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**Human Rights Council****Twenty-second session**

Agenda item 3

**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****Interim report by 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*

Illicit financial flows – generated from crime, corruption, embezzlement and tax evasion – represent a major drain on the resources of developing countries, reducing tax revenues and investment inflows, hindering development, exacerbating poverty and undermining the enjoyment of human rights. It is estimated that, on average, developing countries lost between US\$783 billion and US\$1,138 billion in illicit financial outflows in 2010 and that these flows have increased in real terms to 8.6 per cent over the period 2001–2010, suggesting that existing measures to tackle the problem have not had a significant impact.

Many of the countries affected by massive illicit financial outflows are burdened with heavy external debts and have to make difficult choices concerning allocation of scarce national resources between debt service and provision of essential public services. Curtailing illicit financial outflows and ensuring the repatriation of illicit funds to the countries of origin can increase the resources available to these countries for development, poverty alleviation and the realization of all human rights, particularly economic, social and cultural rights. Repatriation of illicit funds may also help ease the external debt burdens of the countries of origin.

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\* Late submission.

In order to devise effective strategies for tackling the problem of illicit funds and ensuring their repatriation to the countries of origin, it is important to understand the methods and channels of illicit financial flows, which countries such funds originate from and where they are held, as well as existing legal instruments and other initiatives designed to curb these flows. This interim report, submitted pursuant to Human Rights Council resolution 19/38 provides an overview of these issues. The final report of the Independent Expert on this issue will discuss in detail the impact of non-repatriation of illicit funds on development and the realization of human rights and will offer recommendations concerning strategies to combat illicit financial flows so as to ensure the application of the maximum available resources to the full realization of all human rights.

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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, to present to the Human Rights Council at its twenty-second session, 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”.

2. The Independent Expert welcomes the request to analyse the human rights implications of the transfer of funds of illicit origin, which may endanger the stability and security of societies, undermine the values of democracy and morality and jeopardize social, economic and political development, especially when an inadequate national and international response leads to impunity. Corruption, the transfer of illicit funds and legal and other barriers to their repatriation not only divert resources away from activities that are critical for poverty eradication, the fight against hunger and economic and sustainable development, they also undermine the enjoyment of economic, social, cultural, civil and political rights.

3. He takes this opportunity to thank the Government of Guatemala for providing information on its legislative and institutional framework for combating illicit financial flows.

4. In order to formulate effective strategies for tackling the problem of illicit funds and ensuring their repatriation to the countries of origin, it is important to understand the different types of illicit financial flows, from which countries such funds originate and where they are held, as well as current initiatives to curb illicit financial flows. This interim report provides an overview of these issues. The final report of the Independent Expert on the subject will discuss in detail the impact of non-repatriation of illicit funds on development and the realization of human rights and will make recommendations concerning strategies to combat illicit financial flows so as to ensure the application of the maximum available resources to the realization of all human rights in the countries affected by these flows.

## II. Illicit funds: overview of the problem

5. Financial flows may be illicit for two distinct although overlapping reasons. First, they may relate to proceeds of crime, such as corruption, embezzlement, drug trafficking or illegal arms trade. The proceeds are subsequently laundered often through offshore deposits in secrecy jurisdictions<sup>1</sup> and shell companies designed to hide illicit financial flows. Second, although most illicit financial flows derive initially from legitimate economic

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<sup>1</sup> The Tax Justice Network, an independent organization that conducts research, analysis and advocacy in the field of tax and regulation, defines secrecy jurisdictions as “places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain. That regulation is designed to undermine the legislation or regulation of another jurisdiction. To facilitate its use, secrecy jurisdictions also create a deliberate, legally backed veil of secrecy that ensures that those from outside the jurisdiction making use of its regulation cannot be identified to be doing so”. See Tax Justice Network, “Identifying Tax Havens and Offshore Financial Centers”, Briefing Paper (2007).

activities, the transfer abroad of such funds in contravention of relevant laws (such as non-payment of applicable corporate taxes or breach of exchange control regulations) makes them illicit. Thus, illicit funds are funds which are illegally earned, transferred or utilized and include all unrecorded private financial outflows that set in motion the accumulation of foreign assets by residents in breach of relevant legal frameworks.<sup>2</sup>

6. Commonly used methods to evade taxation include trade mis-invoicing and transfer mispricing. Trade mis-invoicing occurs when businesses or individuals shift money abroad by falsifying trade documents (for example, prices in a customs invoice). A buyer and a seller may collude in a scheme in which the buyer only pays the standard market price for imported goods, but is billed for the goods at a higher price. The seller then deposits the difference in a bank account in a secrecy jurisdiction on behalf of the buyer, thus siphoning funds abroad and preventing national authorities from collecting much needed taxes.

7. Transfer mispricing refers to a similar process within multinational companies to evade taxes. A subsidiary of a company avoids paying taxes in a high taxation country by selling its products at a loss to a subsidiary in a low tax country, which then sells the product to final customers at market price and yields the profit.<sup>3</sup> The Organisation for Economic Co-operation and Development (OECD) estimates that a significant percentage of all international trade is intergroup trade occurring between related companies, thus providing multinational corporations with opportunities to shift profits within companies in its own group to make sure that the accounts show high profits in low-tax jurisdictions.<sup>4</sup> While tax evasion, breaking national tax laws, is illegal, many tax avoidance schemes comply with existing laws and regulations. As one researcher has recently noted: “While some of the corporate practices used to dodge taxes are clearly illegal, such as false invoicing and trade mispricing, in many cases these are difficult to prove, given the lack of adequate instruments to effectively regulate them. Other means of shifting profits intra-group are legal or semi-legal yet ethically highly questionable.”<sup>5</sup>

8. Such tax evasion schemes are a concern to all countries struggling with tight budgets and cuts in essential services. However, owing to, inter alia, their resource constraints and

<sup>2</sup> See Dev Kar and Karly Curcio, *Illicit Financial Flows from Developing Countries: 2000-2009 – Update with a Focus on Asia* (Global Financial Integrity, 2011), p. 3.

<sup>3</sup> Recently, corporate tax dodging practices in Europe and the United States have attracted international attention. In November 2012, the managers of Starbucks, Google UK and Amazon appeared before the Public Accounts Committee of the British Parliament to explain why they reported only very limited profits for their business in the United Kingdom of Great Britain and Northern Ireland, through using more favourable European tax jurisdictions, such as the Netherlands, Ireland and Luxembourg to pay corporate their taxes (see BBC World News, “Starbucks, Google and Amazon, grilled over tax avoidance”, 12 November 2012. Available from [www.bbc.co.uk/news/business-20288077](http://www.bbc.co.uk/news/business-20288077)). Amazon UK is reported to have generated sales of more than GBP 3.3 billion in the United Kingdom in 2011, but paid no corporation tax on any profits in the United Kingdom for that year (see Ian Griffiths, “Amazon, £7bn sales, no UK corporation tax”, *The Guardian*, 4 April 2012). In the United States of America, the Senate Permanent Subcommittee on Investigations has held similar hearings into tax evasion practices of technology companies, including Apple, Hewlett-Packard and Microsoft (see Charles Duhigg and David Kocieniewski, “Inquiry into Tech Giants’ Tax Strategies Nears End”, *New York Times*, 3 January 2012). Apple was reported to pay only 2 per cent corporate tax outside the United States (see BBC World News, “Apple paid only 2% corporate tax outside the US”, 4 November 2012. Available from [www.bbc.co.uk/news/business-20197710](http://www.bbc.co.uk/news/business-20197710)).

<sup>4</sup> OECD, “Intra-industry and intra-firm trade and the internationalisation of production” in *OECD Economic Outlook*, No. 71 (2002). Available from [www.oecd.org/dataoecd/6/18/2752923.pdf](http://www.oecd.org/dataoecd/6/18/2752923.pdf).

<sup>5</sup> Øygunn Sundsbø Brynildsen, “Exposing the lost billions”, *Third World Resurgence*, No. 268 (December 2012), p. 22.

heavy external debt burdens, developing countries tend to be the most severely affected by financial outflows related to such schemes.

9. It is notable that most illicit financial flows are facilitated by tax havens, secrecy jurisdiction, shell companies that cannot be traced back to their owners, anonymous trust accounts, bogus charitable foundations, money-laundering techniques and questionable trade practices.

10. While in the past persons hid their involvement with funds derived from bribery, embezzlement of public funds, tax evasion or other forms of corruption through anonymous bank accounts or accounts in fictitious names, this option is becoming increasingly less available. The preferred method is the use of a corporate vehicle. This term is used to refer to companies or corporations, foundations and trusts. A study by the Stolen Asset Recovery (StAR) Initiative, a joint initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC), showed that trust and company service providers, including those in OECD countries, often fail to exercise sufficient due diligence when approached to create or provide administrative services for such corporate vehicles to comply with the recommendations by the Financial Action Task Force (FATF).<sup>6</sup>

11. There is also evidence that, by failing to exercise due diligence, banks play a key role in facilitating illicit financial flows. A series of high profile court cases in the United States of America and elsewhere have shown that international banks have frequently been negligent or complicit in the laundering of corruption proceeds or tax evasion.<sup>7</sup> On 11 December 2012, for example, the bank HSBC entered into a deferred prosecution agreement in terms of which it agreed to pay penalties of a little more than US\$1.9 billion for systemic and willful violations of United States anti-money-laundering and foreign sanctions laws.<sup>8</sup> In the United Kingdom, a 2011 report by the Financial Services Authority based on a survey of the screening practices of British banks for politically exposed persons found that three quarters of the banks surveyed did not properly establish the legitimacy of the funds deposited by such persons; over half failed to apply enhanced due diligence to high-risk politically exposed persons; and over a third “appeared willing to accept very high levels of money-laundering risk” from such clients.<sup>9</sup> Global Witness, a non-governmental organization that campaigns against natural resource-related corruption and conflict, has

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<sup>6</sup> Emile van der Does de Willebois and others, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Washington, D.C., International Bank for Reconstruction and Development/The World Bank, 2011).

<sup>7</sup> See, e.g., United States, Senate, Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank* (Washington, D.C., 2004) and *Keeping Foreign Corruption Out of the United States: Four Case Histories* (Washington, D.C., 2010).

<sup>8</sup> Ben Protess and Jessica Silver-Greenberg, “HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering”, *New York Times*, 10 December 2012; and United States, Department of Justice, Office of Public Affairs, “HSBC Holdings plc and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations”, 11 December 2012. Available from [www.fbi.gov/washingtondc/press-releases/2012/hsbc-holdings-plc-and-hsbc-bank-usa-n.a.-admit-to-anti-money-laundering-and-sanctions-violations-forfeit-1.256-billion-in-deferred-prosecution-agreement](http://www.fbi.gov/washingtondc/press-releases/2012/hsbc-holdings-plc-and-hsbc-bank-usa-n.a.-admit-to-anti-money-laundering-and-sanctions-violations-forfeit-1.256-billion-in-deferred-prosecution-agreement).

<sup>9</sup> Financial Services Authority, *Banks’ management of high money-laundering risk situations* (London, 2011), p. 4.

also prepared several evidence-based case studies, showing that the banking sector facilitated illicit financial flows by doing business with suspicious customers.<sup>10</sup>

### A. Estimates of illicit financial flows<sup>11</sup>

12. The scarcity of data combined with lack of transparency on the part of banks and other financial intermediaries involved in illicit financial transactions renders it difficult to calculate illicit financial flows with a degree of certainty. However, a number of studies have provided useful estimates. A recent study by Global Financial Integrity (GFI) concludes that, depending on the method employed, in 2010, developing countries lost between US\$783 billion and US\$1,138 billion in illicit financial outflows.<sup>12</sup> Despite increased efforts by the international community to curb the flow of illicit funds, the study indicates that such flows have grown in real terms by 8.6 per cent per annum on average over the period 2001–2010, signifying that existing measures to address the problem have thus far not been very effective.<sup>13</sup> It is notable that this rate of growth of illicit flows exceeded the average rate of economic growth (6.3 per cent per annum) of developing countries for the same period.<sup>14</sup>

13. Transfer mispricing and trade mis-invoicing are considered the prime factors for illicit financial flows, followed by illicit flows related to international drug trafficking and other criminal activities. While flows of the proceeds of corruption out of developing countries account for only about 5 per cent of all illicit financial flows, they have been estimated at US\$20–40 billion annually.<sup>15</sup> This is still a very significant amount,

<sup>10</sup> See Global Witness, *Undue Diligence: How Banks do business with corrupt regimes* (London, 2009); and Global Witness, *“International Thief, Thief”: How British banks are complicit in Nigerian Corruption* (London, 2010).

<sup>11</sup> There are several economic models employed to estimate illicit financial flows. The World Bank residual model, for example, considers the difference between the source and use of official funds, including additions to the country’s reserves. A difference thus suggests that money has been misappropriated by someone with access to the Government’s coffers. Global Financial Integrity (GFI), a think tank that has worked for several years on the issue, estimates illicit financial flows through a combined measure by analysing balance of payments data to capture funds that flow through the banking system and trade statistics to estimate the flow of illicit funds through manipulated invoices in import/export operations. The strength of this method is to provide a more complete picture of the total amount leaving a country illicitly. GFI has further refined its methodology by now also providing estimates of illicit flows using the Hot Money Narrow model, which produces more conservative estimates. For a brief overview of the models, see Alessandra Fontana, “‘What does not get measured, does not get done’, The methods and limitations of measuring illicit financial flows”, U4 Brief No. 2 (Bergen, 2010). See also United Nations Office on Drugs and Crime (UNODC), *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes, Research report* (Vienna, 2011), pp. 15–18.

<sup>12</sup> Dev Kar and Sarah Freitas, *Illicit Financial Flows from Developing Countries: 2001–2010* (Washington, D.C., Global Financial Integrity, 2012), p. c.

<sup>13</sup> *Ibid.*, p. 9.

<sup>14</sup> *Ibid.*, p. 9.

<sup>15</sup> See 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, A/HRC/19/42 and Corr.1, para. 5. This figure, based on data from Raymond Baker, *Capitalism’s Achilles Heel: Dirty Money and How to Renew the Free-Market System* (Hoboken, John Wiley and Sons, Inc., 2005), has been frequently used as an estimate by the World Bank and UNODC.

representing between 15 per cent and 30 per cent of all official development aid (ODA) currently received by developing countries.<sup>16</sup>

14. The Independent Expert is concerned that, of the considerable amount of illicit funds referred to above, only a small proportion has been repatriated to the countries of origin. According to the StAR Initiative, only US\$5 billion in stolen assets have been repatriated over the past 15 years.<sup>17</sup> A recent survey of 30 OECD member countries showed that only six of these had frozen assets worth slightly over US\$1.2 billion during the years 2006 to 2009, and they had managed to return only assets worth US\$227 million to foreign jurisdictions during these four years.<sup>18</sup>

15. Other studies also demonstrate low rates of repatriation of illicit funds or stolen assets to countries of origin. The Office of the High Commissioner for Human Rights (OHCHR) has estimated that only around 2 per cent of the estimated funds of illicit origin annually leaving the developing world are repatriated to their countries of origin.<sup>19</sup> While the Arab Spring has renewed efforts to freeze a significant amount of stolen assets by politically exposed persons (such as heads of State and senior public officials) from this region, it is likely that only a fraction of all illicit funds can be traced and finally returned to their countries of origin after the required investigations. Similarly, a study analysing the fate of assets stolen, embezzled or otherwise unlawfully obtained by 25 prominent political leaders after they were forced from office shows that the overall sum of stolen assets by these rulers and their family members was approximately US\$140 billion. However, only a small fraction (5 per cent) of these assets have ever been traced and frozen abroad, and even a smaller fraction (2.4 per cent) had been returned to new, legitimate successor Governments.<sup>20</sup>

16. The low level of repatriation of illicit funds is attributable to several factors, including the length and complexity of the asset recovery process.<sup>21</sup> It can also be argued that the lack of political will on the part of the authorities of the countries of origin and countries where illicit funds are held is another obstacle.<sup>22</sup>

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<sup>16</sup> In 2011, members of the OECD Development Assistance Committee reported US\$135.5 billion net official development assistance. See OECD, *Development Co-operation Report 2012: Lessons in linking sustainability and development* (Paris, 2012).

<sup>17</sup> Kevin M. Stephenson and others, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., StAR Initiative, 2011), p. 11.

<sup>18</sup> OECD/World Bank, *Tracking Anti-Corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action* (Paris and Washington, D.C., 2011), p. 5.

<sup>19</sup> 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. A/HRC/19/42 and Corr.1, para. 8.

<sup>20</sup> MyPrivateBanking, "Billions without a Trace – Dictators' Stolen Assets," May 2011.

<sup>21</sup> For an overview of the many legal and practical obstacles that both countries of origin and destination face when trying to recover or repatriate illicit funds, see, e.g. Stephenson, *Barriers to Asset Recovery* (2011) and A/HRC/19/42.

<sup>22</sup> See, e.g., Switzerland, Federal Department of Foreign Affairs, "Illicit assets of politically exposed persons (PEPs)". Available from [www.eda.admin.ch/eda/en/home/topics/finrec/poexp.html](http://www.eda.admin.ch/eda/en/home/topics/finrec/poexp.html)



## B. Countries of origin

17. Studies indicate that most illicit financial outflows are from developing countries.<sup>23</sup> According to GFI estimates, 61.2 per cent of all illicit financial flows from developing countries come from Asia, mostly due to massive outflows from China and India, the largest developing economies in the region. Illicit financial flows related to commercial transfer mispricing and trade mis-invoicing are estimated to account for over 90 per cent of illicit financial flows from this region. Latin America and the Caribbean follow at 15.6 per cent, with the Middle East and North Africa at 9.9 per cent. Developing Europe follows with 7 per cent of illicit flows, while Africa accounts for 6.3 per cent of all illicit outflows.<sup>24</sup>

18. According to GFI, the following countries accounted for 76 per cent of all illicit financial outflows worldwide during the period 2001–2010: China, Mexico, Malaysia, Saudi Arabia, the Russian Federation, the Philippines, Nigeria, India, Indonesia and the United Arab Emirates (cited in order of size of estimated illicit outflows).<sup>25</sup>

19. While at first glance illicit financial outflows from least developed countries (LDCs) may account only for a small portion of all illicit financial outflows worldwide, they have a particularly negative impact on social development and the realization of social, economic and cultural rights in these countries. Given that LDCs account for less than 2 per cent of world gross domestic product (GDP) and only about 1 per cent of global trade in goods,<sup>26</sup> illicit financial flows from these countries are in relative terms, compared to their small economies, very large. The United Nations Development Programme has estimated that illicit flows from LDCs amounted, on average, to 4.8 per cent of their GDP over the period 1990–2008. This means, that for every dollar received in ODA, on average, 60 cents exit these countries in illicit flows. In eleven LDCs, capital loss related to illicit financial flows was estimated to have exceeded the total ODA received. The total amount of estimated illicit financial flows for 39 LDCs for which sufficient data was available, amounted to US\$246 billion, surpassing debt service payments of US\$164 billion and thus constituting the principal contributing factor to the net resource transfer from these countries to the rest of the world, estimated at US\$197 billion (all data for the period 1990–2008).<sup>27</sup>

## C. Countries of destination

20. There is a lack of comprehensive information pertaining to where illicit funds are held. While in some cases significant funds may be returned by corrupt or criminal actors and invested in private assets, such as land and luxury estates in the countries of origin, most funds remain offshore.<sup>28</sup> Usually illicit financial flows are laundered through a

<sup>23</sup> Trade mis-invoicing was the dominant method of transferring illicit funds from all regions except the Middle East and North Africa, where it accounted for 37 per cent of total outflows during the period 2001–2010. See Kar and Freitas, *Illicit Financial Flows from Developing Countries*, p. 15.

<sup>24</sup> *Ibid.*, pp. 14, j and k.

<sup>25</sup> *Ibid.*, p. 16.

<sup>26</sup> Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), “Least developed countries: About LDCs”. Available from [www.unohrrls.org/en/ldc/25/](http://www.unohrrls.org/en/ldc/25/).

<sup>27</sup> United Nations Development Programme, *Illicit Financial Flows from Least Developed Countries: 1990–2008*, Discussion Paper (New York, 2011), p. 14.

<sup>28</sup> For a discussion of the negative impact of returned illicit funds on land concentration, see, e.g., Francisco Thoumi and Marcela Anzola, “Illicit Capital Flows and Money Laundering in Colombia”, in Peter Reuter (ed.) *Draining Development? Controlling Flows of Illicit Funds from Developing Countries* (Washington, D.C., World Bank, 2012) pp. 145–170.

complex web of corporate vehicles based in secrecy jurisdictions and tax havens and are subsequently invested in shares, real estate or other assets, often together with wealth acquired through legitimate means. Assets held offshore (that is, in jurisdictions where the investor has no legal residence or tax domicile) were estimated to amount to US\$7.4 trillion in 2009.<sup>29</sup> While European investors hold the largest amount of assets offshore – mostly in Switzerland, the United Kingdom, Ireland and Luxembourg – the percentage of wealth held offshore by investors from Latin America, Africa and the Middle East is particularly high. According to the Boston Consulting Group, investors from Latin America, the Middle East and Africa hold between 23.5 and 33.3 per cent of their wealth in offshore financial centres.<sup>30</sup> The banking research firm MyPrivateBanking has estimated that 41 per cent of all offshore assets from the Middle East and Africa are in European Union countries, including the United Kingdom (in the Channel Islands), while 33 per cent of these offshore assets are located in Switzerland. The United States and Latin American and Caribbean countries account for 18 per cent, while Asia, notably Singapore, accounts for 8 per cent of offshore assets from the Middle East and North Africa.<sup>31</sup> Australia is regarded as the main destination of illicit funds from Papua New Guinea.<sup>32</sup>

21. The Asset Recovery Watch database of the StAR Initiative provides an indication of where stolen assets have so far been detected by criminal investigators. As of October 2012, it covered 199 international asset recovery efforts. The database includes 49 recovery efforts in the United States, 32 in the United Kingdom (including the Channel Islands) and 31 in Switzerland. Other reported recovery efforts include: Nigeria (7), France (6), Iraq (6), Lesotho (5) and Australia (4).<sup>33</sup> However, the database includes only publically reported recovery efforts that have come to the attention of the World Bank/UNODC research team and may underestimate the location of illicit assets in countries or jurisdictions that have so far been less active in international asset recovery efforts and may not include cases reported in national media only.

22. During the 2009 financial crisis, the fight against tax evasion became a political priority in wealthy countries and the pressure on tax havens mounted. In early 2012, a study evaluating the “G20 tax haven crackdown”, which compelled tax havens to sign more than 300 bilateral treaties providing for exchange of bank information, was published. The study concluded that these “treaties have led to a relocation of bank deposits between tax havens but have not triggered significant repatriations of funds. The least compliant havens have attracted new clients, while the most compliant ones have lost some, leaving roughly unchanged the total amount of wealth managed offshore”.<sup>34</sup> While the Channel Island of Jersey, Luxembourg and Switzerland lost between 0.5 and 4 per cent of deposits by foreigners, Singapore, the Cayman Islands and Hong Kong attracted between 2 and 3 per cent more funds.<sup>35</sup> Furthermore, most bilateral treaties were signed between OECD countries and tax havens or between tax havens, thus hardly contributing to the reduction of tax evasion suffered by developing countries.

<sup>29</sup> See UNODC, *Estimating illicit financial flows*, p. 44.

<sup>30</sup> *Ibid.*, p. 45.

<sup>31</sup> MyPrivateBanking, *What the Arab Revolution Means for Wealth Managers* (Kreuzlingen, MyPrivateBanking, 2011).

<sup>32</sup> See Jason Sharman, *Chasing Kleptocrats' Loot: Narrowing the Effectiveness Gap*, U4 Issue No. 4 (August 2012), p. 7.

<sup>33</sup> See <http://star.worldbank.org/corruption-cases/arw>.

<sup>34</sup> Niels Johannesen and Gabriel Zucman, “The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown”, Working Paper, No. 2012-4 (Paris School of Economics, 2012), p. 26. Available from <http://halshs.archives-ouvertes.fr/docs/00/74/86/51/PDF/wp201204.pdf>.

<sup>35</sup> *Ibid.*, figure 4.

23. In order to enhance efforts to tackle the problem of illicit financial flows, it is critical that the international financial system is made more transparent and that countries of origin and countries of destination improve their cooperation in the fight against these flows. Making the global financial system more transparent requires fundamental reforms.

### III. Current initiatives to curb illicit financial flows

24. There are a number of legal instruments and initiatives at the international, regional and national levels to address the issue of illicit financial flows, mostly resulting from corruption. Most of the conventions discussed below require the contracting parties to criminalize activities undertaken to hide or launder the proceeds of corruption and envisage measures to confiscate such proceeds.

#### A. Multilateral initiatives

25. The United Nations has been involved in combating the transfer of illicit funds derived from corruption for many years.<sup>36</sup> The topic was extensively discussed during the drafting of the United Nations Convention against Corruption.<sup>37</sup> The Convention, which has been ratified by 165 States (as of 18 February 2012) and sets a comprehensive point of reference for anti-corruption laws, institutions and actions of States parties, recognizes the return of illicit funds as a fundamental principle. Article 57, paragraph 3 (a), requires that the requested State party shall: “In the case of embezzlement of public funds or of laundering of embezzled public funds ... return the confiscated property to the requesting State Party.” The same also applies to proceeds of crimes covered by the Convention. Article 52, paragraph 1, enjoins each State party 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 design to detect suspicious transactions for the purpose of reporting to competent authorities.”

26. In its resolution 1/4, the Conference of States Parties to the Convention set up the Open-ended Intergovernmental Working Group on Asset Recovery to assist the Conference in the implementation of its mandate relating to the return of the proceeds of corruption. One of its tasks is to assist in the development of cumulative knowledge in the area of asset recovery, including through mechanisms for locating, freezing, seizing, confiscating and returning the instruments and proceeds of corruption; identifying capacity-building needs and encouraging cooperation among relevant existing bilateral or multilateral initiatives; facilitating the exchange of information, good practices and ideas among States; and

<sup>36</sup> See, e.g., General Assembly resolutions 55/61, 55/188, 56/186, 57/244, 65/169 and Economic and Social Council resolution 2001/13. See also the reports by the Secretary-General on preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets, in particular to the countries of origin, consistent with the United Nations Convention against Corruption, A/65/90 and A/67/96.

<sup>37</sup> See the global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, A/AC.261/12.

building confidence and encouraging cooperation between requesting and requested States.<sup>38</sup>

27. In mid-2007, UNODC and the World Bank jointly launched the StAR Initiative to support international efforts to end safe havens for funds earned through corruption. The initiative offers capacity-building, policy analysis and knowledge-building and provides, upon request, technical assistance to countries that are operationally engaged in asset recovery cases. It has published several research reports and tools for practitioners including the *Asset Recovery Handbook: A Guide for Practitioners*.<sup>39</sup> In 2012, the StAR Initiative provided country-specific technical assistance in 16 countries or groups of countries that can be divided in two categories: (a) assistance to countries engaged in active asset recovery cases; and (b) assistance to countries to build capacity to generate and conduct asset recovery cases (A/67/96, para. 33). The StAR Initiative also advocates for the effective implementation of Chapter V of the United Nations Convention against Corruption and other standards to detect, deter and recover the proceeds of corruption.

28. The OECD framework for fighting bribery consists of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials and the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. However, the Convention only deals with the supply side of bribery (that is, when someone is offering a bribe and not when someone is asking for a bribe). It also does not address issues such as the use of offshore financial centres and practices that block effective investigation and prosecution of corruption offences. OECD has tracked anti-corruption and asset recovery commitments of its 30 member States and has been engaged jointly with the Asian Development Bank in an Anti-Corruption Initiative for Asia and the Pacific on the subject of asset recovery and mutual legal assistance.<sup>40</sup>

29. Combating the flow of illicit funds has been also on the agenda of the African Union and the Economic Commission for Africa. In March 2011, the Fourth Joint Annual Meetings of the African Union Conference of Ministers of Economy and Finance and Economic Commission for Africa Conference of Ministers of Finance, Planning and Economic Development adopted resolution 886 (XLIV) on illicit financial flows mandating the establishment of a high-level panel on illicit financial flows from Africa.<sup>41</sup> The aim of the panel is to undertake extensive and in-depth studies to shed light on the extent and effect of illicit financial flows on national economies as well as on the human impacts of the phenomenon.

30. The African Union Convention on Preventing and Combating Corruption provides for prevention, criminalization, regional cooperation and mutual legal assistance, as well as the recovery of stolen assets. It covers a number of offences, including bribery (domestic

<sup>38</sup> See note by the Secretariat on strengthening international asset recovery efforts: progress report on the implementation of asset recovery mandates, CAC/COSP/WG.2/2012/3, para. 2.

<sup>39</sup> Jean-Pierre Brun and others, Washington, D.C., World Bank, 2011. Available from <http://star.worldbank.org/star/>.

<sup>40</sup> See OECD, *Behind the Corporate Veil: Using corporate entities for illicit purposes* (Paris, 2001); OECD/World Bank, *Tracking Anti-Corruption and Asset Recovery Commitments*; Asian Development Bank/OECD, "Asset Recovery and Mutual Legal Assistance in Asia and The Pacific: Proceedings of the 6th Regional Seminar on Making International Anti-Corruption Standards Operational" (2008).

<sup>41</sup> The panel, which is led by Thabo Mbeki, the former president of South Africa, brings together eminent personalities from within and outside Africa who share a common concern and expertise in the financial aspects of the continent's development.

and foreign), diversion of property by public officials, money-laundering, trading in influence, illicit enrichment and concealment of property.

31. In Europe, there are several legal instruments for fighting corruption. The European Union instruments are the 1997 Convention on the fight against corruption involving officials of the European Communities or Officials of Member States of the European Union and the 2003 Framework Decision 2003/568/JHA on combating corruption in the private sector. However, both of these instruments are concerned with penalizing and not preventing corruption. The Council of Europe anti-corruption instruments are the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, both of which were adopted in 1999.

32. The Inter-American Convention against Corruption, which was adopted by the Organization of American States in March 1996 and entered into force in March 1997, covers corruption in the public sector and provides for a comprehensive system of inter-State monitoring and compliance assessments. Under the Convention, corruption includes bribery, domestic and foreign; illicit enrichment; money-laundering and concealment of property.

33. In May 2012, the G8 adopted an Action Plan on Asset Recovery within the overall framework of the Deauville Partnership with Arab Countries in Transition. In the plan, G8 countries commit to a comprehensive list of actions that aim to promote cooperation and case assistance, capacity-building efforts and technical assistance in support of the efforts of Arab countries in transition in recovering assets diverted by previous regimes. In this context, an inaugural meeting of the Arab Forum on Asset Recovery was held in Doha from 11 to 13 September 2012 co-organized by Qatar and the United States presidency of the G8, with technical support from the StAR Initiative.

34. Also worthy of mention are the Extractive Industries Transparency Initiative and FATF. The Initiative is a joint effort by civil society, business and Governments, which seeks to ensure that information on payments to Governments by companies in the extractive industries sector is published by both companies and Governments.<sup>42</sup> It has been suggested, however, that for the extractive industries initiatives to be more relevant to efforts to tackle illicit financial flows, their transparency requirements should extend beyond revenues to licensing, contracts, resources flows and other production factors, as well as to public expenditure.<sup>43</sup> In addition, these initiatives should integrate elements of the tax justice and tax evasion agendas.

35. FATF, an intergovernmental body with 36 members representing most major financial centres, was established by the G7 countries in 1989 to become an international policymaking body in the fight against money-laundering.<sup>44</sup> It develops and promotes policies to combat “money laundering, terrorist financing and other related threats to the

<sup>42</sup> See <http://eiti.org/>.

<sup>43</sup> Philippe Le Billon, *Extractive sectors and illicit financial flows: What role for revenue governance initiatives?* U4 issue No. 13 (November 2011).

<sup>44</sup> A key problem for FATF in its formative years was to gain international acceptance of its recommendations beyond the participating FATF States. However, in 1998, the General Assembly, in its resolution S-20/4 D countering money-laundering, adopted a Political Declaration and Action Plan in which it identified the FATF recommendations as “the standard” by which “the measures against money-laundering” adopted by individual States “should be judged”. See also General Assembly resolution 60/288; Security Council resolution 1617 (2005); and the 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem.

integrity of the international financial system".<sup>45</sup> While its regime initially focused on combating money-laundering related to drug trafficking, FATF has recently devoted more attention to the issue of laundering of the proceeds of corruption.<sup>46</sup> In February 2012, FATF adopted a new set of recommendations which, if translated into national law, will provide an opportunity to ensure that national legislation makes it more difficult to hide illicit money in secrecy jurisdictions.

## B. National initiatives

36. Many countries have adopted anti-money-laundering legislation enabling banks and other financial intermediaries to identify parties to agreements or to report any suspicious transactions.

37. Some countries have recently adopted measures that require companies listed on their stock exchange to provide information about their financial activities on a country-by-country basis. For example, the Dodd-Frank Act in the United States requires extractive companies listed on the New York Stock Exchange to disclose information about their financial activity around the world on a country-by-country basis. On 22 August 2012, the U.S. Securities and Exchange Commission issued binding regulations to implement the oil-gas and mining disclosure provisions contained in the Dodd-Frank Act. Starting in 2014, an estimated 1,100 companies will have to start disclosing the payments they make to Governments on a country-by-country and project-by-project basis. A directive that would introduce country-by-country reporting by multinational companies in the European Union is currently under consideration.<sup>47</sup> Expanding country-by-country reporting to the European Union would be an important step, as it has been pointed out, that out of the 350 gas, oil and mining companies that are for example listed on the London Stock Exchange, only 14 companies would have to report to the Securities and Exchange Commission in the United States.<sup>48</sup> So far such initiatives have mainly been limited to extractive industries.

38. Since 2001, the Government of Switzerland has organized informal meetings of Government experts on asset recovery in Lausanne. In 2011, the Government introduced a new law, the Restitution of Illicit Assets Act, which supplements the Federal Act on International Mutual Legal Assistance in Criminal Matters and provides a further legal basis for freezing and repatriating assets of politically exposed persons (that is, heads of State and senior public officials who embezzle State funds) when procedures of mutual legal assistance have failed to produce the desired outcome. The country has returned about CHF1.7 billion to countries of origin.

39. The Independent Expert welcomes the above-mentioned multilateral and national initiatives. Nevertheless, there are some questions about the effectiveness of some national initiatives which may point to the need for more robust regulation by the States concerned. For example, in November 2012, the Swiss Financial Market Supervisory Authority published an assessment of due diligence obligations of Swiss banks when handling assets of politically exposed persons. The study found that Swiss banks had correctly identified 22 out of 29 customers as politically exposed persons. The study however indicated that one bank had applied a very narrow definition of politically exposed persons in its operations

<sup>45</sup> See <http://www.fatf-gafi.org/pages/aboutus> (accessed on 19 February 2013).

<sup>46</sup> See FATF/OECD, *Laundering the Proceeds of Corruption* (Paris, 2011).

<sup>47</sup> See [http://ec.europa.eu/internal\\_market/accounting/other\\_en.htm](http://ec.europa.eu/internal_market/accounting/other_en.htm) and [http://ec.europa.eu/internal\\_market/consultations/2010/financial-reporting\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/financial-reporting_en.htm).

<sup>48</sup> Marta Ruiz and Maria José Romero, *Exposing the lost billions: How financial transparency by multinationals on a country by country basis can aid development* (Brussels, Eurodad, 2010), p. 21.

and that, in two cases, a politically exposed person had deliberately been treated as a normal customer, although banking staff were aware of the high-risk nature of the customer.<sup>49</sup> Similarly, while the Annual Report of the Money Laundering Reporting Office of Switzerland for 2011 showed a surge of 40 per cent in suspicious activity reports to it by Swiss commercial banks from 2010 to 2011<sup>50</sup> and some observers have concluded that this is a sign that official measures against money laundering have increasingly become effective, Swiss NGOs have disputed this, pointing out that the surge of reporting to the Office was rather a reflection of international pressure as many Swiss banks had been engaged for years with corrupt customers from North Africa until the Government of Switzerland decided to freeze their assets.<sup>51</sup>

40. The Independent Expert considers that it is desirable that all measures to tackle illicit financial flows are designed with the need to promote the realization of human rights of the populations of the countries of origin of illicit funds, particularly the poor who disproportionately suffer the negative effects of the shortage of resources resulting from illicit financial outflows. Indeed, such an approach would be consistent with the recognition (explicit or implicit) in most anti-corruption conventions of the negative impact of illicit financial flows on development, governance and human rights.<sup>52</sup>

### C. Other initiatives

41. A number of non-governmental organizations have played an important role in exposing corruption and lack of due diligence on the part of international banks, as well as drawing attention to the negative impact of illicit funds on the rule of law and the realization of economic, social and cultural rights. They include Global Financial Integrity, Global Witness, Transparency International, Publish What You Pay, Tax Justice Network, Christian Aid, Eurodad, Aktion Finanzplatz Schweiz and many others. Some of these organizations have been active in the Task Force on Financial Integrity and Economic Development, a consortium of Governments and research and advocacy organizations that focuses on achieving greater transparency in the global financial system for the benefit of developing countries.

42. Some organizations have campaigned for improved national legislation and policies to reduce the flow of illicit funds from developing countries or to ensure their repatriation, or provided technical assistance to Governments focusing on anti-money-laundering and

<sup>49</sup> Swiss Financial Market Supervisory Authority (FINMA), “Due diligence obligations of Swiss banks when handling assets of “politically exposed persons: An investigation by FINMA” (Bern, 2011), p. 7.

<sup>50</sup> Switzerland, Money Laundering Reporting Office, *Annual Report 2011* (Bern, Federal Office of Police, 2012), p. 3.

<sup>51</sup> Bern Declaration, “Geldwäscherei - Sorgfaltspflicht der Banken greift nicht”, 14 May 2012. Available from [www.evb.ch/p25020100.html](http://www.evb.ch/p25020100.html).

<sup>52</sup> For example, the African Union and Council of Europe anti-corruption conventions recognize the threat that corruption poses to the enjoyment of human rights. Thus, the preamble to the African Union Convention on Preventing and Combating Corruption refers to the States parties’ awareness of “the need ... to foster the promotion of economic, social and political rights in conformity with the provisions of the African Charter on Human and Peoples’ Rights and other relevant human rights instruments” (fourth para.), while article 2, paragraph 4, states as one of the objectives of the Convention the promotion of “socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights”. The preambles of both Council of Europe Conventions stress that corruption threatens the enjoyment of human rights (Criminal Law Convention on Corruption, fifth para., and Civil Law Convention on Corruption, fifth para.).

asset recovery. For example, the International Centre for Asset Recovery at the Basel Institute on Governance in Switzerland assists authorities in enhancing their capacities to seize, confiscate and recover the proceeds of corruption and money-laundering. To this end, the Centre delivers interactive, country-specific on-site training programmes conceptualized and devised to enhance the skills and competencies of investigators and prosecutors to analyse, investigate and prosecute complex corruption, financial crime and money-laundering cases. The Centre further assists countries by facilitating mutual legal assistance and providing advice to concerned law enforcement authorities in handling specific asset recovery cases.<sup>53</sup>

43. In Norway, the U4 Anti-Corruption Resource Centre assists donor practitioners in more effectively addressing corruption challenges through their development support. U4 offers relevant anti-corruption material, including our own applied research, through an extensive web-based resource centre and runs in-country and online training on anti-corruption measures and strategies for partner agencies and their counterparts.<sup>54</sup>

#### **D. The role of international assistance and cooperation**

44. The successful repatriation of illicit funds to countries of origin and the prevention of further illicit financial outflows require a concerted effort by the international community. Thus, the United Nations Convention against Corruption and other instruments on corruption all contain provisions on international cooperation and/or mutual legal assistance.<sup>55</sup>

45. It is notable that international cooperation for development, as well as for the realization of economic, social and cultural rights, is an obligation of all States. The principle of international assistance and cooperation is underscored in the Universal Declaration of Human Rights (art. 28); the Declaration on the Right to Development (art. 3, para. 3); the International Covenant on Economic, Social and Cultural Rights (arts. 2, para. 1, 22 and 23) and the Convention on the Rights of the Child (art. 4).

46. In the context of addressing the human rights and development challenges posed by the diversion of resources through illicit financial flows, it is important to note that States are under a duty to ensure respect for minimum subsistence rights for all. Under article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, a State party is obligated to take the necessary steps “to the maximum of its available resources” to ensure the progressive realization of the rights enshrined in the Covenant. It is accepted that the phrase “its available resources” refers to both the resources within a State and those available from the international community through international assistance and cooperation.<sup>56</sup> Moreover, international assistance and cooperation must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the International Covenant on Economic, Social and Cultural Rights can be fully realized.

<sup>53</sup> See [www.baselgovernance.org/icar/](http://www.baselgovernance.org/icar/).

<sup>54</sup> See [www.u4.no/](http://www.u4.no/).

<sup>55</sup> United Nations Convention against Corruption, chaps. IV and V; AU 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>56</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties obligations, para. 13.



#### IV. Illicit funds, asset recovery and human rights

47. As the Independent Expert's work on the subject matter of resolution 19/38 is ongoing, this section offers some preliminary comments about the impact of non-repatriation of illicit funds to the countries of origin on the enjoyment of human rights. The final report of the Independent Expert on the subject will contain a detailed analysis of the impacts, drawing on the experiences of a number of developing countries that have been severely affected by the scourge of illicit financial flows.<sup>57</sup>

48. It is widely recognized that illicit funds (including the proceeds of crime, corruption, money-laundering and tax evasion) divert resources intended for development, thereby undermining Government efforts to provide basic services and their ability to comply with their human rights obligations.<sup>58</sup> The diversion of resources due to illicit financial flows and the non-repatriation of these funds reduce the "maximum resources" available to the countries of origin for the full realization of economic, social and cultural rights. The impact is disproportionately felt by the poor.

49. The non-repatriation of illicit funds also has an impact on the rule of law in the country of origin. Where both the incentives for and opportunities to export illicit wealth are significant, it is likely that the damage to the rule of law will 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

<sup>57</sup> A recent, widely publicized case is that of Zambia. According to a report by Global Financial Integrity, between 2001 and 2010, Zambia lost US\$8.8 billion in illicit financial flows, of which US\$4.9 billion is attributable to trade mis-invoicing. This is a massive amount for a poor developing country with an external debt of US\$2.5 billion and a Human Development Index ranking of 164 out of 187 countries. In 2011, the GDP of Zambia was US\$19.2 billion, while its GDP per capita was US\$1,413. The Government collected a total of US\$4.3 billion in revenue. Illicit financial outflows drain the country of resources needed for economic development and social investment. The loss also means the Government has to borrow from external sources. In 2012, the Government issued a Eurobond of US\$750 million which pushed up the country's external debt from US\$1.6 billion to approximately US\$2.5 billion. It is notable that these illicit outflows come on top of outflows from legal corporate tax avoidance, mainly through abusive transfer pricing in the mining sector. According to the country's Deputy Finance Minister, Miles Sampa, US\$2 billion is lost yearly to tax avoidance by multinational corporations operating in Zambia. Of all the major multinationals that export copper and other metals out of Zambia, just "one or two" officially recorded a profit, and therefore pay no corporate tax. It is estimated that legislation being considered by the Government to close corporate tax avoidance loopholes and criminalize false reporting will enable the Government to raise US\$1.5 billion annually. This would increase the national revenues by 35 per cent and allow much needed investment in education, health or infrastructure. See Sarah Freitas, "What Billions in Illicit and Licit Capital Flight Means for the People of Zambia", Task Force on Financial Integrity and Economic Development, 13 December 2012, available from [www.financialtaskforce.org/2012/12/13/what-billions-in-illicit-and-licit-capital-flight-means-for-the-people-of-zambia](http://www.financialtaskforce.org/2012/12/13/what-billions-in-illicit-and-licit-capital-flight-means-for-the-people-of-zambia); Christian Aid, "Zambia must launch copper mining tax probe, says Christian Aid partner", 18 February 2011, available from [www.christianaid.org.uk/pressoffice/pressreleases/February-2011/zambia-launch-copper-mining-tax-probe-christian-aid-partner-1802.aspx](http://www.christianaid.org.uk/pressoffice/pressreleases/February-2011/zambia-launch-copper-mining-tax-probe-christian-aid-partner-1802.aspx); Christian Aid, *Blowing the whistle: Time's Up for Financial Secrecy* (London, Christian Aid, May 2010), p. 23, available from [www.christianaid.org.uk/images/blowing-the-whistle-caweek-report.pdf](http://www.christianaid.org.uk/images/blowing-the-whistle-caweek-report.pdf); Matthew Hill, "Zambia Says Tax Avoidance Led by Miners Costs \$2 Billion a Year", Bloomberg News, 25 November 2012, available from [www.bloomberg.com/news/2012-11-25/zambia-says-tax-avoidance-led-by-miners-costs-2-billion-a-year.html](http://www.bloomberg.com/news/2012-11-25/zambia-says-tax-avoidance-led-by-miners-costs-2-billion-a-year.html).

<sup>58</sup> See, e.g., A/HRC/19/42. All the international legal instruments dealing with corruption recognize that the scourge undermines economic development.

chances of detection and therefore increases the likely returns”.<sup>59</sup> If parts of the political elite are able or willing to accumulate wealth through illicit outflows, economic inequalities are exacerbated and incentives to strengthen tax agencies, investigatory powers of police services, the independence of the judiciary and public audit services are low. This is in particular a problem in developing countries that face resource constraints in establishing well-equipped and independent institutions to address such complex issues like transfer mispricing.

50. It is important that asset recovery efforts are viewed as part of several efforts that States must make in order to comply with their human rights obligations. As the OHCHR study on the subject underscores, 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” (A/HRC/19/42, para. 24).

51. In addition, a human rights approach to asset recovery has to consider policy implications relating to the use of returned illicit funds. The StAR Initiative has pointed out that the use of returned assets is the sovereign decision of the country that recovers its stolen property. However, in a study on the management of returned assets, it has concluded that “countries that have embraced a policy of openness and transparency in the design of arrangements for the management of returned assets have benefitted from this approach”.<sup>60</sup>

52. The Independent Expert supports this view. In his estimation, respect for and adherence to the human rights principles of transparency, accountability and participation is a critical factor in ensuring the prudent use of repatriated illicit funds. He further endorses the view advanced in the OHCHR study that “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” (A/HRC/19/42, para. 30). As the study underscored, since “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” (ibid., para. 28.)

53. It is worth noting in this regard that the Special Rapporteur on the right to education has recently stressed that the restitution of illicit funds frozen by the European Union would provide Tunisia with an opportunity to ensure and improve the realization of the right to education.<sup>61</sup> In transitional countries, returned illicit assets may also help States to fulfil their obligations to provide reparation to victims of human rights violations of a previous regime.<sup>62</sup> While not a comprehensive solution to the problem of financing transitional justice initiatives and reparation programmes, recovered assets have for example been used in Peru for anti-corruption and transitional justice measures, including truth-seeking and

<sup>59</sup> Mick Moore, “The Practical Political Economy of Illicit Flows” in Peter Reuters (ed.), *Draining Development*, p. 474.

<sup>60</sup> StAR Initiative, *Stolen Asset Recovery – Management of returned assets: Policy considerations* (Washington, D.C., 2009), p. xi.

<sup>61</sup> Special Rapporteur on the right to education, “Restitution de fonds à la Tunisie: une chance unique pour l’éducation”, News Release, 21 December 2012. Available from [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12907&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12907&LangID=E).

<sup>62</sup> See OHCHR, *Rule-of-law tools for Post-Conflict States: Reparations programmes* (New York and Geneva, 2008). Available from [www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf](http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf).

reparations.<sup>63</sup> This is particularly the case if returned illicit funds derive from assets controlled by politically exposed persons that are alleged to have directly or indirectly been responsible for past human rights violations, including violations of economic, social and cultural rights.

54. According to a study commissioned by the European Parliament, there is a comprehensive European Union regulatory framework to identify, trace, seize and confiscate proceeds of organized crime in the European Union. However, implementation of this regulatory framework is proceeding slowly. Moreover, there is no regulation pertaining to the social re-use of confiscated assets and most European Union member States do not have provision for the use of confiscated assets for civil society or for social purposes.<sup>64</sup>

55. Human rights are also relevant for the seizure and freezing of the proceeds of corruption or other criminal activities. It is notable in this regard that some provisions of the United Nations Convention against Corruption have been contested on human rights grounds. Article 31, paragraph 8, of the Convention provides that an offender must demonstrate the lawful origin of not only the alleged proceeds of crime but also of other property liable to confiscation. Nevertheless, the OHCHR study notes that “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, 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” (A/HRC/19/42, para. 46).

56. Finally, illicit financial flows should not be a human rights concern for States only. While States have the primary duty to respect, protect and fulfil human rights, the Guiding Principles on Business and Human Rights require business enterprises to “avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur” (guiding principle 13). Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows and undermine the abilities of States to progressively achieve the full realization of economic, social and cultural rights cause adverse human rights impacts. This is particularly the case when they operate in States that have difficulties in meeting the minimum core human rights obligations. The same applies to trust and company service providers and commercial banks that do not meet basic due diligence standards when they provide services or help launder and hide illicit funds in offshore financial centres.

## V. Next steps

57. Over the next few months, the Independent Expert will continue gathering information for the study requested by the Council. Given the complexity of the subject matter and the paucity of empirical data concerning the human rights and development dimensions of the illicit financial flows, he considers that he will only be in a position to prepare a comprehensive study after extensive consultations with all stakeholders, including

<sup>63</sup> For an argument that transitional justice should engage more strongly with corruption and economic crimes, see, inter alia, Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” *The International Journal of Transitional Justice*, vol. 2, No. 3 (2008), pp. 310–330.

<sup>64</sup> See European Parliament, *The need for new EU legislation allowing the assets confiscated from criminal organisations to be used for civil society and in particular for social purposes* (Brussels, 2012).

States, United Nations bodies and agencies, as well as other international and regional entities engaged in addressing transfers of illicit origin or supporting the recovery and repatriation of stolen assets. In particular, he intends to convene an expert consultation on the subject bringing together experts from all regions. In this regard, he has identified a core group of experts. The Independent Expert therefore requests the Council to consider allocating sufficient funds for this activity which he considers an important part of his efforts to carry out the mandate set on in resolution 19/38.<sup>65</sup>

58. The Independent Expert hopes, resources permitting, to convene the expert meeting and finalize the report for submission to the Council at the earliest possible time.

## VI. Conclusion

59. **The magnitude and growth of illicit funds generated by crime, corruption, embezzlement and tax evasion, as well as their socioeconomic implications, underscore the need for robust policy responses that will not only curtail these flows but also ensure that countries of origin sufficient are able to use the maximum available resources for the realization of economic, social and cultural rights in accordance with the obligations assumed under the relevant international human rights instruments.**

60. **In order to develop effective strategies for tackling the problem of illicit funds and ensuring their repatriation to the countries of origin, it is important to understand the methods and channels of illicit financial flows, which countries such funds originate from and where they are held, as well as existing legal instruments and other initiatives designed to curb these flows. This interim report, submitted pursuant to Human Rights Council resolution 19/38 has provided an overview of these issues. The final report of the Independent Expert on this issue will discuss in detail the impact of non-repatriation of illicit funds on development and the realization of human rights and will offer recommendations concerning strategies to combat illicit financial flows so as to ensure the application of the maximum available resources to the full realization of all human rights.**

61. **The Independent Expert looks forward to continuing his consultations and his dialogue with all stakeholders in order to generate sufficient information for a comprehensive study on this important subject as requested by the Council.**

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<sup>65</sup> In September 2012, the Independent Expert arranged a meeting of experts on the issue of illicit funds and human rights to generate information for the study requested in resolution 19/38, reflecting regional experiences concerning the impact of the non-repatriation of illicit funds to the countries of origin on the realization of human rights in such countries. However, the meeting was cancelled due to, inter alia, the insufficient resources OHCHR had been able to identify for it. It appears that the lack of an explicit request, in resolution 19/38, for such a consultation led to the statement of programme budget implications arising from the draft resolution not providing for such activity. According to the statement of programme budget implications, the preparation of the study requested in resolution 19/38 required only a three-month consultancy “to assist the Independent Expert with technical aspects of the research” and “conference services for translation of the study”.