Maximum Available Resources*, pp. 5 and 23, where the authors identify debt financing, monetary policy, financial reform and taxation as some of the areas that are essential for mobilizing resources. See also the report of the Special Rapporteur on the right to food on his mission to Brazil (A/HRC/13/33/Add.6, para. 36).

<sup>23</sup> Balakrishnan et al., *Maximum Available Resources*, pp. 3–4, citing Magdalena Sepulveda, *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp, Intersentia, 2003).

international objectives, such as the target set by the United Nations Development Programme that 5 per cent of gross domestic product be spent for social purposes (such as basic education, primary health care and basic water).<sup>24</sup>

21. It should be noted, however, that these indicators focus only on Government expenditure and international assistance. They do not provide an indication of what a country's available resources are, nor do they reveal the difficulties Governments face in raising the maximum available resources.<sup>25</sup>

22. Difficulties in mobilizing sufficient resources for the realization of economic, social and cultural rights arise at both the domestic and international levels. At the domestic level, obstacles include regressive taxation systems, generous tax incentive systems, weak tax administration and tax evasion and avoidance schemes.<sup>26</sup> At the international level, a key obstacle is the volume of funds that countries lose each year through illicit flows.

### C. Capacity of States to realize human rights

23. It is widely accepted that illicit funds (including the proceeds of corruption, money laundering, tax evasion and other crimes) divert resources intended for investment in policies and programmes that contribute to the establishment of conditions for the realization of economic, social and cultural rights or to establish and strengthen institutions for the protection of civil and political rights.<sup>27</sup> According to OECD, illicit financial flows have a "damaging impact" on the ability of developing countries to mobilize their own financial resources for investment, and "the most immediate impact of such illicit flows is a reduction in domestic public and private expenditure and investment, which means fewer jobs, hospitals and schools, less infrastructure – and ultimately less development".<sup>28</sup>

24. The diversion of resources due to illicit financial outflows and the non-repatriation of those funds reduce the maximum resources available to the countries of origin for the progressive realization of economic, social and cultural rights. Put differently, illicit financial flows undermine the ability of States to comply with their obligation to devote the maximum available resources to the realization of human rights, particularly economic, social and cultural rights.

25. In its recent study on illicit financial flows, poverty and human rights, the International Bar Association made a pertinent observation. It has concluded that "actions of states that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other states to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights".<sup>29</sup> While this observation focuses on tax evasion, the Independent Expert considers that it is equally applicable to other forms of illicit financial flows, including those generated through corruption, bribery and theft of public funds.

<sup>24</sup> Balakrishnan et al., *Maximum Available Resources*, pp. 2–3. See also United Nations Development Programme, *Human Development Report: Financing Human Development* (1991), p. 6.

<sup>25</sup> Tax Justice Network Germany, *Taxes and Human Rights*, Policy Brief No. 8e, February 2013, pp. 1–2.

<sup>26</sup> *Ibid.*, pp. 2–3.

<sup>27</sup> See, for example, Farzana Nawaz, "Impact of international asset recovery and anti-money laundering efforts on poverty reduction and political accountability", U4 Expert Answer No. 230, U4 Anti-Corruption Resource Centre, 17 January 2010.

<sup>28</sup> OECD, "Measuring OECD responses", p. 3.

<sup>29</sup> International Bar Association, *Tax Abuses*, p. 2.

26. The repatriation of stolen assets makes available additional resources for development activities. The level of impact repatriated assets can have on human rights is however unclear, largely due to the fact that there is a lack of systematic information on the effectiveness of repatriated funds in reducing poverty in the countries of origin.<sup>30</sup> In addition, the evidence from successful cases of asset repatriation indicates that utilization of those funds to reduce poverty depends on factors such as political will and assignment to priority areas.<sup>31</sup>

27. Nevertheless, it can be argued that repatriated assets have the potential to enhance the resources available to States to fund programmes required for the promotion and protection of human rights. According to the World Bank, every \$100 million in stolen assets recovered could fund first-line treatment for over 600,000 persons with HIV/AIDS for a year, or some 250,000 water connections for poor households, or full immunization for 4 million children.<sup>32</sup>

#### **D. The need for a human rights-based approach**

28. It is important to consider efforts to tackle the problem of illicit financial flows and recover stolen assets as part of several efforts that States must make in order to comply with their human rights obligations, including the obligations to provide international assistance and cooperation (A/HRC/19/42 and Corr.1, para. 23) and to utilize the maximum available resources for the realization of human rights.

29. Although the repatriation of funds of illicit origin to the countries of origin offers an opportunity for the Governments of those countries to invest in infrastructure and social programmes that ensure that the full range of human rights are respected, protected and fulfilled, the Independent Expert accepts that not all returned funds would automatically be channelled to human rights since there are other priorities, such as infrastructure. There is also the possibility of mismanagement, misappropriation<sup>33</sup> and Government profligacy which could erode any positive human rights outcomes or even result in negative human rights outcomes.

30. In view of the fact that States may not necessarily have the capacity or political will, and that funds may be mismanaged or misappropriated, the challenge is to ensure efficient, accountable and transparent use of such assets. This underscores the importance of a human rights-based approach to dealing with recovered stolen assets (see A/HRC/19/42 and Corr.1). In that regard, the Independent Expert considers that a human rights-based approach, with its emphasis on the key human rights principles of non-discrimination, participation, transparency and accountability, could ensure that returned assets are spent in a manner that reflects the public will, meets the needs of society and promotes human rights, in particular of the marginalized groups.<sup>34</sup>

31. A review of some case studies concerning the utilization of repatriated funds would seem to support this view. The studies indicate that the prudent and effective use of recovered assets to fund poverty alleviation programmes requires robust oversight

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<sup>30</sup> Nawaz, "Impact of international asset recovery", p. 3.

<sup>31</sup> See Jimu, "Managing proceeds of asset recovery".

<sup>32</sup> World Bank and United Nations Office on Drugs and Crime, Fact Sheet on Asset Recovery, available from <http://go.worldbank.org/8VPQP4KJIO>.

<sup>33</sup> Studies show that a lack of safeguards can lead to funds being misappropriated again. See, for example, Jimu, "Managing Proceeds of Asset Recovery", p. 16.

<sup>34</sup> International Bar Association, *Tax Abuses*, pp. 148–149.

mechanisms.<sup>35</sup> Without such mechanisms, recovered assets can be misappropriated or mismanaged.

32. Moreover, since recovered assets 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 (A/HRC/19/42 and Corr.1, para. 28).

33. During the expert consultation convened by the Independent Expert in June 2013, a number of States emphasized that where requested States return funds identified as funds of illicit origin to the country of origin, they should do so without any conditions. The Independent Expert fully supports that position. The use of returned assets is a matter for the sovereign decision of the country that recovers its stolen assets. A State which does not own the assets in question cannot claim the right to attach conditions as to their use upon return: this would be inconsistent with the right of peoples to self-determination, which includes the inalienable right to full sovereignty over all their natural wealth and resources.<sup>36</sup>

## **IV. The importance of international assistance and cooperation**

34. Illicit financial flows are a global problem, but success in countering them requires concerted efforts from the international community, complemented by appropriate domestic measures to address corruption, money laundering, corporate tax evasion and avoidance schemes and to improve investment codes. That implies a commitment by all States to the principle of international assistance and cooperation.

### **A. The obligation of international assistance and cooperation**

35. Under international law, States have an obligation of international assistance and cooperation to support the realization of human rights.<sup>37</sup> Article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights specifically refers to an obligation to take steps, including through international assistance and cooperation, to realize the rights enshrined in the Covenant. It thus clearly affirms an obligation to engage. Similarly, the Convention on the Rights of the Child enjoins States to take measures to implement the economic, social and cultural rights in the treaty to the maximum extent of their available resources and, where needed, within the framework of international cooperation (art. 4).<sup>38</sup>

36. The Declaration on the Right to Development also embodies the principle of international cooperation. Under article 3, paragraph 1, it indicates that States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. According to the high-level task force on the implementation of the right to development, “the responsibility for the creation of this enabling environment encompasses three main levels: (a) States acting collectively in

<sup>35</sup> See, for example, Jimu, “Managing proceeds of asset recovery”, p. 15.

<sup>36</sup> Declaration on the Right to Development, art. 1, para. 2.

<sup>37</sup> See also the Universal Declaration of Human Rights (art. 28); the Declaration on the Right to Development (art. 3, para. 3); and the International Covenant on Economic, Social and Cultural Rights (arts. 22 and 23).

<sup>38</sup> Articles 24, paragraph 4, and 28, paragraph 3, of the Convention require States to promote and encourage international cooperation in regard to the rights to health and to education, taking particular account of the needs of developing countries.

global and regional partnerships; (b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (c) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction” (A/HRC/15/WG.2/TF/2/Add.2, annex, p. 8).

37. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights also demand that States take measures either individually or through international cooperation in order to protect the economic, social and cultural rights of people within and beyond their territory.<sup>39</sup>

38. While article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights refers in particular to economic and technical assistance and cooperation, it does not limit the undertaking to such measures. Thus, according to the commentary to the Maastricht Principles, international assistance must be understood as a component of international cooperation: “International assistance may, and depending on the circumstances must, comprise other measures, including provision of information to people in other countries, or cooperation with their state, for example, to trace stolen public funds or to cooperate in the adoption of measures to prevent human trafficking.”<sup>40</sup>

39. Based on the above interpretation, the Independent Expert considers that the duty of international assistance and cooperation extends to international cooperation in tackling factors that facilitate illicit financial flows and in ensuring the recovery of stolen assets. That is confirmed by the Convention against Corruption and other instruments on corruption, all of which contain provisions on international cooperation and/or mutual legal assistance.<sup>41</sup>

40. In relation to the activities of non-State actors, in particular transnational corporations, the Maastricht Principles underscore that States “should cooperate in order to ensure that any victim of the activities of non-state actors that results in a violation of economic, social and cultural rights has access to an effective remedy, preferably of a judicial nature, in order to seek redress”.<sup>42</sup> This requirement is of particular relevance to the issue of addressing the negative impacts of tax evasion and avoidance by transnational corporations.

41. Lastly, where States encourage or facilitate illicit financial flows, or deliberately frustrate the efforts of other States to counter such flows, they could be in breach of their international human rights obligations, particularly with respect to economic, social and cultural rights.<sup>43</sup> In that regard, it is notable that the Maastricht Principles underline that States that receive a request to assist or cooperate and are in a position to do so must consider the request in good faith,<sup>44</sup> and respond in a manner consistent with their

<sup>39</sup> Principles 23 and 29.

<sup>40</sup> Olivier De Schutter et al., “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *Human Rights Quarterly*, vol. 34 (2012), p. 1157.

<sup>41</sup> Convention against Corruption, chaps. IV and V; African Union Convention on Preventing and Combating Corruption, art. 19; Inter-American Convention against Corruption, art. XIV; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 9 and 12.

<sup>42</sup> De Schutter et al., “Commentary to the Maastricht Principles”, p. 1145.

<sup>43</sup> International Bar Association, *Tax Abuses*, p. 2.

<sup>44</sup> Principle 35. Good faith is a general principle of international law that is implied by article 2, paragraph 2, of the Charter of the United Nations and enshrined in articles 26 and 31, paragraph 1, of the Vienna Convention on the Law of Treaties and General Assembly resolution 2625 (XXV).

obligations. This is of particular importance in relation to requests for repatriation of stolen assets or illicit funds.

## **B. Recovery and repatriation of stolen assets**

42. The recovery and repatriation of stolen assets to their country of origin is an important component of the fight against illicit financial flows.<sup>45</sup> In relation to illicit funds generated through corruption by public officials, it serves a number of purposes. First, it can provide much needed additional resources to the countries of origin for public investment. Secondly, by indicating that there are consequences to corruption and the proceeds of corruption will not easily be concealed, it can have a deterrent effect on corruption and embezzlement by public officials. Lastly, by depriving corrupt officials of their loot, asset recovery can provide justice for the victims of corruption.<sup>46</sup>

43. The recovery of stolen assets is a complex, time-consuming and costly undertaking. Obstacles include the challenge of locating the stolen funds, inconsistent legal requirements across borders,<sup>47</sup> lack of legal expertise in requesting countries, lack of political will in requesting and requested countries,<sup>48</sup> and lack of coordination between national and international agencies. That suggests that international assistance and cooperation is critical to the successful recovery of stolen assets.

## **C. Tackling secrecy jurisdictions and corporate abuses**

44. As noted in the interim report of the Independent Expert (A/HRC/22/42 and Corr.1, paras. 5–9), a key driver of illicit financial flows and therefore an obstacle to the capacity of States to utilize their maximum available resources is the prevalence of tax evasion, in particular by multinational companies. This is compounded by a lack of transparency in relation to the operations of those entities, the existence of secrecy jurisdictions as well as the use of shell companies, anonymous trust accounts, bogus charitable foundations, money-laundering techniques and questionable trade practices.<sup>49</sup>

45. According to one recent report, developing countries lose between €660 billion and €870 billion each year in illicit financial flows, mainly in the form of tax evasion by multinational companies.<sup>50</sup> The report finds that “there is a significant discrepancy between tough political rhetoric” from the Governments of the 13 European countries surveyed and their actions. All of the countries surveyed were failing to demand sufficient levels of tax transparency from companies, the majority were reluctant to establish public access to information on the beneficial ownership of companies, trusts or foundations in their

<sup>45</sup> Asset recovery is “a fundamental principle” of the Convention against Corruption (art. 51).

<sup>46</sup> OECD, “Measuring OECD responses”, para. 24.

<sup>47</sup> See Open-ended Intergovernmental Working Group on Asset Recovery, document entitled “The Arab Spring and the recovery of stolen assets: challenges and responses two years later (conclusions of the 7th Practitioners’ Workshop held in Lausanne, Switzerland, 28–29 January 2013)”, submitted by Switzerland (CAC/COSP/WG.2/2013/CRP.1), p. 5.

<sup>48</sup> Countries that are recipients of stolen assets are often reluctant to take action against powerful interest groups such as banks, while in countries that are the victims of corruption by public officials, the perpetrators or beneficiaries of corruption may still be in power. Jack Smith, Mark Pieth and Guillermo Jorge, “The recovery of stolen assets: a fundamental principle of the UN Convention against Corruption”, U4 Brief No. 2, February 2007, Chr. Michelsen Institute, second page. Available from [www.u4.no/themes/uncac/](http://www.u4.no/themes/uncac/).

<sup>49</sup> Also known as “tax havens”, “international financial centres” or “offshore financial centres”.

<sup>50</sup> Eurodad, “Giving with one hand”, p. 1.

jurisdiction and none supported the equal inclusion of developing countries in policymaking on tax evasion in practice. All supported the position of the European Union that OECD should be the leading decision-making forum on those issues.<sup>51</sup>

46. It should be noted that OECD lacks global legitimacy in financial governance and, in particular, that its resolutions do not take the interests of developing countries sufficiently into account.<sup>52</sup>

47. To ensure transparency in payment flows, it is critical that States should require transnational corporations to make full disclosure in their annual statements of account and financial reports for all subsidiaries and holdings in the countries in which they are achieving turnover, earning returns and paying tax.

48. The Independent Expert also considers that robust international action is required to address the issue of secrecy jurisdictions. Regrettably, existing efforts in that regard by organizations such as the Group of 20 have not been very successful.

## V. Conclusions and recommendations

49. **Illicit financial flows deprive Governments of substantial resources they need to fund programmes that contribute to the realization of economic, social and cultural rights, and to establish and strengthen the institutions for the protection and promotion of civil and political rights. While official development assistance remains an important source of finance for poverty alleviation and development, the substantial amounts lost to illicit financial flows — estimated at US\$ 946.7 billion in 2011 — could help the efforts of developing countries to mobilize domestic resources for poverty alleviation, development and the realization of human rights, and to reduce their dependence on external financing, which can lead to the erosion of ownership of national development agendas and promote a paternalistic or charitable attitude towards developing countries. To ensure that repatriated illicit funds provide the most benefit for the populations of the countries of origin, such funds should be managed and spent in accordance with the principles underpinning a human rights-based approach; repatriated illicit funds can enhance the maximum available resources.**

50. **In order to assist States in their efforts to counter the problem of illicit financial flows and to ensure the successful repatriation of illicit funds, as well as their efficient use for the realization of human rights, the Independent Expert recommends that :**

(a) **States should ensure the prompt and unconditional repatriation of funds of illicit origin to the countries of origin;**

(b) **Countries of origin should ensure that decisions concerning the use of repatriated assets are taken in accordance with the principles underpinning a human rights-based approach and that the assets are used in a manner that reflects the will of the population and with particular sensitivity to the situation of marginalized groups;**

(c) **States should strengthen efforts under chapter VI of the United Nations Convention against Corruption to build the capacity, including through specialized training, of investigators, prosecutors and the judiciary in developing countries in the areas of anti-corruption, tax evasion and asset recovery;**

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<sup>51</sup> Ibid.

<sup>52</sup> Tax Justice Network Germany, Taxes and Human Rights (footnote 25 above), p. 4.

(d) States should establish an intergovernmental forum on tax under the auspices of the United Nations to serve as the main decision-making body on international tax policies. This would ensure that developing countries participate on an equal basis in the reform of existing international tax rules;

(e) States should consider establishing an intergovernmental forum on illicit financial flows under the auspices of the United Nations to further explore policy responses to the phenomenon and to coordinate the efforts of the various organizations involved in addressing different forms of illicit financial flows;

(f) States should consider elaborating a comprehensive international treaty on issues related to illicit financial flows, such as tax evasion, profit shifting by multinational companies and limiting the ability of secrecy jurisdictions to facilitate illicit financial flows;

(g) States should address the obscurity of information on the beneficial ownership of companies, trusts and other legal entities through which the proceeds of corruption and other illicit funds are often channelled;

(h) States should enact legislation to address abuses by multinational corporations and other business enterprises, such as tax evasion and avoidance, which deprive Governments of domestic resources for the implementation of their development agendas. Such legislation should, *inter alia*, require multinational corporations to publicly report, on a country-by-country basis, the name of each country where they operate and the names of all subsidiaries in each country of operation; the financial performance of the corporation or group (including sales, purchases, labour costs and profits, and distinguishing between sales within the group and to other companies); the value of all their assets in that country and the cost to maintain those assets; and full details of tax liabilities (including amounts paid and owed);

(i) States should undertake further analysis of the negative impact of illicit financial flows in the context of the post-2015 development agenda;

(j) States should reconsider special tax holidays, incentives and rates that ultimately reduce the level of resources available to Governments for fulfilling their human rights obligations;

(k) States should conduct country-specific analyses of the reasons underlying illicit financial flows in order to inform appropriate policy responses;

(l) States should include information on the amounts lost through illicit financial flows, the factors driving such flows and a comprehensive analysis of the impact of the flows in their reports to the United Nations treaty bodies and under the universal periodic review.

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