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**Human Rights Council**

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Agenda items 3 and 5

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

**Human rights bodies and mechanisms**

 Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights - Progress report of Human Rights Council Advisory committee

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 I. Mandate and background

1. In Human Rights Council resolution 31/22, the Human Rights Council requested the Advisory Committee to conduct a comprehensive research-based study on the impact of the flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights, with a special emphasis on the right to development.

2. Among its other goals, the study was commissioned with a view to compiling relevant best practices and main challenges, and to make recommendations on tackling those challenges based on the best practices in question. The Advisory Committee was asked to present a progress report to the Human Rights Council at its thirty-sixth session for its consideration. The Advisory Committee was further requested to seek, if necessary, further views and the input of Member States, relevant international and regional organizations, the United Nations High Commissioner for Human Rights and relevant special procedures, as well as national human rights institutions and non-governmental organizations, in order to finalize the above-mentioned study. The Advisory Committee was also asked to take into account the final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development 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 (A/HRC/31/61). At its 17th session, the Advisory Committee established a drafting group composed of Mr. Mario Luis Coriolano, Mr. Mikhail Lebedev, Mr. Obiora Chinedu Okafor (Co-Rapporteur), Mr. Ahmer Bilal Soofi (Chairperson) and Mr. Jean Ziegler (Co-Rapporteur). Ms. Mona Omar joined the drafting group during the 18th Session of the Committee.

3. This report additionally draws on earlier UN-sponsored studies including:

4. The ‘Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development 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, Juan Pablo Bohoslavsky’ (A/HRC/31/61) [hereafter referred to as the “Final study”]

5. ‘Illicit financial flows, human rights and the post-2015 development agenda – Interim study 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, Juan Pablo Bohoslavsky’ (A/HRC/ 28/60) [hereafter referred to as the “Interim study”]

6. Schubert, Esther, ‘Illicit financial flows, tax and human rights’ Background paper, October 2015[[3]](#footnote-4).

7. ‘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, Cephas Lumina’ (A/HRC/22/42)

 II. Introduction and definition

 A. Definition of Illicit Financial Flows

8. As important as it is to the problems of under-development, poverty and the lack of realization of human rights around the world, the expression “illicit financial flows” (IFFs) is a term that has no single, universally accepted definition. The United Nations (UN) has, thus far, not expressly defined the term.

9. The emergent consensus, however, is that the term means much more than simply “illegal. Accordingly, definitions such as those offered by Global Financial Integrity (GFI), a research and advocacy organisation working to curb such flows, which conflate the term “illicit” and “illegal” and thus limit it to the “*illegal* movements of money or capital from one country to another”[[4]](#footnote-5) are now generally disfavoured including by the International Monetary Fund (IMF),[[5]](#footnote-6) the Organisation for Economic Cooperation and Development (OECD)/the G20,[[6]](#footnote-7) and the Tax Justice Network.[[7]](#footnote-8) Other abusive practices, such as forms of tax avoidance and transfer mispricing, are now seen as also within the ambit of the term IFFs. Even more strikingly, the United Nations Conference on Trade and Development (UNCTAD) has adopted a broader definition of IFFs that include activities “contravening the law or its spirit[[8]](#footnote-9)”. And what is more, the United Nations Economic Commission for Africa (UNECA) has defined IFFs to include “commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials[[9]](#footnote-10).”

10. Based on the foregoing, any useful definition of IFFs would necessitate a broader, two-tiered interpretation of the word ‘illicit’. In the first, ‘illicit’ would refer to funds which are illegally earned, transferred or utilized and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks. More specifically: funds relating to the proceeds of crime – for example, funds acquired through corruption; criminal activities; abuse of power including theft of state assets/ funds; market abuse; tax abuse and regulatory abuse, would be included.

11. In its second sense, ‘illicit’ would refer to funds from legitimate economic activity that become illicit due to the subsequent contravention or circumvention of laws in how those funds are handled or dealt with (A/HRC/22/42, para. 5). This includes all arrangements designed to circumvent the law or its spirit such as tax evasion, forms of tax avoidance, and forms of tax optimization schemes; as well as profit shifting by multinational corporations; trade misinvoicing and transfer mispricing. This definition is consistent with the one employed in the Final Study.

12. Finally, and perhaps more importantly, this definition with its inclusion of tax avoidance is in consonance with current politico-economic exigencies. Two recent ‘political’ events seem to indicate the increasing centrality of tax avoidance to a working definition of IFFs. The first is the political fallout from the Panama Papers; and the second is the creation of the Platform for Collaboration on Tax, a joint initiative of the IMF, OECD, UN and the World Bank. Thus, tax avoidance has clearly evolved into a significant political issue distinct of its twin (i.e. tax evasion) and any attempt to sidestep it in a study like this is untenable. This is particularly true as the majority of all illicit financial flows are related to cross-border tax transactions (Final Study; para 5), while corruption-based outflows are a very small fraction of the total (Interim Study; para 14).

 B. Estimates

13. Relying on trade data and balance of payments leakages for their December 2015 report, the research and advocacy non-profit, Global Financial Integrity, estimates that in 2013, $1.1 trillion left developing countries in illicit financial outflows. This highly conservative estimate does not pick up movements of bulk cash, the mispricing of services or many types of money laundering[[10]](#footnote-11). UNCTAD, meanwhile, endorses the French NGO CCFD-Terre Solidaire’s estimate of €800 billion worth of IFFs per annum[[11]](#footnote-12). Significantly, in its analysis of the three broad motivations driving IFFs – crime, corruption and tax abuse – UNCTAD argues that “only about a third of total IFFs represent criminal money, linked primarily to drugs, racketeering and terrorism. … [M]oney from corruption is estimated to amount to just 3 per cent. The third component, which accounts for the remaining two thirds of the total, refers to cross-border tax-related transactions, about half of which consists of transfer pricing through corporations[[12]](#footnote-13).” Comparatively, the GFI estimates that trade misinvoicing accounts for 83.4 percent of measurable IFFs on average[[13]](#footnote-14). The United Nations Economic Commission for Africa, on the other hand, estimates that the continent has lost more than $1 trillion in IFFs in the last 50 years and continues to haemorrhage over $50 billion per annum. The figure is understood to be a conservative estimate due to, first, the lack of accurate data for all African countries and second, the fact that some forms of IFFs – such as the proceeds of bribery and drugs/firearms and human trafficking – cannot be reliably assessed[[14]](#footnote-15).

 III. The non-repatriation of IFFs: overview of the problem

14. The effective repatriation of looted assets to the countries of origin remains instrumental to the global effort to support development, good governance, the enjoyment of all human rights, and the strengthening of the rule of law, around the world. The non-return of such funds contributes immensely to the violation of human rights (including social and economic rights) especially in developing countries. However, numbers show that only a tiny portion of illicit funds transferred abroad is effectively returned to the countries of origin. In the period 2006-2012, the total amount of assets returned by OECD States represented the 1.6% of those that remained frozen.[[15]](#footnote-16) Six years after the Arab Spring this trend remains: the looted States (Tunis, Egypt, Libya and Yemen) have only recovered 1 billion of the 165 USD billion stolen by their former dictators[[16]](#footnote-17).

15. Attempts to repatriate stolen assets most commonly imply undertaking long, complex and costly mutual legal assistance (MLA) procedures which, in the best scenario, may end up with the repatriation of only a portion of the misappropriated assets to the country of origin[[17]](#footnote-18). The burden of reaching a solution essentially relies on the good faith and the success of the cooperation between the concerned States[[18]](#footnote-19).

16. Proving the illicit origin of the stolen money often reveals to be an unsurmountable requirement in practice[[19]](#footnote-20). Difficulties in such procedures may lead a State to conclude extrajudicial agreements by means of which impunity is granted to those who looted the public funds in exchange of recovering a part of the assets[[20]](#footnote-21).

17. It is striking to see how the money that has been stolen and is urgently needed for development and the realization of all human rights is instead stalled in banks of developed countries that continue to make gains[[21]](#footnote-22). As long as the “dirty money” remains frozen, banks continue to charge their “captive clients” with particularly high management commissions.

18. The role played by banks as facilitators of money laundering and corruption go very often unnoticed. Domestic laws require them an enhanced scrutiny on political exposed persons (PEPs) but such laws are often not observed[[22]](#footnote-23). In addition, offshore jurisdictions provide a perfect regulatory set-up to those seeking to obscure links to money, with shell companies, nominee directors and secrecy[[23]](#footnote-24).

 IV. Best practices in the Return of Illicit Funds

19. A number of global best practices in the return of illicit funds can be discerned from the available evidence. If globally adhered to, these best practices will help in ensuring that countries of origin have much greater access to the necessary funds to ensure the enjoyment of human rights, including social and economic rights, in their jurisdictions.

20. The following are some of these best practices:

(a) Greater scrutiny of Politically Exposed Persons: The term “Politically Exposed Persons” (PEPs) was devised by the Financial Action Task Force (FATF) in 2003 to refer to individuals (or their family or close associates) who were or had been entrusted with a prominent public function[[24]](#footnote-25). FATF contended that such persons should undergo additional scrutiny since they were capable of abusing their position and influence to launder money or commit related predicate offences, including corruption and bribery, as well as conduct activity related to terrorist financing. The February 2012 revision to the FATF rules expanded the definition of PEPs to include domestic PEPs in addition to those in foreign jurisdictions.[[25]](#footnote-26)More significantly, the definition was extended to cover PEPs in international organisations[[26]](#footnote-27). Financial institutions and other professionals were charged with conducting this scrutiny[[27]](#footnote-28).

(b) Reversal of the Burden of Proof: This is the new requirement under money laundering and anti-corruption laws that an individual possessed of excessive wealth demonstrate that such wealth has a legitimate origin – has had some success in impeding IFFs. Further success may be achieved if destination countries accept foreign confiscation orders and provide legal and technical assistance to foreign jurisdictions[[28]](#footnote-29). This would be in consonance with Articles 31, 43 and 48(1)(f) of the UN Convention against Corruption[[29]](#footnote-30).

However, a few caveats are in order here. First, several jurisdictions still adhere to the requirement that the prosecution establish guilt beyond a reasonable doubt in criminal cases[[30]](#footnote-31). Second, such reversal also seems to run counter to the due process guarantees contained in the International Covenant on Civil and Political Rights[[31]](#footnote-32) – a point also articulated by Juan Pablo Bohoslavsky with respect to freezing assets or prosecuting those suspected of corruption or of handling or facilitating crime-related financial flows[[32]](#footnote-33).

(c) Pro-repatriation laws in destination countries: Haitian president Jean-Claude Duvalier was believed to have amassed over $300 million by skimming government contracts. This money was deposited in Swiss bank accounts. When Duvalier was deposed by popular revolt in 1986, Haiti asked Swiss authorities to freeze $5m but couldn’t secure its return since it failed to mount a legal case. Duvalier would have won the money back by default in 2002 when the statute of limitations kicked in had Switzerland not invoked constitutional powers which allow it to freeze assets in order to safeguard national interests. A 2011 Swiss law which reverses the burden of proof and a court decision have paved the way for the return of the money to the country of origin. A 2015 Swiss law that allows for the repatriation of funds held in Switzerland by foreign dictators has also been helpful in the same regard.[[33]](#footnote-34) However, several provisions of the said law are open to entirely subjective interpretation that may be construed in derogation to the rights and interests of

the countries of origin[[34]](#footnote-35). Equally problematic are Article 15 of the Swiss law, which sets out criteria for “the presumption that the funds are of illicit origin”[[35]](#footnote-36) and Article 17, which prescribe conditions for repatriation of funds[[36]](#footnote-37). Accordingly, such pro-repatriation laws merit the introduction of appropriate and objectively determined safeguards that will protect the interests and rights of the countries of origin.

(d) Adequate training and funding of law enforcement officers: The forensic audit skills required to trace monies held by multiple shell companies and parked in Special Purpose Vehicles across multiple jurisdictions are not easily available, particularly in developing countries. While some developed countries are trying to build domestic capacity, effective asset recovery requires sufficient investment, both financially and in staff (training for law enforcement officers, dedicated staff with sufficient expertise and funding to carry out investigations).[[37]](#footnote-38)

(e) Greater transparency and exchange of information: To combat IFFs, law enforcement authorities must be able to access and exchange relevant information about activities, assets or incomes of individuals, companies and legal entities and arrangements in foreign jurisdictions. In the specific area of anti-money laundering and counter-terrorism financing efforts, the Egmont Group comprising 152 Financial Intelligence Units is an example of a global platform whereby expertise and financial intelligence is shared with a view to combating both crimes[[38]](#footnote-39).

(f) Robust, issue-specific and cross-jurisdictional institutional and professional networks: Restricting the ambit of their anti-IFFs operations to specific issues allows such networks to focus on the details, leverage their specializations, learn from each other’s successes and failures and reduces the potential for politically-motivated conflict in large groups. One such example is found in Russia, where the General Procuratura located in the Federal Prosecutor’s office promotes practicable international cooperation through formal and informal patterns of interaction between various national contact centres. This cooperation extends to the identification, arrest, confiscation and restitution of assets accumulated as result of corruption.

(g) Harmonisation of global tax strategies: Base erosion and profit shifting (BEPS) refers to aggressive tax avoidance strategies practiced by multinational corporations (MNCs). By exploiting gaps and mismatches in tax rules, these MNCs artificially shift profits to no- or low-tax jurisdictions, thereby eroding the tax base of the host country (something that inhibits a country’s ability to guarantee the enjoyment of human rights to its people).[[39]](#footnote-40) Often these host countries are poor South countries. The harmonisation of tax strategies across the globe; anti-abuse clauses in all tax treaties and enhanced disclosure requirements and transparency in both source and destination countries would eliminate the incentive for MNCs to shift profits from one jurisdiction to the next[[40]](#footnote-41). For, if all jurisdictions offered the same or similar tax rates, there would be no incentive to move revenues around as a tax evasion/avoidance strategy. Similarly, if all national tax administrations worked together to ensure effective compliance – i.e. taxpayers pay the correct amount to the right jurisdiction – the opportunities for MNCs to engage in BEPS (and to thus author IFFs) would be severely diminished. A few steps in this direction are already underway, including efforts by the G20 Leaders who have called for an Inclusive Framework for Base Erosion Profit Shifting implementation;[[41]](#footnote-42) a new joint IMF/World Bank initiative on strengthening tax systems in developing countries; and the Addis Ababa Tax Initiative designed to dramatically increase donor support for building tax capacity in poorer countries[[42]](#footnote-43).

(h) Promotion of global anti-corruption and tax reform initiatives through greater civil society participation[[43]](#footnote-44): The UN Convention against Corruption (UNCAC) adopted in 2004 is a high-profile example of the mobilisation of states as well as civil society, NGOs and grass roots communities to a common end: the combating of corruption. Significantly, while the UNCAC holds states primarily responsible for rooting out corruption and effective international cooperation, it also places similar responsibility on individual and groups comprising civil society to provide the support states require to achieve such ends.[[44]](#footnote-45)

 V. National legislation: Switzerland

21. The case of Switzerland is very illustrative as it shows that having an adequate domestic legal arsenal and political willingness does not necessary lead to the effective repatriation of the stolen assets[[45]](#footnote-46).

22. With approximately 26% of the world market of offshore private assets under management, the country is one of the major global financial centres. With a particularly favourable national legislation on banking secrecy and lax anti-laundering laws, for many years, Switzerland was a “commercial paradise” for the banking sector. IFFs, including the personal fortunes illicitly amassed by foreign dictators, indiscriminately flowed into Swiss banks. Banks acted with complete impunity and managed to avoid any kind of public control or scrutiny[[46]](#footnote-47).

23. Today, in theory, Swiss national anti-money laundering laws oblige the banking sector to systematically scrutinize the origin of funds of dubious origin and to report of any suspicious cases to the Swiss intelligence financial unit[[47]](#footnote-48). Regulations also provide for an enhanced control of politically exposed persons (PEPs) suspected of having enriched themselves by illicit means.

24. However, major obstacles to enforce anti-money laundering legislation still remain in practice. Regulations are poorly respected and major international scandals involving the Swiss financial market continue to come to light. In the opinion of many experts, the Swiss bank reporting system simply does not work: “it is quite obvious that the rules exist, but they are applied with insufficient care. This also means that regulators are not doing their job”[[48]](#footnote-49). Thus, Swiss banks continue to benefit all-too-often from judicial impunity.

 A. The compliance of Swiss Banks with anti-money laundering legislation

25. Swiss banks have been traditionally granted with the autonomy to set their own operating rules[[49]](#footnote-50). A financial market supervisory authority, the FINMA, is in charge of monitoring all institutions holding a banking licence in Switzerland. Despite being a public control body, the FINMA does not belong to the Federal Administration. Its action is apparently independent from external interferences but not from the banks. The Board of Directors is mainly composed of former bank managers as well as most part of its staff.[[50]](#footnote-51) Furthermore, the FINMA is financed by the very same institutions that are under its own supervision: the banks.[[51]](#footnote-52)

26. By law, the FINMA is endowed with a great margin of discretion. This includes the capacity to refuse collaboration with criminal prosecutors or any other national authorities when it “is retained to be incompatible with a procedure under way or with the aims of surveillance of financial markets”. The FINMA can also deny “information not available to the public” or refuse to handle in any documentation “to preserve its own procedure of supervision” [[52]](#footnote-53).

27. FINMA’s annual reports do not provide full information on cases of violation of the bank’s due diligence particularly regarding PEPs. Even when sanction procedures are considered, information on the entities under investigation, the final outcomes of such procedures or sanctions imposed are only partially released[[53]](#footnote-54).

28. A 2016 FAFT evaluation report on Switzerland concluded that the process of reviewing existing customers in the banking sector “is unsatisfactory overall”[[54]](#footnote-55). More specifically, sanctions imposed by the supervisory authorities were considered insufficient to prevent further violations[[55]](#footnote-56). Doubts on the efficacy and credibility of the whole anti-laundering dispositive are also raised by civil society.

29. In fact, lack of transparency on accountability procedures undertaken against the banks may lead to the conclusion that they are still accepting “dirty money” “bellow the radar” and that such activities continue to go unnoticed for the general public[[56]](#footnote-57). This situation may show that the financial sector has a great power and lobbying capacity as to afford not taking seriously preventive measures or necessary cooperation with public authorities.

 B. Return of stolen assets

30. In relation to the return of stolen assets, the situation is absolutely striking. Hundreds of millions of US dollars of illicit provenance remain frozen in Switzerland[[57]](#footnote-58). The Swiss government claims that it is seeking − honestly and vigorously − to return these funds to the countries of origin[[58]](#footnote-59). It also claims that the lack of restitution is eroding the good reputation and integrity of the Swiss financial centre. At cantonal level, there is a similar willingness. In Geneva, for example, the millions of IFFs laundered through the housing market have led to a housing crisis that disproportionally affects the working class and the poorest sectors of the society.

31. A number of legal matters relating to the return of stolen assets are currently pending before the Swiss courts. National legislation provides a number of means to appeal at all stages of the proceedings. Procedures are protracted and a number of lawyers are making huge profits from assisting criminals to hide and benefit from IFFs. In the Abacha case, for example, those assisting the former dictator in avoiding the restitution of the stolen assets took a total of USD 17 million[[59]](#footnote-60). They are competent and efficient in delaying tactics; that partially explains why the assets stolen by the Ben Ali/Trabelsi and the Mubarak’s clans in 2011 have not been returned to the countries of origin yet.

32. The 2015 *Foreign Illicit Assets Act* (FIAA) was passed to facilitate the restitution of illicit assets also in cases where MLA is not feasible or fails. However, it remains to be seen the impact of this specific regulation in practice. The law may facilitate the release of illicit assets frozen when a solution of compromise is reached between the affected state and the person suspected of misappropriation. Such arrangements are controversial, since they also preclude any legal proceedings initiated in the country of origin as well as anti-money laundering investigations taking place in Switzerland[[60]](#footnote-61).

 VI. Case-studies on the repatriation of IFFs

33. The following examples show the role financial institutions play by blatantly accepting suspicious funds. Banks and law professionals profit from these protracted and complex processes to make huge profits at the expense of the money needed for development and the enjoyment of all human rights in the affected countries.

 A. Nigeria

34. This is one of the exceptional cases in which a looted state managed within a reasonable period of time to successfully repatriate much of the IFFs transferred outside its shores. As it is well known, the former dictator Sani Abacha and his entourage managed to misappropriate over 2 USD billion of state funds[[61]](#footnote-62). Money was systematically diverted from the Central Bank to banks in the UK, Jersey, Switzerland, Luxembourg, Liechtenstein, Austria and the US. Only in Switzerland, the Abacha’s clan had a total of 130 bank accounts.

35. In 2000, investigations opened by the Swiss authorities resulted in a report incriminating 14 banks for lack of compliance with its due diligence duties under anti-money laundering legislation. The report however strikingly concluded that the “existing regulatory framework was in principle sufficient and even extensive if internationally compared” and that the Swiss financial center had “appropriate rules designed to avoid undesirable funds”[[62]](#footnote-63).

36. In 2004, thanks to the action of the Swiss General Attorney of Geneva Bernard Bertossa, the greater part of the assets frozen were repatriated to Nigeria. Switzerland responded favourably to Nigeria’s request for mutual legal cooperation. In addition, criminal investigations on money laundering were opened pursuing article 305 ff. of the Swiss Criminal Code. By considering that the structure set up by Abacha and his accomplices constituted a “criminal organization” the Swiss courts endorsed that the illicit origin of the assets may be presumed under certain circumstances[[63]](#footnote-64).

37. In 2016, Nigeria tried to recover another USD 321 million that were confiscated in Switzerland. However, after an extra-judicial agreement reached between the government of Nigeria and the family of the former dictator, Switzerland agreed to return part of the funds to the government while simultaneously dropping criminal proceedings against Abba Abacha, the son of the deceased dictator, who waived all further claims he had to the assets[[64]](#footnote-65).

 B. Tunisia

38. For more than 20 years, the former dictator of Tunisia diverted public funds and public properties for their own benefit. According the World Bank, more than 21% of the profits generated by Tunisia’s private sector were controlled by the clan[[65]](#footnote-66). Ben Ali and his accomplices used public institutions as tools to favour their private business and manipulated the law to serve its personal interest and to punish those who opposed to them.

39. In 2011, MLA proceedings to clarify the origin of the 61.75 million USD blocked in Switzerland were immediately undertaken. The FINMA also announced sanctions and stated that the identity of the banks involved in the looted of Tunisian public treasure would be made public. The list was never released, nor information on any eventual sanction imposed to any of the banks suspected of accepting and hiding the money of Ben Ali and Mubarak’s clans were released. In 2013, the FINMA concluded that only in 4 of the 22 cases examined it was necessary to initiate a binding “administrative” procedure to get information on the role played by the banks in “grave wrongdoings”[[66]](#footnote-67).

40. In March 2015, Tunisia filed a civil action claiming to HSBC 114 million CHF plus interest for having accepted the fortune of Ben Ali’s brother in law. The funds of illicit origin would have transited through HSBC accounts in the period where the corruption was particularly notorious in Tunis. Reportedly, the own banks compliance body had signalled this fact to the managers[[67]](#footnote-68).

41. After six years of proceedings only a quite pyrrhic sum (USD 250.000) has been repatriated[[68]](#footnote-69). An early order to return to Tunisia 40 USD million whose criminal origin had been sufficiently established was however overturned on appeal by a court which found a violation of the accused right to be heard.

42. The repatriation of the funds will be possible once final and enforceable judgments confirming the illicit origin of the frozen assets have been issued or concluded in Tunisia. The Tunisian Government has to prove the acts of embezzlement and corruption committed by Ben Ali and his accomplices. But freezing orders have a limited duration, legal procedures are too slow and crimes that are at the origin of the request of repatriation are subject to statute of limitations.

 C. Malaysia

43. This case refers to the alleged misappropriation of USD 4 billion from a state-owned Malaysian investment fund set up in 2009 to promote economic and social development projects. Dozens of interconnected people, companies and governments have been identified to have a connection with the fund, which mainly operates from the Caiman Islands. Malaysia has rejected the Swiss request for legal assistance claiming that criminal investigations are being conducted by its own authorities[[69]](#footnote-70).

44. In Switzerland, criminal investigations on bribery and money laundering revealed that around 800 million USD were illicitly deviated through three Swiss banks (reportedly, BSI SA Bank, Bank Coutts &Co. and Falcon Private Bank)[[70]](#footnote-71). The FINMA withdrawn the banking licence to all of them for flagrant violations of anti-money laundering obligation and has confiscated the illicitly gained profits to Falcon (2.5 million CHF) and Coutts &Co (6.5 million CHF). Only in the case of Coutts were criminal proceedings also opened for the suspected deficiencies in the bank’s internal organisation and reportedly the FINMA is considering opening enforcement proceedings against the responsible employees[[71]](#footnote-72).

 VII. The negative impact of the non-repatriation on the enjoyment of human rights

45. The lack of repatriation of IFFs not only contributes to increase the fracture between developed and developing countries. It also hinders the socio-economic development of the developing countries especially, as well as their capacity to deliver basic social services to their citizens. As consequence, the citizenship’s confidence in the governments and the rule of law is eroded, and corruption and poverty perpetuated.

 A. Non-Return jeopardizes the enjoyment of economic, social and cultural rights

46. IFFs reduce the resources to be committed to social and economic investment and infrastructures, jeopardizing the state’s ability to fulfil economic, social and cultural rights to the maximum of its available resources. Diversion of funds through corruption particularly impacts on the socio-economic rights of the population of the poorest States, which may encounter difficulties to fulfil their minimum core obligations of the most basic rights: the right to food, the right to an adequate standard of living, and the rights to health and education[[72]](#footnote-73).

47. The negative consequences derived from the lack of repatriation of IFFs for the affected population are evident. When the population is deprived of the minimum quality standards indispensable for survival, not only civil but also the economic and social rights of the population are violated. Such violations undoubtedly have a direct impact on the dignity of the citizens, whose most fundamental rights are deliberately curtailed.

48. In Tunis, the return of the assets already frozen in several countries would contribute to alleviate effects on the population of the increasing fiscal pressure caused by the country’s deteriorating economic situation. The repatriation of the looted money to Yemen may certainly contribute to ameliorate the extreme living conditions of the population in a country with one of the lowest rates of human development[[73]](#footnote-74).

 B. Non-Return hinders the realization of the right to development

49. The non-repatriation of IFFs deprives countries of origin of the much needed additional resources for public investment; jeopardising its development prospects. Developing countries lose billions of dollars every year through IFFs. In Africa, it is estimated that over the past 50 years, the continent has lost 1 trillion USD in IFFs. This amount is equivalent to all the official development assistance received in the same timeframe[[74]](#footnote-75).

50. Furthermore, lack of repatriation of IFFs creates immense human suffering and clearly undermines development. Countries lose capital for investment and revenue that could have been used to financing development programmes. These outflows pose a particularly serious concern to countries with high levels of poverty and increasing resource needs due to population growth. Reduction of official development assistance due to the global economic and financial crisis is compelling even more developing countries to look to their own resources to fund its development agendas[[75]](#footnote-76).

51. Deprived of important sums of assets, and from the revenues of natural resources, developing countries are forced to reduce investment in key development sectors or to increase their debt burden to introduce the necessary policies at the domestic level. Lack of public policies and investment on social and economic programs disproportionately affects the weakest sectors of the population.

52. IFFs also undermine state capacity and governance. People and corporations behind IFFs usually get involved in corruption acts to transfer the proceeds of bribery and abuse of power. By preventing the proper functioning of regulatory institutions they compromise state officials and institutions. This may reverse all efforts to reinforce state structures and to consolidate the rule of law.

53. Countries which are rich in natural resources and countries with inadequate or non-existent institutional architecture particularly attract IFFs. In a MoU on the modalities for the return to Nigeria of stolen assets confiscated by the UK it was acknowledged that “the embezzlement of large amounts of state funds considerably reduced the resources available to the government of Nigeria to provide social services or invest in infrastructure and economic development in order to move the country to greater prosperity”. The plundering of national revenues may thus lead to a violation of right of the people to freely dispose of their natural wealth and resources[[76]](#footnote-77).

 C. Non-Return reinforces impunity and perpetuates corruption

54. The non-repatriation of the stolen assets sends the wrong message that cases of grand corruption will remain unpunished. Impunity must be avoided particularly where national resources and public funds have been systematically plundered or tolerated by those in the government or occupying high levels of power as to cause damage and affect the fundamental rights and freedoms of the population[[77]](#footnote-78).

55. Despite the concept of crimes against humanity is traditionally linked to grave or systematic violations of civil and political rights, there is no doubt that the international community has an interest in putting an end to impunity of economic and financial crimes, particularly those that can be qualified as grand corruption. Criminal organizations emerged from “kleptocratic” regimes, i.e. those whose only objective is the pillage of the state’s resources cause a direct damage to the State[[78]](#footnote-79).

56. It is not audacious then to affirm that there is a connexion between crimes against humanity and the systematic pillage of the public resources of a country. Corruption and abuse of power when systematically orchestrated from the government lead to an unjustified increase of the debt burden and curtails the socio-economic progress and sustainable development of the country.

57. Economic crimes must be an integral part of transitional justice frameworks. Amnesties, immunities or statutes of limitations should not serve to guarantee impunity to those responsible of violations of economic, social and cultural rights which may amount to crimes against humanity. Accountability for serious human rights violations and economic crimes committed under past regimes must be prosecuted as amnesty in cases of grand corruption contributes to the weakening of processes of transition to democracy.

 VIII. Main Challenges inhibiting the return of illicit funds

58. As was noted earlier, the return of illicit funds expatriated mostly from developing countries has too often met with difficulty and ineffectiveness. The main challenges that inhibit the return of these funds are as follows:

A. Lack of political will: Repatriation involves the return of funds that have, over time, become imbricated in the economy of the destination country. For some, “lax financial regulation” in some destination countries is a deliberate attempt to compete with offshore financial centres (OFCs) for illicit funds and the negative discourse around OFCs is intended to skew the competition[[79]](#footnote-80). The withdrawal of these funds, thus, would require the destination countries taking action against powerful domestic interest groups such as, for example, financial institutions[[80]](#footnote-81) and real estate developers, which is far harder than blaming island nations far away:

(i) Benefits of IFFs to Local Property Markets: Illicit funds are now key to shoring up real estate markets in many places, including London (UK), New York (US) and Vancouver (Canada). The impact of their repatriation would not just be limited to construction- and property finance-related industries but also manifest itself in decreased spending power available to most consumers in economies of these destination countries.

(ii) Benefits of IFFs to Local Financial Markets: In 2009, then chief of the UN Office on Drugs and Crime Antonio Maria Costa revealed that at the height of the 2008 financial crash, drug money was pumped into the global financial system to keep it afloat[[81]](#footnote-82). Foreign funds, including IFFs, have also been key to shoring up all-too-many credit-driven, developed, economies due to the latter’s lack of domestic savings that would finance their economic growth.[[82]](#footnote-83) Thus, the hasty withdrawal of any funds (licit or illicit) due to the need to repatriate them to their countries of origin would severely affect the economies of many of the developed countries.

(iii) Benefits of IFFs to Local Professional Service Providers: Many jurisdictions have specialized in the provision of financial and legal services to those who are involved in the generation and facilitation of IFFs.[[83]](#footnote-84) However, this list of IFFs-friendly countries/jurisdictions includes the Switzerland, Hong Kong and Singapore, as well as USA states such as Delaware, Nevada and Wyoming.[[84]](#footnote-85) Thus, the hasty repatriation of the illicit funds which are ‘banked’ in these jurisdictions would threaten the stability and prosperity of the economies of these jurisdictions.

B. **Difficulty of establishing a nexus between IFFs and crime and/or civil wrongdoing**: In the case of illicit flows resulting from criminal conduct, establishing a clear link between the crime committed in the country of origin and the proceeds of crime in the destination jurisdiction is inordinately difficult[[85]](#footnote-86). This difficulty is compounded by the fact that the link – the proof – needs to be incontrovertible if repatriation is to be ordered. Where the IFFs stem from activities which qualify as civil wrongdoings, repatriation is all the more difficult since there is no clearly established international convention for doing so. As noted in Section V, while instruments such as the UNCAC urge states to “consider” cooperating in such cases too, this provision remains of an advisory – and thus limited – utility.

C. **Difficulty of establishing beneficial ownership and/or piercing the corporate veil**: Whether IFFs stem from crime, corruption or tax abuse, many – if not most – transactions are conducted behind several corporate veils and routed through multiple jurisdictions to extinguish traces of ownership[[86]](#footnote-87). As such, it is too often very hard to conclusively identify the beneficial owner of a company.

D. **Debates over conditionality or the “human rights-based approach”:** This is rapidly shaping into one of the most divisive issues in the repatriation of illicit funds. Advocates for conditionality – particularly in the destination countries in the global North – insist that the return of funds be conditioned on promises that the country of origin will use them to satisfy human rights obligations[[87]](#footnote-88). Predictably, countries of origin in the global South are vehemently opposed to the idea of conditionality attached to the use of their own funds[[88]](#footnote-89). Further, they contend that they should be able to design and fund development projects based on their national priorities – not on Western notions of ‘appropriate’ human rights projects. The notion is thus a highly problematic.

 IX. The importance of international cooperation in the return of funds of illicit origin

59. IFFs carry serious economic and human rights consequences that cannot be redressed without concerted international cooperation (and even solidarity). For example, the African Commission on Human and Peoples’ Rights notes that both MNCs and individuals from Africa drain billions of US dollars every year from the continent[[89]](#footnote-90). Unless all countries commit to significantly more coordinated global action to address loopholes, weak laws, and monitoring across jurisdictions, many such countries will continue being heavily drained of their revenue potential.

60. The return of IFFs derived from tax abuse, criminal activity and/or corruption depends in part on the forensic audit skills and strong state prosecution that some countries of origin, particularly developing countries, lack. This need is exacerbated where law enforcement authorities lack the ability to prosecute transnational crime[[90]](#footnote-91) and criminal syndicates and politicians control or have significant influence over the legal and state authorities in these source countries. The Egyptian Initiative for Personal Rights, for example, points to the capture of judiciary by the corrupt elements and argues that apart from building the capacity of national courts, the international community should also develop a mechanism to address the full or partial failure of the local judiciary[[91]](#footnote-92). Finally, repatriation is also exceedingly difficult where the underlying wrongful act is civil in nature (rather than criminal).

61. In many cases where IFFs are routed via multiple jurisdictions to their eventual destination, repatriation also requires engagement with multiple legal regimes. Without greater international cooperation, it will be even more difficult for many countries of origin to trace IFF flows and meet the standards of proof required to effect repatriation. There will also be a host of procedural issues: in Jamaica, for example, domestic courts necessarily address the issue of restitution under local statutes. However, the procedural law does not differentiate between residents and non-residents when it comes to victims and third-party claimants, thus creating problems regarding witness attendance and the taking of admissible evidence[[92]](#footnote-93). Further, the criminal networks and politicians who control state and legal authorities in some of these countries of origin will continue to facilitate IFFs unless destination countries recognise their primary responsibility in preventing such crimes against humanity and head off IFFs from their countries.

62. In their ostensible competition for foreign investment, speculative financial flows and/or individual wealth, poor countries are increasingly pitted against each other in needless “tax wars” that do little more than eventually shrink almost all of their tax bases, distort markets and lead to a regulatory race to the bottom[[93]](#footnote-94). Greater international cooperation can allow poor countries to resist the temptation to institute such ‘beggar-thy-neighbour’ policies and maintain a common minimum standard to protect all of their respective markets and tax bases.

63. In order to prevent IFFs, all stakeholders need to be equally committed to both South-South and North-South cooperation. The necessity for North-South cooperation stems from the fact that the final destinations of almost all IFFs are, almost without exception, either rich Western countries or their satellites[[94]](#footnote-95). This point is picked up by the Independent Expert in Para 9 of his Final Study, when he notes that “… many of the world’s most important secrecy jurisdictions are developed countries, which have historically been overlooked in their role in facilitating tax evasion” and IFFs. Further, a 2014 OECD report noted: “… without action, OECD countries are at risk of becoming safe havens for illicit assets from developing countries[[95]](#footnote-96).” Unless secrecy jurisdictions and destination countries commit to doing all that they can to prevent IFFs landing on their shores, the ‘safe haven’ charge is likely to stick.

64. South-South cooperation is also critical as it will, first, arrest regional beggar-thy-neighbour taxation policies and anti-corruption policies by enhancing cooperation, presenting a common front, and reducing harmful competition. Second, this kind of cooperation could conceivably lead to the formation of regional economic blocs focused on this issue that would tend to strengthen the negotiating positions of these poorer countries vis-à-vis the relevant MNCs and their countries of origin[[96]](#footnote-97). This will address the fundamental imbalance of wealth and power between these actors.

 X. Conclusions and recommendations

65. Without effective repatriation of the stolen assets, developing countries and countries in transition to democracy are deprived of very much needed resources, and the momentum for undertaking the economic and social reforms, necessary for bolstering development, is being missed. The delaying tactics of governments and banks, as well as attempts to justify hindrances to the effective return of IFFs, are not only reproachable from a moral point of view but also politically and economically inacceptable.

66. The fact that those countries who struggled for democracy during the Arab Spring had not been able to recover the money looted by its former dictators is scandalous. Stolen assets must be effectively returned not only because those resources are urgently needed, but also due to its highly symbolic value. The international community must urgently send a strong message: that corruption promoted by the highest levels of the State cannot be tolerated and will not remain unpunished.

67. States must cooperate in good faith to facilitate the repatriation of IFFs. They must enact proactive legislation and promote policies and practices aimed at facilitating the smooth and prompt return of the assets to the countries of origin. The international community must struggle to curve depredatory financial practices which lead to human rights violations and contribute to erode the rule of law.

68. The HRC Advisory Committee recommends that Member States:

 (i) Ensure the prompt and unconditional repatriation of funds of illicit origin to the countries of origin.

69. A renewed decisive and pro-active global commitment is needed to tackle the phenomenon of IFFs and their ensuing negative impact on human rights and the right to development. States must take urgent action to push forward the procedures aimed at the recovery of stolen assets. They must adopt all measures needed to prevent the plundering of public assets to the benefit of private individuals or entities. Corruption and other practices that tend to maximize profits by contouring the spirit of the law must be curtailed. Policies to end corruption and money laundering must be decisive and preventive measures must be effective and implemented in practice.

 (ii) Ensure that crimes that are at the origin of IFFs and grand corruption are adequately sanctioned, and do not remain unpunished or subject to statutes of limitations.

70. Impunity for those who systematically and massively plunder public resources is unacceptable. Those responsible of grand corruption must be made accountable and amnesty laws should not be misused to contour justice. Under certain circumstances, financial crimes with transnational implications should be prosecuted at international level and not be subject to statute of limitations. States should consider ways to qualify as punishable international crimes, acts of corruption that are carried out systematically and have a real impact on the social and economic well-being of the population, i.e. lead to the dismantling of social services hindering thereby the economic and social progress.

 (iii) Ensure that banks and financial intermediaries involved, notably those specialized in asset management, are made accountable for their involvement in IFFs.

71. States must urgently ensure that banks and other financial intermediaries acting under their jurisdiction carry out their business with due diligence. They should effectively monitor their compliance with all preventive measures envisaged at national level and make banks and banks managers accountable in cases of violation. Criminal sanctions must be envisaged and they must be proportional to the gravity of the case. States must ensure that financial intermediaries are pro-actively taking actions to fight corruption and money laundering. Banks must provide proofs of the actions that are being taken to avoid “dirty money”. They must ensure that regulatory authorities undertake all measures to guarantee banks due diligence and accountability and that they are implement them in practice; they must also effectively demonstrate the impartiality and the independence in its functioning.

 (iv) Support the suppression of tax havens and the regulation of offshore companies.

72. The problematic surrounding asset recovery processes should be addressed as part of a broader international dialogue on the reform of the international financial system. States should actively support global initiatives aimed at curtailing those practices in the financial sector that favour IFFs. More specifically, they must join the OECD struggle against tax havens and offshore companies by supporting the following measures: a) the setting up of a publicly available international register of offshore companies; b) prohibiting anonymous shares in limited liability companies; c) making the ultimate beneficiary nominee of shares publicly known.

1. Sections (Obiora Okafor): I,II, IV, VIII and IX. The Co-rapporteur would like to thank Ms. Sanaa Ahmed, of the Osgoode Hall Law School, Toronto, Canada, for her assistance in the preparation of this report. [↑](#footnote-ref-2)
2. Sections (Jean Ziegler): III, V, VI, VII and X. The Co-rapporteur would like to thank Ms. Milena Costas Trascasas for her assistance in the elaboration of these sections. [↑](#footnote-ref-3)
3. Available at [http://www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlowsConsultation/BackgroundPaperFinal.pdf](https://www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlowsConsultation/BackgroundPaperFinal.pdf); accessed August 2, 2016 [↑](#footnote-ref-4)
4. http://www.gfintegrity.org/issue/illicit-financial-flows/ [↑](#footnote-ref-5)
5. Arezki, Rabah, Rota-Graziosi , Gregoire&Senbet, Lemma (2013) “Capital Flight Risk” in *Finance & Development*, Vol. 50, No. 3[.](file:///C%3A/Users/ookafor/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.IE5/LL5NZDRN/) Available at http://www.imf.org/external/pubs/ft/fandd/2013/09/arezki.htm [↑](#footnote-ref-6)
6. . <https://www.oecd.org/tax/beps/beps-about.htm>&<https://www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm> [↑](#footnote-ref-7)
7. http://www.taxjustice.net/topics/inequality-democracy/capital-flight-illicit-flows/ [↑](#footnote-ref-8)
8. . UNCTAD (2014) Trade and Development Report, 2014. Available at <http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf> p 173 [↑](#footnote-ref-9)
9. UNECA (2016) Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa; available at [http://www.uneca.org/sites/default/files/PublicationFiles/iff\_main\_report\_26feb\_en.pdf p 9](http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf%20p%209). The UNECA was mandated to establish the High Level Panel on Illicit Financial Flows from Africa by the 4th Joint African Union Commission/United Nations Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development held in 2011. The chairperson of the panel was former South African president Thabo Mbeki. [↑](#footnote-ref-10)
10. . http://www.gfintegrity.org/issue/illicit-financial-flows/; accessed August 2, 2016.In its December 2015 report *Illicit Financial Flows from Developing Countries*: *2004* – *2013*, GFI estimated that developing and emerging countries lost $7.8 trillion during the period under study. IFFs grew at an average rate of 6.5 percent per annum during this period and topped $1 trillion in the year 2011. The authors of the report justify the selection of the 2004-2013 period for analysis by pointing to the fact that this is the most recent 10-year period for which data are available (p vii; 5). Available at <http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf>. [↑](#footnote-ref-11)
11. UNCTAD (2014) “Urgent global action needed to tackle tax avoidance”, available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&Sitemap\_x0020\_Taxonomy=CSO [↑](#footnote-ref-12)
12. UNCTAD (2014) Trade and Development Report, 2014; available at <http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf>, p 173 [↑](#footnote-ref-13)
13. GFI (2015) *Illicit Financial Flows from Developing Countries*: *2004* – *2013* p 1; available at <http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf> [↑](#footnote-ref-14)
14. UNECA (2016) Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa; available at [http://www.uneca.org/sites/default/files/PublicationFiles/iff\_main\_report\_26feb\_en.pdf p 15](http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf%20p%2015). [↑](#footnote-ref-15)
15. Between 2006 and 2009, 277 million out of 1.225 USD billion frozen; and between 2010-2012, 147.2 million out of 1.398 billion USD frozen. OECD, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, 2014, p. 88. [↑](#footnote-ref-16)
16. Transparency International, *Lost Billions: Recovering public money in Egypt, Libya, Tunisia and Yemen*, 2014, p. 1. [↑](#footnote-ref-17)
17. Generally speaking, frozen assets can only be returned to the country of origin after the judicial authorities demonstrate the illicit origin of the assets, normally on the basis of information obtained within the framework of MLA. [↑](#footnote-ref-18)
18. There is no any structured international process or established body to facilitate asset recovery processes. In the framework of the UNCAC, an open-ended Intergovernmental Working Group on Asset Recovery was set in 2006 to provide advice and assisting the Conference of States Parties. [↑](#footnote-ref-19)
19. M. Schnebli, “Lessons learned from the past: Today’s response from requested countries”, in G. Fenner, *Emerging Trends in Asset Recovery*, 2013, p. 51. [↑](#footnote-ref-20)
20. In 2016, following a reconciliation agreement concluded by the Egyptian government criminal proceedings against several persons connected with Mubarak were dropped. As consequence, CHF 180 million that were frozen in Switzerland were released without any condition. Proceedings on money laundering in Switzerland were also precluded. Swiss Confederation “Arab Spring: Attorney General meets Egyptian authorities in Cairo”, 17.12.2016. [↑](#footnote-ref-21)
21. A report of the US Senate showed how professionals and financial institutions were used to bring large amounts of suspect funds into the US to advance their interests. Permanent Subcommittee of Investigations, *Keeping foreign corruption out of the United States: four cases histories*, 2010. [↑](#footnote-ref-22)
22. Banks are among the biggest facilitators of tax dodging by other corporations. The list of European banks setting up the offshore companies is headed by UBS and Credit Suisse. See: Oxfam International, *Opening the vaults. The use of tax havens by Europe’s biggest banks*, March 2017, p. 8. [↑](#footnote-ref-23)
23. As the UN Independent Expert on the Promotion of a Democratic and Equitable International Order observes: “Collusion between the world’s biggest banks, specialized law firms, and consulting and accounting firms, has led to a global system designed to hide money and avoid taxes by virtue of secretive offshore structures” (A/71/286, par. 13). [↑](#footnote-ref-24)
24. Available at [www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF Recommendations 2003.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf); p 14. Article 52 of the UN Convention against Corruption (2004) echoes this definition but in far less detail. Available at <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; p42 [↑](#footnote-ref-25)
25. . Foreign PEPs are defined as individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. FATF (2013) Politically Exposed Persons (Recommendations 12 and 22), p 4-5; available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> [↑](#footnote-ref-26)
26. International organisation PEPs are persons who are or have been entrusted with a prominent function by an international organisation, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions. While even the 2003 version of FATF’s 40 recommendations advised caution on dealings with PEPs, the focus was on foreign PEPs. FATF (2013) Politically Exposed Persons (Recommendations 12 and 22), p 3; available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> [↑](#footnote-ref-27)
27. FATF (2013) “FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)”. Available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> p5 [↑](#footnote-ref-28)
28. . Illicit Financial Flows from Developing Countries: Measuring OECD responses, p 16 [↑](#footnote-ref-29)
29. Said article urges states to consider helping each other out in investigations and proceedings on civil and administrative matters regarding corruption. Available at <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>, p 30, p40 [↑](#footnote-ref-30)
30. See, for example, Malaysia’s response to illicit funds questionnaire circulated by UNHRCAC as well as the Resolution on behalf of the Group of African States. [↑](#footnote-ref-31)
31. Available a [http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx](https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx) [↑](#footnote-ref-32)
32. See his response to illicit funds questionnaire circulated by UNHRCAC. [↑](#footnote-ref-33)
33. The first beneficiary of the December 2015 law was Nigeria, which stands to receive $321 million of the Abacha monies. <http://www.reuters.com/article/us-swiss-assets-idUSKCN0YG29Z> and <http://www.dailynigerianews.com/2016/07/29/nigeria-switzerland-sign-mou-on-repatriation-of-321m-abacha-loot/>, accessed Aug 2, 2016. [↑](#footnote-ref-34)
34. . The section regarding conditions where an asset freeze is to be deemed admissible read as follows: “[where] the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable; [] the level of corruption in the country of origin is notoriously high; [] it appears likely that the assets were acquired through acts of corruption or misappropriation or other crimes; [] the safeguarding of Switzerland's interests requires the freezing of the assets.” Available at <https://www.newsd.admin.ch/newsd/message/attachments/44109.pdf>; p 2 [↑](#footnote-ref-35)
35. The presumption will follow if “the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person; [and] the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.” Available at <https://www.newsd.admin.ch/newsd/message/attachments/44109.pdf>; p 7 [↑](#footnote-ref-36)
36. ”The restitution of assets is made in pursuit of the following objectives: [] to improve the living conditions of the inhabitants of the country of origin, or to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity.” [↑](#footnote-ref-37)
37. . OECD Better Policies for Development 2014, Policy coherence and illicit financial flows [↑](#footnote-ref-38)
38. <https://www.egmontgroup.org/en/content/about> [↑](#footnote-ref-39)
39. http://www.oecd.org/ctp/beps/. [↑](#footnote-ref-40)
40. See Resolution presented by Tunisia (on behalf of the Group of African States), Libya and Egypt on The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation. A/HRC/34/L.16. [↑](#footnote-ref-41)
41. . <https://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>, p 4 [↑](#footnote-ref-42)
42. . <https://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>, p 3 [↑](#footnote-ref-43)
43. This demand is endorsed by both Juan Pablo Bohoslavsky and the Egyptian Initiative for Personal Rights in the responses to the UNHRCAC questionnaire. [↑](#footnote-ref-44)
44. <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; p 6 [↑](#footnote-ref-45)
45. In many other cases, there is a manifest lack of political will to repatriate stolen assets. [↑](#footnote-ref-46)
46. “The complex case of Tunisia’s blocked funds”, Swiss Info, 6.4.2015 [↑](#footnote-ref-47)
47. Financial intermediaries have the obligation to report to the Money Laundering Reporting Office Switzerland (MROS). [↑](#footnote-ref-48)
48. O. Longchamp and M. Herkenrath, “Money laundering, liability and sanctions for financial intermediaries – the issue of having the assets of politically exposed persons in Switzerland”, in G. Fenner, *Emerging Trends in Asset Recovery*, 2013, p 128; ‘Banks Scrutinize Regimes’ Assets’, *Wall Street Journal* , 23.02.2011. [↑](#footnote-ref-49)
49. In 2015, the FINMA approved the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence, drafted by the Swiss Association of Bankers. [↑](#footnote-ref-50)
50. The current FINMA’s Director, Mark Branson is a former Director of the “Union de Banques Suisse” (UBS), and previously in charge of UBS Japan, involved in the scandal of the manipulation of the Libor rate. [↑](#footnote-ref-51)
51. FINMA's costs are borne by the supervisory fees and levies paid by those institutions. [↑](#footnote-ref-52)
52. See Article 40 of the « Loi sur l’Autorité fédérale de surveillance des marchés financiers (Loi sur la surveillance des marchés financiers » (LFINMA). [↑](#footnote-ref-53)
53. See, O. Longchamp and M. Herkenrath, *op.cit.,* p. 133. [↑](#footnote-ref-54)
54. FATF, Anti-money laundering and counter-terrorist financing measures. Switzerland- Mutual Evaluation Report, December 2016, p. 91 and 105. [↑](#footnote-ref-55)
55. FINMA’s sanctions are particularly painless for banks; « Trois banques épinglées pour leur gestion de fonds », *24 Heures*, 21 Octobre 2013. [↑](#footnote-ref-56)
56. O. Longchamp, “CSO Report on Switzerland’s experience of assets recovery”. Working document, Public Eye (forthcoming). [↑](#footnote-ref-57)
57. The country has returned USD 2 billion in the past 30 years. However, hundreds of millions of USD remain still frozen. [↑](#footnote-ref-58)
58. Switzerland has recently published the booklet: *No dirty money. The Swiss Experience in Returning Illicit Assets,* December, 2016. [↑](#footnote-ref-59)
59. S. Besson, « La fin de l’affaire Abacha enrichit deux études d’avocats genevois », *Le Temps*, 17 Mars 2015. [↑](#footnote-ref-60)
60. O. Longchamp and M. Herkenrath, *op.cit.,* p. 136. [↑](#footnote-ref-61)
61. The looted funds were transferred directly to banks accounts abroad, held by offshore companies belonging to members of the Abacha’s clan or foreign businessman, who then remitted the same sums to members of the criminal organization. See: E. Monfrini, Y. Klein, “The Abacha Case”, in M Pieth (ed.) *Recovering Stolen Assets*, 2008, p. 10-11. [↑](#footnote-ref-62)
62. Commission fédérale des banques, « Fonds Abacha auprès des banques suisses », 30 aout 2000, p. 18. [↑](#footnote-ref-63)
63. “Abacha funds to be handed over to Nigeria - Majority of assets obviously of criminal origin”, 18.08.2004. [↑](#footnote-ref-64)
64. « Nigeria : Genève clôt en catimini le dossier du dictateur Abacha », *Le Monde*, 17.03.2015. [↑](#footnote-ref-65)
65. B.Rijkers, C. Freund, A. Nucifora, All in the family, State Capture in Tunisia, World Bank, Policy Research Paper, 2014. [↑](#footnote-ref-66)
66. FINMA, Obligations de diligence des banques suisses en relation avec les valeurs patrimoniales de «personnes politiquement exposées», 10 novembre 2011, pp. 7-10 (updated in March). [↑](#footnote-ref-67)
67. The bank charged 2% of management commissions amounting to a total of 8.3 million CHF. « La Tunisie réclame 114 million de francs à HSBC pour avoir accueilli l’argent du clan Ben Ali », *Le Temps*, 19 Mars 2015. [↑](#footnote-ref-68)
68. “Switzerland to return over USD 250,000 of Ben Ali's money to Tunisia”, *Africanews*, 1.6.2015. In addition Tunisia managed to recover 28.8 million USD held by Ben Ali’s wife in a Lebanese Bank. [↑](#footnote-ref-69)
69. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-60510.html [↑](#footnote-ref-70)
70. Ibid. [↑](#footnote-ref-71)
71. “FINMA sanctions Coutts for 1MDB breaches”, 2 February 2017; FINMA: « Falcon sanctionné pour ses manquements en lien avec 1MDB ». [↑](#footnote-ref-72)
72. See for example, ACommHPR, *Free Legal Assistance Group and Others v. Zaire,* Communications 25/89, 47/90, 56/91, 100/93, 1 October 2010, para. 17. [↑](#footnote-ref-73)
73. It ranks the 168 out of 188. In 2013, 4% of the population was considered by UNDP multidimensional poor. Today, food insecurity affects the 705 of the population due to the armed conflict. See: H. Kodmani, « Guerre oubliée au Yémen : la famine menace », *Libération*, 23 Mars 2017. [↑](#footnote-ref-74)
74. *Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, p. 14. [↑](#footnote-ref-75)
75. *Ibid.* p. 53. [↑](#footnote-ref-76)
76. In a complaint recently filed with the African Commission on Human and People’s Rights by the Association Pro Derechos Humanos de España (APDHE) against Equatorial Guinean. APDHE considers that the government’s plundering of national oil revenues violates the right of the Equatorial Guinean People to freely dispose of their natural wealth protected by the African Charter on Human Rights. [↑](#footnote-ref-77)
77. For a definition of grand corruption, see: E. Hava, “Strategies for Preventing International Impunity”, Indonesian Journal of International and Comparative Law, 2015(2), p. 520. [↑](#footnote-ref-78)
78. See: Monfrini and Klein, in: *Etat de droit et confiscation international*, Giroud/Borghi (ed), Genève, Lugano, Bruxelles, 2010, p. 135. [↑](#footnote-ref-79)
79. See, generally, Masciandaro, Donato (ed). 2004. Global Financial Crime: Terrorism, Money Laundering and Offshore Centres. London, Ashgate, and Sharman, J.C. 2011. The Money Laundry: regulating criminal finance in the global economy. Ithaca, Cornell University Press. [↑](#footnote-ref-80)
80. Smith, Jack, Pieth, Mark and Jorge, Guillermo. “The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention against Corruption,” U4 Brief No. 2, February 2007, Chr. Michelsen Institute. Available at [www.u4.no/themes/uncac/](http://www.u4.no/themes/uncac/). Malaysia picks up this point in its general observations in response to the UNHRCAC questionnaire. Interestingly, some authors contend that [↑](#footnote-ref-81)
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82. http://www.forbes.com/sites/mikepatton/2014/10/28/who-owns-the-most-u-s-debt/#20e0d1141907 [↑](#footnote-ref-83)
83. . Shaxson, Nicholas & Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016) [↑](#footnote-ref-84)
84. . Kasperkevic, Jana “Forget Panama: it's easier to hide your money in the US than almost anywhere”, The Guardian, April 6, 2016. Available at <https://www.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delaware> [↑](#footnote-ref-85)
85. O’ Murchu, Cynthia “Follow the money”, Financial Times, (London, England) August 14, 2014 [↑](#footnote-ref-86)
86. Halter, Emily Marie; Harrison, Robert Mansour; Park, Ji Won; Sharman, Jason Campbell; Van Der Does De Willebois, Emile J. M. (2011) *The puppet masters*: *how the corrupt use legal structures to hide stolen assets and what to do about it*, Stolen Asset Recovery (StAR) initiative, Washington, DC: World Bank. Available at <http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it>; OECD Better Policies for Development 2014 *Policy coherence and illicit financial flows*; available at <http://www.oecd.org/pcd/Better-Policies-for-Development-2014.pdf>, p 27. [↑](#footnote-ref-87)
87. See the EU’s response to UNHRCAC’s illicit funds questionnaire. [↑](#footnote-ref-88)
88. See, for example, Juan Pablo Bohoslavsky’s response to illicit funds questionnaire circulated by UNHRCAC as well as the Resolution on behalf of Group of African States [↑](#footnote-ref-89)
89. *. The African Commission on Human and Peoples’ Rights, meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia;236 Resolution on Illicit Capital Flight from Africa; available at* [*http://www.achpr.org/sessions/53rd/resolutions/236/*](http://www.achpr.org/sessions/53rd/resolutions/236/) [↑](#footnote-ref-90)
90. Jamaica’s response to UNHRCAC questionnaire. [↑](#footnote-ref-91)
91. Egyptian Initiative on Personal Rights, responses to UNHRCAC questionnaire on illicit funds. The EIPR advocates the setting up of an international anti-corruption court that can issue declaratory judgements (especially where corruption is married with human rights abuses in the country of origin) that will force all member states to freeze and repatriate the monies. Of course, such an initiative would – be necessary implication – be of retroactive application. [↑](#footnote-ref-92)
92. Jamaica’s response to UNHRCAC questionnaire. [↑](#footnote-ref-93)
93. . Shaxson, Nicholas &Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016 [↑](#footnote-ref-94)
94. OECD reports on IFFs; J. Henry, (2016) “How to respond to the Panama Papers”, Foreign Affairs; available at <https://www.foreignaffairs.com/articles/panama/2016-04-12/taxing-tax-havens>; Shaxson, Nicholas &Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016). [↑](#footnote-ref-95)
95. . <https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> p 3; accessed August 2, 2016 [↑](#footnote-ref-96)
96. Mehta, Krishen “Ten Ways Developing Countries Can Take Control of their Own Tax Destinies” in Pogge, Thomas Mehta, &Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016, p 353 [↑](#footnote-ref-97)