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**Mandate 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**

Geneva, 26 September 2015

## Reply to the Human Rights Council Advisory Committee:

## Questionnaire on the negative impact of non-repatriation of fund of illicit origin on the enjoyment of human rights

*Question 2: What are the negative impacts of non-repatriation of funds of illicit origin on the enjoyment of human rights? What were the positive impacts in cases in which such funds were returned to the country of origin?*

To date, five studies have looked into the issue of negative impacts of funds of illicit origin on the enjoyment of human rights. They include a study by OHCHR (A/HRC/19/42), two reports by my predecessor, Cephas Lumina (A/HRC/22/42; A/HRC/25/52), and two studies authored by myself (A/HRC/28/60; A/HRC/31/61). The studies have underlined that illicit financial flows (including the proceeds of crime, corruption, money-laundering and tax evasion) basically divert resources intended for development, thereby undermining Government efforts to provide basic services and their ability to comply with their human rights obligations. They also undermine the rule of law in countries of origin. My final study focused on tax evasion and avoidance, as it is estimated that tax-related illicit financial flows make up the largest percentage of all illicit financial flows and thus reduce the fiscal space of Governments to realize economic, social and cultural rights in particular.

I am not aware of studies that have yet empirically demonstrated the positive impact of the return of stolen funds on the enjoyment of human rights. This is probably also due to the fact that there have to date been relatively few returns, compared to the amounts estimated to leave countries of origin (see A/HRC/28/60, para 14-18). There have been some publications relating to good practices on the management of returned stolen assets (see for example StAR Initiative, *Stolen Asset Recovery – Management of returned assets: Policy considerations* (Washington, D.C., 2009)).

*Question 3: What are the roles of national courts and procedures in establishing the illicit nature of funds required to be restituted?*

Thus far, my work has not looked into detail into the role of national courts and procedures for establishing the illicit nature of funds. A publication of the UNODC-World Bank Stolen Asset Recovery Initiative has outlined 29 barriers to asset recovery, both practical and legal barriers inhibiting the identification, freezing and return of stolen assets[1] (). According to this report barriers include weak enforcement of anti-money laundering regulations in many States, lack of due diligence of private financial institutions, banking secrecy laws, barriers to respond adequately to requests for mutual legal assistance, lack of national laws to criminalize certain conduct as prohibited under the United Nations Convention Against Corruption (UNCAC), lack of non-conviction based confiscation mechanisms in several jurisdictions etc. Next to courts, banking supervisory institutions, tax enforcement authorities, financial intelligence units and financial institutions can play an important role to detect funds of illicit origin, prevent money laundering, and reduce tax abuse and tax evasion.

*Question 4: What is the applicable legal framework regarding funds of illicit origin and their repatriation, in terms of domestic law and international treaties from your perspective?*

In the field of crime-based illicit financial flows, main international frameworks include the United Nations Convention Against Corruption (2003), the United Nations Convention against Transnational Organized Crime and its protocols against trafficking in persons, Smuggling of Migrants, and the Illicit Manufacturing of and Trafficking in Firearms (2000), the Terrorist Financing Convention (1999) and the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Financial Action Task Force (FATF) has developed international standards on combating money laundering and the financing of terrorism & proliferation.[2]

A further step for putting in place the international legal framework aimed at combatting tax evasion was taken with the signing of the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA) in October 2014 by OECD and G20 States, which operationalises the automatic exchange of information on the basis of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Currently, over 60 jurisdictions have signed the CRS MCAA. Concerns that developing countries may not be able to benefit from this new emerging regime on an equal basis should however be noted. OECD/G-20 have also elaborated 15 actions to equip governments with domestic and international instruments to address tax avoidance, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created.[3]

Some countries, like Switzerland, have passed particular national laws to facilitate the freezing and return of stolen assets of Politically Exposed Persons (Federal

[1] Stolen Asset Recovery Initiative: Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action (Washington DC, 2011), available at: http://star.worldbank.org/star/publication/barriers-asset-recovery
[2] http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf
[3] http://www.oecd.org/tax/beps/beps-actions.htm

Act on the Restitution of Assets obtained unlawfully by Politically Exposed Persons (RIAA).[4]

Relevant human rights standards such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) need to be considered when applying international and national law applicable to the repatriation of funds of illicit origin. Illicit financial flows, in particular tax evasion and avoidance, erode the tax base and fiscal space and undermines the obligation of States to use maximum available resources for the realization of economic social and cultural rights included in article 2 (1) of the ICESCR. The ICCPR contains relevant due process guarantees that cannot be ignored when freezing assets or prosecuting persons suspected to have been involved in corruption or other criminal related financial flows. Private financial institutions need to undertake human rights due diligence as outlined by the Guiding Principles for business and human rights (A/HRC/17/31). This includes preventing adverse human rights impacts and ensuring remedial action if their business practices have contributed to them. Laundering corruption or crime-based funds or facilitating tax evasion and avoidance usually contributes to adverse exterritorial human rights impacts in countries of origin, undermining the rule of law or shrinking the fiscal space of States to realize human rights.

*Question 5: Can you provide examples of best practices or recommendations for the successful return of funds of illicit origin?*

My mandate has underlined the importance of prudent use of such funds based on the principles of the human rights principles of transparency, accountability and participation (see for example A/HRC/22/42, para 52). I support the view that using returned stolen assets for the realization of economic and social rights or for reparations to victims for past human rights violations would be recommendable (Ibid, para 53). The question of how stolen assets can be used for reparations to victims of human rights violations, including for violations of economic, social and cultural rights, could be further examined.

There is a widespread view that countries of destination of funds of illicit origin should not impose conditionalities on the return of stolen assets, as such assets are not owned by the State of destination. Therefore the use of such funds should be a sovereign decision of the State to which the funds are returned. However there can be human rights issues when returning stolen assets may result in supporting governments that use public funds for widespread or systematic violations of human rights. In addition, there may be political barriers inhibiting the return of stolen assets, when there are fears in countries of destination that such assets would not benefit the people in the country, but would be misappropriated again through corruption.

Switzerland has set up monitoring frameworks to ensure that returned assets benefit the population in the country of origin and to prevent returned assets flow back into corrupt channels in collaboration with countries of origin or international organizations that could be critically examined.

[4] https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/illicit-assets-pep/praevention.html

The question of how to provide reasonable incentives for the return of corruption-based assets to the public treasury without contributing to impunity of persons responsible for corruption and embezzlement of public funds may warrant further study and reflection. In all likelihood there are no easy solutions for Governments to overcome this dilemma. A comparative analysis of laws providing some form of amnesty for tax evasion or corruption against recovery of public funds, may be helpful to identify good practices and related challenges for human rights and the rule of law.

*Question 6: How can States, the United Nations, non-governmental organizations, national human rights institutions, and financial institutions contribute to the successful return of funds of illicit origin to their countries of origin?*

A comprehensive answer to this question would require more elaboration. I would however like to refer, inter alia, to the recommendations contained in my interim study (A/HRC/28/60, para 77) and final study (A/HRC/31/61, para 78-98).

States should reduce various barriers to asset recovery, ensure swift responses to requests for mutual legal assistance in such cases, or may need to follow the path of Switzerland to pass particular legislation that would facilitate the freezing and return of stolen assets.

Most importantly, States should abolish banking secrecy laws, ensure automatic exchange of tax information, and require the establishment of public registers of beneficiaries of trusts and other vehicles used to hide assets, etc. States also need to strengthen banking oversight, including imposing penalties for lack of due diligence by financial institutions if they accept funds of doubtful origin without reporting suspicious assets to banking supervisory bodies

Much could already be achieved by a more thorough a thorough implementation of UNCAC in national law and regulations and by better adherence to existing recommendations such as the FATF recommendations.

Whistleblowers are essential to combat corruption, tax evasion and avoidance. I have therefore recommended that multilateral organizations should develop model provisions to protect whistleblowers who disclose abusive tax practices to address gaps in their protection. Civil society participation should be included in this process (A/HRC/31/61).

*Question 7: Would you be in favour or against the following points related to off-shore companies? (a) A publicly available international register of offshore companies. (b) Prohibition of anonymous shares in limited liability companies (LTDs). (c) Making the ultimate beneficiary nominee of shares publicly known to avoid tax evasion*

My final study (A/HRC/31/61) included a recommendation that States should impose a legal requirement for the public disclosure of beneficial ownership information, in order to eliminate the potential for anonymous ownership of companies, trusts and foundations (para 80). Please see the report for further details on these recommendations.

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