**INTERSESSIONAL SEMINAR ON THE NEGATIVE IMPACT OF THE NON-REPATRIATION OF FUNDS OF ILLICIT ORIGIN TO THE COUNTRIES OF ORIGIN ON THE ENJOYMENT OF HUMAN RIGHTS**

**8 February 2022 - Palais des Nations, Geneva**

**(I) Challenges and good practices for efficient International Cooperation**

**(II) Options for a non-binding set of practical Guidelines for efficient Asset Recovery**

**1.** Asset Recovery as regards illicit funds transferred abroad is a matter of concern for human rights lawyers though the subject is also within the domain of experienced economists and financial advisers. The Advisory Committee of the Human Rights Council was first entrusted to carry out a study on the impact of non-repatriation of funds of illicit origin on the enjoyment of human rights [A/HRC/26/52 dated 29 June 2017]. When the Advisory Committee of the Human Rights Council was tasked subsequently with producing a Study on utilizing non-repatriated illicit funds, pending their repatriation, to support the achievement of the Sustainable Development Goals few experts on the Committee were willing to act as Rapporteur as this encompassed the realms of law and finance. [Having studied Philosophy, Politics and Economics at the University of Oxford before becoming a barrister I volunteered to be Rapporteur, perhaps little realizing what I had got myself into before taking up the challenge]. The Report we produced is to be found at A.HRC/43/66 dated 23 January 2020.

**2.** I propose first to summarize the two studies carried out by the Advisory Committee and to mention the Recommendations made therein.

**3. I.** **The negative impact of the non-repatriation of illicit funds on the enjoyment of human rights.**

 **(i)** Non return prevents states from fulfilling their minimum core obligations of most basic rights; the right to food, the right to an adequate standard of living, and the rights to health and education and consequently jeopardizes the enjoyment of economic, social and cultural rights, especially by the poorest section of the population.

 **(ii)** Non-return hinders the realization of the right to development as capital which could have been used to finance development or programmes is siphoned elsewhere. Examples of this are in abundance and are closely linked with acts of corruption.

 **(iii)** Non return reinforces impunity of those who are culpable of financial and economic crimes and result in the perpetuation of corruption and the systematic pillage of the public resources of a country.

 **(iv)** The above may even lead to violations of civil and political rights putting at risk democratic states.

**4. II.** **Main challenges inhibiting the return of illicit funds.**

**A.** **(i)** Lack of political will in some destination countries to repatriate illicit funds (which have become embricated in their economy).

 **(ii)** Illicit Funds may benefit local property markets in some destination countries when used to finance the construction industry and the expansion of property finance-related industries.

 **(iii)** Illicit Funds are also alleged to benefit local financial markets. In the 2008 financial crash it appears that drug money was pumped into the global financial system to keep it afloat.

 **(iv)** Illicit funds may also have helped to develop the provision of financial and legal services. Professional services providers in destination countries would be losing business if funds are repatriated.

**B.** Difficulty of establishing a nexus between IFFs and crime and/or civil wrongdoings.

**C.** Difficulty of establishing beneficial ownership and/or piercing the corporate veil.

**D.** Should repatriation be linked with conditionality, that is, should destination countries dictate how repatriated funds should be used in countries of origin?

**5. III.** **Necessity for** **International Cooperation**

The first study also stressed the importance of international cooperation in the return of funds of illicit origin whether it is North-South cooperation or South-South cooperation. In extreme cases there may be a rivalry among destination countries to attract funds without ascertaining their source. The Financial Action Task Force is now addressing this issue seriously to ensure that offshore centres are clean and to practice an effective KYC. The existence of multiple legal regimes does not make matters easier when it comes to tracing Illicit Funds Flows, for it is well known that funds transit through many countries before reaching safely their eventual destination. The issue of advantageous tax regimes has become of international concern. New Guidelines are attempting to take care of such matters.

**6. IV.** **Recommendations of the Advisory Committee in the first study –** That states should -

**(i)** Ensure the prompt and unconditional repatriation of illicit funds to their countries of origin;

**(ii)** Ensure that crimes that are at the origin of IFFs are adequately sanctioned and do not remain unpunished;

**(iii)** Monitor banks and financial intermediaries involved, notably those specialized in asset management, to compel then to carry out their business with due diligence and make them accountable in case of violation, to support global initiatives, to regulate tax payers and offshore companies.

**UTILIZATION OF ILLICIT FUNDS PENDING THEIR REPATRIATION**

**7.** The second study of the Advisory Committee of which I was the Rapporteur formulated proposals to utilize non repatriated illicit funds pending their repatriation to support the achievement of the SDGs (A/HRC/43/66). It was presented at the 43rd session of the Human Rights Council in February 2020. It involved looking at all the documents on the subject from the STAR initiative, the Mbeki Report concerning Africa, part of jurisprudence of the European Court of Human Rights, etc. The end result was not so rewarding as one was venturing into unchartered territory.

**8.** Funds allegedly of an illicit nature may be frozen during investigation and proceedings in Court which are subject to a long drawn process. But was there a solution for their being put to good use in the meantime?

**9.** The Advisory Committee put forward some proposals with an urgent need for follow-up by lawyers, economists, bankers and financial advisers.

**10. A. Creation of a special fund in the country of origin**

 **(i)** Under this procedure, assets pertaining to illicit funds, especially emanating from dictators who have absconded, who have passed away or who have been imprisoned, may be frozen through an administrative procedure or through a judicial procedure that is not conviction based.

 **(ii)** The funds may be transferred to the country of origin by the Ministry of Finance, or Central Bank of the country of destination. There must be a precondition, however, that the transferee will not put the funds into the Consolidated Fund or annual budget of the Government. A special fund should be created for the utilization of the money.

**(iii)** A separate board of management should be set up consisting of representatives from the public sector, including the central bank, and the private sector to decide on the use and allocation of the funds. The funds will be in the nature of a solidarity fund reserved for social projects to improve the living conditions of the population, especially those who are living in poverty in order to achieve the SDGs.

**11. B. Creation of a Fund of Funds**

**(i)** One type of market-based re-empowerment scheme through which the non-repatriated assets could be revalued and reactivated monetarily and financially is the creation of a fund of funds in which each country of origin concerned would participate. The advantages of such a mechanism are manifold and include:

 **(a)** Portfolios made of diverse assets from investments in bonds and equities, direct investment in different sectors, and indirect investment through a multitude of channels, such as asset management funds, private equity funds, hedge funds, payment funds, environmental funds, social funds and governance funds;

 **(b)** Distribution of risk, which reduces the probability of losses and increases the opportunities for profit.

 **(ii)** Revenues from such funds should be used to advance the implementation of the Sustainable Development Goals, in accordance with national priorities, determined through wide consultation and participation processes.

 **(iii)** The advantage of an investment fund is that money may be invested in a wide portfolio of shares and securities so as to spread risk and ensure “safe” returns.

**12. C. Creation of fund governed by national central banks**

**13. D. Creation of a sovereign wealth fund in the country of destination**

 The country of destination could establish a sovereign wealth fund using the frozen illicit funds, which would be a State-owned investment fund investing in real and financial assets such as stocks, bonds, private equity funds or hedge funds. The return from the investments could be used for the benefit of the countries of origin.

**14. E. Channelling the funds through regional banks**

 Another proposal is to channel the funds through regional banks, which have the financing of projects in member countries as an objective. This would be in line with the proposals made by the High-level Panel on Illicit Financial Flows from Africa. Funds would be allocated pro rata to the countries of origin concerned. Where central banks act as independent monetary authorities, they could play a key role in the transfer of funds and in the supervision over the use of the illicit funds.

**GUIDELINES FOR ASSET RECOVERY**

**15.** As for Guidelines for efficient Recovery of Stolen Assets the following may be consulted.

 **I. The Draft OHCHR GUIDELINES** being developed by a group of experts in private meetings held under the auspices of the OHCHR -

**Principle 1:** States have a duty to protect and fulfill human rights by adopting and enforcing laws and policies on the prevention of corruption and money laundering.

**Principle 2:** States’ laws and policies for the prevention of corruption must reflect the principles of accountability, transparency, and participation.

**Principle 3:** States have a duty to protect the human rights of persons who report corruption and money laundering.

**Principle 4:** States have a duty to ensure the progressive realization of economic, social and cultural rights by providing international assistance and cooperation in the context of asset recovery.

**Principle 5:** States must respect the human rights of persons under investigation for, accused of, or convicted of corruption and money laundering offences.

**Principle 6:** Persons whose human rights have been violated as a result of corruption have a right to an effective remedy.

**Principle 7:** States have a duty to allocate returned assets in an accountable, transparent, and participatory manner.

**Principle 8:** Receiving States have a duty to use recovered assets in a manner that contributes to the realization of human rights.

**Principle 9:** Requested States have an obligation to return embezzled public funds to requesting States.

There is a very comprehensive COMMENTARY which elaborates on these Principles.

Regarding Principle 5 one may refer to the work of Prof. Radha Ivory “Corruption, Asset Recovery and the Protection of Property in Public International Law: the Human Rights of Bad Guys” (Cambridge University Press, 2014). The human rights of accused parties must be respected, but there are instances where the burden of proof may shift on them to account for their unexplained wealth. In Revenue Law tax authorities do ask for explanations about the origins of sudden enrichment. It would be advisable to dilute Principle No. 5 for investigation and prosecution in exceptional cases.

We may also suggest the introduction of an additional principle to take further the proposals in the second report of the Advisory Committee to the following effect-

**Principle 10:** Requested States have to devise schemes to respond to reasonable demands from the States where Illicit Funds originate to utilize non-repatriated Illicit Funds pending their repatriation, for the benefit of the Requesting States.

**II.** **The Lausanne Guidelines** adopt a more practical approach towards asset recovery including restraining assets, Investigation, Timing, Legal Requirements, Contacts, Communications, Parallel Investigation and Mutual Legal Assistance.

**III.** **The Guidelines for the efficient Recovery of Stolen Assets** published by the International Centre for Assets Recovery, Stolen Asset Recovery Initiative of the World Bank following the Lauzanne Seminar Initiative of the Swiss Federal Department of Foreign Affairs.

 Guidelines 1 to 10 include Freezing, Investigation and Mutual Legal Assistance and the Steps accompanying same are again practical guidelines

**IV**. Finally we have the **Asset Recovery Handbook - A guide for Practitioners** produced by the World Bank Group and STAR Initiative as well as the UNODC in 2020.

 This voluminous, comprehensive and useful handbook identifies the challenges that may be encountered and the good practices that may be adopted in the process of Asset Recovery.

**16. CONCLUSION**

 Asset Recovery following illicit transfer of funds has not met with worldwide success. How to render it more efficient is still a problem. As the title of one publication has put it, the cases have been “Few and Far Between”. Legal proceedings, whether criminal or civil, take too much time. Cases of Non-Conviction based Asset Recovery have been concerned with relatively small amounts of Illicit Funds. Let us hope International Cooperation, Mutual Legal Assistance will prevail to prevent the unjust enrichment of the bad guys and make them accountable for their unexplained wealth. This would facilitate and speed up the recovery and repatriation of Illicit Funds to achieve the SDGs by 2030.