.

Illicit financial flows, tax and human rights

Background paper

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Esther Shubert[1]

Executive summary

This background paper has been drafted to inform discussion by experts, State delegates and other relevant stakeholders in New York and New Haven on 29 to 30 October 2015. Both meetings are intended to inform the final study of the Independent Expert on foreign debt and human rights, Juan Pablo Bohoslavsky, on illicit financial flows, human rights and the post 2015 development agenda of the United Nations, to be submitted to the Human Rights Council in March 2016. The paper should be read in conjunction with the Interim Report of the Independent Expert (A/HRC/28/60) from March 2015.

The background paper expands on the problem of tax abuse introduced in the Interim Report, and discusses in greater detail the practices of tax evasion through the offshoring of private wealth by wealthy individuals and through trade misinvoicing, as well as tax avoidance by multinational corporations. Together these are estimated to account for the majority of all illicit financial flows, and as such have a detrimental impact on States' abilities to realize human rights, especially social, economic and cultural rights, but also political rights and the right to equality and non-discrimination. The background paper also discusses how these practices may violate international human rights obligations.

Combatting illicit financial flows has been incorporated into the United Nation's Sustainable Development Goals, adopted during the United Nations Sustainable Development Summit of September 25-27, 2015. The background paper concludes with a discussion of policy proposals for ensuring that the relevant targets will be met. Questions to inform further discussion are attached in an annex.

[1] PhD candidate in philosophy at Yale University. The author supports as a consultant the Independent Expert on Foreign debt and human rights in his work on illicit financial flows and human rights. The text is for discussion purposes and does not necessarily reflect the views of the Independent Expert on foreign debt and human rights.

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I. Introduction

Illicit financial flows, largely unheard of until only a few years ago, are now widely recognized to have detrimental development and human rights impacts. For this reason, it is essential for the international community to take coordinated action to curb illicit financial flows. The Sustainable Development Goals of the United Nations include now a particular target to reduce by 2030 significantly illicit financial flows and strengthen the recovery and return of stolen assets.[2] In July 2015, States vowed at the 3rd International Conference on Financing for Development to strive to eliminate tax havens and to redouble their efforts to reduce substantially illicit financial flows by 2030. The new international development goals adopted in September 2015 provide therefore an important opportunity to make headway on this urgent problem.

Following Independent Expert on foreign debt and human rights in his Interim Report (A/HRC/28/60), illicit financial flows can be defined narrowly or broadly. In their narrow sense, illicit financial flows refer to unrecorded financial flows involving funds that are illegally earned, transferred or utilized. This definition covers, for example, the profits of illegal activities such as crime and corruption. However, even if the funds originate from legitimate sources, their transfer abroad in violation of domestic laws, such as tax regulations, would render the capital illicit. Similarly, funds with a legitimate origin that are used for unlawful purposes, such as terrorist financing, would also be considered illicit. In their broader sense, illicit financial flows refer also to funds that, through legal loopholes and other artificial arrangements, circumvent the spirit of the law, including, for example, tax minimization schemes used by multinational corporations (MNCs). This practice is generally classified as tax avoidance, to differentiate it from illegal tax evasion.

The Interim Report explains the human rights impact of illicit financial flows, and proposes a preliminary set of recommendations for how the goal of curbing illicit financial flows could be operationalized within the United Nations' Sustainable Development Goals (SDGs). In doing so, the Independent Expert discusses a wide range of phenomena classified as illicit financial flows, including illegal tax evasion, tax avoidance by MNCs, bribery and corruption (as well as concomitant asset recovery) and other criminal activities. However, as the Independent Expert himself points out, "While crime, corruption, and tax evasion and abuse can contribute to illicit financial flows, all negatively affecting human rights in a number of ways, it has been estimated that the majority of all illicit financial flows are related to cross-border tax-related transactions" (§75). Curbing tax-related illicit financial flows thus has the potential to make the largest fiscal impact on States' abilities to realize human rights, especially social, economic and cultural rights.

[2] See SDG target 16.4 of the outcome document of the 2015 Sustainable Development Summit, "Transforming our world: the 2030 Agenda for Sustainable Development" (A/69/L.85).

This background paper will therefore complement the Interim Report by providing a more detailed analysis of the practices that lead to tax-related illicit financial flows: illegal tax evasion through the offshoring of private wealth and trade misinvoicing, as well as legal but morally questionable tax avoidance by MNCs. In addition, the background paper will discuss the human rights impacts of these practices, and discuss how practices that lead to tax-based illicit financial flows may violate international human rights obligations. It will conclude with a review of some of the most prominent policy proposals to combat tax abuse, and suggest areas for discussion concerning additional policy responses to illicit financial flows, drawing attention especially to their human rights dimensions.

II. Tax abuse

i. The offshoring of private wealth

Jurisdictions with high levels of financial secrecy attract all kinds of illicit funds. Combined with low tax rates, they become ideal locations for tax-evading funds. Indeed, many important tax havens are home to a large private banking industry that is at the heart of large-scale tax evasion by the wealthy. While the 'offshore' financial services they offer to wealthy foreigners can of course be used legally—by reporting the relevant accounts and investments to domestic tax authorities—, they are often used secretly, without reporting, and can even be rendered anonymous through a complex web of corporate vehicles such as fake foundations and trusts, and other kinds of 'shell' companies. They can then reside untaxed or minimally taxed, with no means of identifying whose money it is.[3]

The terms 'tax havens,' 'secrecy jurisdictions' and 'offshore financial centers' will be used interchangeably in this background paper, although there is disagreement about how best to understand each concept, as well as which of these elements is most important when it comes to understanding tax evasion.[4] According to UNCTAD (2014: 171), 'secrecy jurisdiction' and 'tax haven' refer primarily to a geographic location with certain kinds of regulations (e.g. financial secrecy, low tax rates), while 'offshore financial center' refers primarily to financial services and activities catered to foreign investors, with no legal or tax residence, wishing to exploit mechanisms created by the relevant legislation in tax havens or secrecy jurisdictions. Depending on which element is emphasized, different jurisdictions will get picked out as key players in the tax evasion phenomenon.

[3] This is made possible, for example, by the lack of any legal requirement to register and publish beneficial ownership—who ultimately benefits financially from the company or assets in question. In trusts, the beneficial owner is separate from the person who has legal control over the company or assets (the trustee). For more information, see, e.g. Tax Justice Network (2009).

[4] See, for example, Cobham (2012: 340-347) and Gravelle (2015: 1-9) for review and discussion.

However, it is essential to note 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. This is made clear, for example, by the Tax Justice Network's Financial Secrecy Index, which establishes a ranking of jurisdictions according to both their degree of financial secrecy as well as their relative importance in global finance.[5] As UNCTAD (2014: 172) explains, from the perspective of the Financial Secrecy Index, "some of the world's leading providers of financial secrecy are among the world's largest and wealthiest countries. This contrasts with the widespread perception that tax havens are small (often tropical) islands or micro-States. Indeed, tax havens are not working on the margins of the world economy, but rather as an integral part of modern business practices."[6] This will have important ramifications in terms of attributing responsibility for the resulting human rights consequences (to be discussed below).

Destinations of offshore wealth (2012)

	$ billions
Switzerland	2,200
Hong Kong and Singapore	1,200
Channel Islands and Dublin	1,100
Caribbean and Panama	1,100
United Kingdom	900
United States	700
Other (incl. Dubai and Monaco)	700
Luxembourg	600

(*source*: Boston Consulting Group, 2013: 11)

Given the nature of the secrecy involved, estimating how much private wealth is hidden offshore is difficult and must be done indirectly.[7] Estimates also vary greatly, but all are substantial. Zucman (2014; 2015) estimates that $7.6 trillion (8% of global financial household wealth) was held in tax havens at the end of 2013—with an estimated

[5] The Financial Secrecy Index ranks 82 jurisdictions according to their financial secrecy and the scale of their activities using a set of 15 indicators. These indicators include an assessment of their banking secrecy, the availability of public registers for trust funds and foundations or ownership of companies, compliance with international anti-money laundering recommendations and whether companies are required to comply with country-by-country reporting. See here for the full methodology.

[6] Alex Cobham (2012: 346) defends this approach arguing that, "From the global perspective, strong opacity in a major player may do more damage than complete secrecy in a tiny one." ActionAid (2013) and Christian Aid (2013) also draw attention to the key role played by developed countries in facilitating tax evasion.

[7] For the methodologies used to produce some of the estimates reported here, see Zucman (2014: 140) and Henry (2012: 4).

80% of it unrecorded. Boston Consulting Group (2014)'s figure of global private wealth held offshore in 2013 is $8.9 trillion. Henry (2012) estimated that at the end of 2010, unrecorded private wealth invested offshore was as much as $21-32 trillion (10-15% of global financial wealth), while a more recent estimate (Henry, forthcoming) is even higher: $24-$36 trillion as of 2015. Importantly, these figures provide a lower bound since they include only financial wealth and disregard real assets, such as real estate, art, jewelry, gold, etc.[8] Henry (ibid) estimates that the value of such non-financial assets owned through shell companies is an additional $5-10 trillion.

Moreover, there is consensus that the amount of private wealth held offshore is growing. Zucman (2014) estimates that global offshore wealth increased by 28% from end-2008 to end-2013. Boston Consulting Group (2014) estimates that offshore private wealth increased by 10.4% from 2012 to 2013. And Henry (forthcoming) estimates that unrecorded offshore private wealth grew at an average rate of 16% a year from 2004 to the present. And this trend is especially strong in developing countries. As Zucman (2014: 141) explains, "Inflows seem to be coming largely from developing countries; as their share of global wealth rises, so too does their share of offshore wealth. More than half of offshore assets still belong to residents of high-income countries…but if the current trend is sustained, emerging countries will overtake Europe and North America by the end of the decade."

These massive sums imply huge tax revenue losses. Zucman (2014) estimates that global tax revenue losses due to offshore tax evasion are $200 billion per year; Henry (2012)'s estimate is $189-288 billion per year, assuming a conservative rate of return of just 3% and a 30% tax rate.

Both developed and developing countries suffer as a result. But developing countries are particularly hard hit. Zucman (2014, 2015) reports that the relative amount of wealth from developing countries held abroad is much greater than for developed countries: 20-30% in many African and Latin American countries; 50% or more in Russia. Boston Consulting Group (2013: 4, 11) provides similar figures: 26% for Latin America; 33% for the Middle East and Africa. Moreover, developing countries tend to have much smaller tax revenues per capita than developed countries, further magnifying the impact of these losses for developing countries. Following Henry's methodology, UNCTAD (2014: 175) calculates that the tax gap for developing countries is $66−$84 billion per year—about two thirds of total official development assistance (ODA).

Another important fact to note is the greatly unequal ownership of this offshore wealth. Henry (forthcoming) estimates that 85-90% belongs to fewer than 10 million people—just 0.014% of the world's population—, and at least a third of it belongs to the world's top 100,000 families, each with a net worth of at least $30 million. Similarly, Zucman (2014: 141) reports that "while offshore assets are rising, the number of clients is

[8] See e.g. Story and Saul (2015) about the use of shell companies in the New York luxury real estate market. According to the article, nearly half of all residential purchases over $5 million in the United States in recent years were made by shell companies.

falling, and so the average wealth per client is booming. The main Swiss banks have been refocusing their activities on their 'key private banking' clients, those with more than $50 million in assets. Recent policy changes…are indeed making it more difficult for moderately wealthy individuals to use offshore banks to dodge taxes: for them, the era of bank secrecy is coming to an end. But more fundamentally, offshore banks are responding to the increasing concentration of global fortunes." This means, as Zucman argues, that the global reduction in tax revenues accrues almost entirely to the wealthiest. In this way, tax evasion promotes and perpetuates income inequality.

Estimates of offshore private wealth by region (2013)

	Offshore wealth ($ billions)	**Share of financial wealth held offshore**	**Tax revenue loss ($ billions)**
Europe	2,600	10%	75
United States	1,200	4%	36
Asia	1,300	4%	35
Latin America	700	22%	21
Africa	500	30%	15
Canada	300	9%	6
Russia	200	50%	1
Gulf countries	800	57%	0
Total	**7,600**	**8%**	**190**

(*source*: Zucman, 2014: 140)

Estimates of offshore private wealth by region (2012)

	Offshore wealth ($ billions)	**Share of financial wealth held offshore**
Western Europe	2,700	8%
Asia-Pacific	2,100	5%
Middle East and Africa	1,600	33%
Latin America	1,000	26%
North America	800	2%
Eastern Europe	300	13%
Total	**8,500**	**6%**

(*source*: Boston Consulting Group, 2013: 4, 11)

ii. Trade misinvoicing

Another common tax-evading practice is trade misinvoicing, which involves falsifying trade documents, such as customs forms. By under-invoicing exports and over-invoicing imports, commercial tax-evaders can move assets out of countries and into secret bank accounts and shell companies in tax havens (Kar and Spanjers, 2014: 2).[9]

According to Global Financial Integrity (GFI), trade misinvoicing is the most common ways of illicitly moving funds out of developing countries. They estimated that it accounted for 80% of all illicit outflows, or $5.1 trillion, between 2003 and 2012, and grew at an annual rate of 7.3% over this period (ibid).[10] An analysis by GFI (2015) shows that in seven out of the last ten years, the global volume of illicit financial outflows from developing countries (again, of which trade misinvoicing constitutes the vast majority) was greater than the combined value of all official development assistance (ODA) and foreign direct investment (ODI) flowing into poor nations. The chart below provides a regional breakdown of outflows due to trade misinvoicing for this period.

Estimates of trade misinvoicing by region (2003-2012)

	Cumulative IFFs ($ billion)	**% IFFs due to misinvoicing**	**Cumulative outflows due to misinvoicing ($ billion)**
Sub-Saharan Africa	528.9	68.2	360.7
Asia	2,655.6	85.5	2,270.5
Developing Europe	1,386.4	85.0	1,178.4
MENA	727.4	24.7	179.7
Western Hemisphere	1,288.8	87.7	1,139.3
All developing countries	6,587.1	77.9	5,131

(*source*: Kar and Spanjers, 2014: 7, 16)

Importantly, these estimates are thought to be very conservative since they account for only one type of trade misinvoicing, known as 'reinvoicing.' As GFI explains, reinvoicing occurs when goods are exported under one invoice, the invoice is then sent to another jurisdiction, such as a tax haven, where the price is altered, and finally, the revised invoice is sent to the importing country for clearing and payment purposes (Hollingshead, 2010: 1). They do not account for misinvoicing on trade of services and intangibles (20% of world trade), nor does it capture 'same invoice faking'—where

[9] It should be noted that trade misinvoicing can occur for reasons other than tax evasion; these include money laundering, claiming tax incentives, and dodging capital controls. See also GFI (n.d.).

[10] For a discussion of GFI's methodology see, e.g Kar and Spanjers, 2014: 3.

misinvoicing occurs within the same invoice as agreed between exporters and importers. A study by GFI has found that tax revenue losses to developing countries due to reinvoicing alone amounted to $98-106 billion per year between 2002 and 2006 (ibid). This is close to worldwide ODA, $135 billion in 2013—an all-time high (OECD, n.d.).

iii. Corporate Tax Avoidance

The broad definition of illicit financial flows applies not merely to illegal tax evasion, but also the aggressive tax planning strategies that multinational corporations (MNCs) make use of to minimize their tax burden. While not technically illegal, the overall effect of these practices is to reduce the corporate tax base of many countries in a way not intended by domestic policy. More generally, tax avoidance by MNCs harms society by avoiding a 'fair share' of the tax burden.

Several features of the current international corporate tax system make corporate tax avoidance possible. Under the current framework, each corporate entity, including subsidiaries and the parent company, are treated as legally separate and taxed accordingly. Strategic placement and use of subsidiaries therefore allows MNCs to minimize their overall tax liabilities. This is further facilitated by inconsistencies across bilateral tax treaties, which MNCs exploit in choosing the location of subsidiaries—a process known as 'treaty shopping'—in order to make profits disappear for tax purposes (Zucman 2014: 125; UNCTAD, 2014: 175).

In a practice known as 'profit shifting,' MNCs take advantage of tax rate differentials across jurisdictions and shift taxable income and assets away from source countries, where economic activity takes place, and into associated companies in tax havens, sometimes with no real staff or business activities (Acton Aid, 2013: 6). Jurisdictions that offer preferential corporate tax rates therefore play an important role in profit shifting since they make this practice profitable. Indeed, according to Zucman (2015: 4), 55% of all the foreign profits of US firms are kept in tax havens. These havens can also act as conduits, allowing income to pass through them tax-free. It is estimated that about one third of international investment passes through tax havens before reaching its intended destination as productive assets. The primary reason for this is tax planning (Bolwijn, 2015).

Profit-shifting methods include, for example, the use of intragroup loans (subsidiaries in low-tax countries grant loans to subsidiaries in high-tax countries), the relocation of intangibles to low-tax jurisdictions, and the manipulation of transfer prices. Transfer prices are the prices at which companies exchange goods and services internally. The OECD's Arm's Length Principle requires these transactions take place at market prices, as if the transacting parties were unrelated. But evidence shows that intragroup trade often occurs at distorted prices, with firms exporting goods and services to low-tax subsidiaries at relatively low prices, and importing from them at relatively high prices (Zucman: 2014, 127).[11] This includes fees and royalties charged for intellectual property,

[11] Beyond transfer pricing abuse, some critics argue that an even more fundamental flaw of the Arm's Length Pricing system is that, in many cases, the relevant external comparables don't exist (see e.g.

such as patents, brands and trademarks (ICRICT, 2015: 8). UNCTAD (2014: 175) reports that these practices have become more common as economic activity has become increasingly based on information technology and intangibles.[12]

Transfer pricing audits can be complex, expensive and time-consuming, especially for tax administrations in developing countries which may have greater resource constraints and less technical capacity. The High Level Panel on Illicit Financial Flows from Africa (n.d. §27) reports that: "We were particularly concerned that only three African countries had transfer pricing units in their internal revenue services. Given the widespread nature of such activities even in developed countries involving well-known companies, we noted that African countries lacking any official monitoring capacity must be very vulnerable to IFFs stemming from transfer mispricing."

Corporate tax avoidance has recently come under public scrutiny, starting in the United Kingdom following revelations that some of the world's biggest companies—including Starbucks, Google and Amazon—had been paying little to no tax there for years. A House of Commons investigation revealed, for example, that Starbucks reported operating at a loss for 14 out of 15 years despite a 31% market share, and paid only £8.6 million in taxes over a 13 year period during which time it recorded sales of £3.1 billion (UK Revenue and Customs Public Accounts Committee, 2012). The High Level Panel (n.d. §27) similarly reports that: "We found evidence that abusive transfer pricing was occurring on a substantial scale in Africa. In a particularly telling example, an African President informed the Panel that a multinational corporation in his country had never paid taxes over a 20-year period because it consistently reported making losses. He was certain that this could only have been due to profit shifting, since no business entity could remain in operation if it were making losses for such a long time."

Like tax evasion, corporate tax avoidance results in tax revenue losses for both developed and developing countries. A recent UNCTAD study estimates tax revenue losses to developing countries of $100 billion annually, which represents about one-third of corporate income taxes that would be due in the absence of profit shifting. *Total* development resource leakages, including, for example, lost earnings from missed reinvestment opportunities in addition to tax revenue losses, are an estimated $250-300 billion per year. Moreover, these estimates are likely a lower bound since they do not cover all forms of corporate tax avoidance (Cobham, 2015a; Bolwijn, 2015).

A recent IMF study estimates long-run annual revenue losses to developing countries of $200 billion per year (1.7% of GDP) and to OECD countries of $500 billion per year (0.6% of GDP) (Crivelli, De Mooij and Keen, 2015: 19-20). Gravelle (2013: summary) reports losses due to profit-shifting by US firms of $100 billion per year, while Zucman (2014) calculates a decline in the effective tax rate on US firms from 30% to 20% over the last 15 years, two thirds of which is attributable to profit-shifting. According to Zucman, these losses are borne by both the US government, and the governments of other

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Zucman, 2014: 127; ICRICT, 2015: 7-8).

[12] For more detailed information on corporate tax avoidance, see e.g Gravelle, 2015.

countries, although it is hard to determine which governments lose most. However, "In both cases, US shareholders win. Since equity ownership is very concentrated… so too are the benefits" (Zucman, 2014: 133).

Corporate tax avoidance causes additional problems beyond lost revenue. The preceding suggests that corporate tax avoidance also perpetuates inequality since the benefits accrue to a small minority while revenue losses will need to be made up by the broader population. Moreover, in developing countries it decreases the competitiveness of domestic businesses since, unlike MNCs (which can generate up to 90% of all investment in developing countries), they generally cannot take advantage of cross-border tax haven transactions in order to minimize their tax bill (ActionAid, 2013: 6). Finally, it wastefully increases the cost tax administration, also especially problematic for developing countries (ICRICT, 2015: 9).

III. Impacts on human rights

These various tax-evading and avoiding practices have important human rights consequences. As the Independent Expert explains in his Interim Report, "illicit financial outflows deprive Governments first and foremost of resources required to realize progressively economic, social and cultural rights. They also undermine efforts to build up effective institutions to uphold civil and political rights and the rule of law in the countries of origin" (§22). Tax abuse has additional implications for the rights of equality and non-discrimination, and it perpetuates and exacerbates income inequality, with has further human rights impacts**.**

i. Economic, social, cultural rights

According to the Special Rapporteur on extreme poverty and human rights, Philip Alston, "extreme poverty is a negation of all human rights. It obviously makes the enjoyment of economic and social rights impossible" (Alston, 2015a). Economic, social and cultural rights are the most unfulfilled human rights today, as evidenced by the prevalence of extreme poverty. For example, of 7.3 billion people alive today: 795 million are chronically undernourished; over 1 billion lack adequate shelter; 748 million lack safe drinking water; 1.8 billion lack adequate sanitation; 1.1 billion lack electricity; more than one-third lack reliable access to essential medicines; 781 million over age 14 are illiterate; and 168 million children (aged 5 to 17) work outside their household. (Pogge, 2015b: 14; Pogge, 2015a).

Under international law, States bear primary responsibility for upholding human rights within their territory. Fulfilling economic and social rights is, therefore, in the first instance the responsibility of the governments where extreme poverty persists. But many of these governments are themselves poor and have a shortage of revenue with which to meet their obligations. There are many reasons for this, but tax abuse by wealthy elites and MNCs is an important contributing factor. As we have seen, the resulting revenue losses are huge, including in low- and middle-income countries. This missing tax revenue could clearly go a long way toward helping these countries achieve massive reductions in existing human rights deficits. As the High-Level Panel on Illicit Financial Flows from Africa (n.d. §53) explains, "reduced tax earnings resulting from hiding taxable funds has a direct effect on the provision of public services such as schools, clinics, sanitation, security, water and social protection." The additional revenue would also be a significant benefit for developed countries, many of which have imposed austerity measures in response to economic crisis. Alternatively, it could help developed countries meet their 0.7% of GDP ODA commitments, a target few countries have reached.

In addition to revenue losses, tax abuse can hurt economies, especially those of developing countries, thereby hindering development. Specifically, when private wealth is illicitly transferred abroad, local economies do not benefit from domestic use of those resources, including for consumption and investment. These lost opportunities negatively impact growth and job creation. Similarly, when profits are illicitly transported abroad, local reinvestment does not occur (High-Level Panel, n.d. §52).

ii. Civil and political rights, and the rule of law

Extreme poverty undermines not only the enjoyment of social, economic and cultural rights, but civil and political rights, as well. Very poor people are more vulnerable to violence, including by police and state officials; are generally less able and well equipped to defend their legal rights; and can become politically marginalized and disenfranchised (Pogge, 2015b: 14-15; Pogge, 2015a; Alston, 2015a). The impact of tax abuse on economic and social rights can thus be felt on political rights in these ways, as well.

At the same time, when large-scale tax evasion is allowed to occur with impunity, this undermines the rule of law. It can also lead to low tax moral and more widespread non-compliance, as well as reduced confidence in government more generally (Grinberg, forthcoming; Cobham 2012: 352; CDG: 7-8). Moreover, the same secrecy structures that facilitate tax evasion also facilitate corruption and other crimes, further undermining the rule of law. For example, of 213 cases of corruption between 1980 and 2010 reviewed by the World Bank, over 70% relied on anonymous shell companies (Global Witness, 2013). Finally, as discussed in the Interim Report of the Independent Expert, unregulated money can lead to the infiltration of criminal interests in the public sector, through political funding in contravention of domestic regulations. This contributes to the risk of State capture and subverts the right to vote and the right to public participation (§31).

iii. Equality and non-discrimination

While the loss of tax revenue due to tax evasion and avoidance accrues to the wealthy, the poor must make up the difference. As the former Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, explains in her report on tax policies and human rights, "Tax abuse by corporations and high net-worth individuals forces Governments to raise revenue from other sources: often regressive taxes, the burden of which falls hardest on the poor" (A/HRC/26/28 §60).

This has important human rights implications. Regressive tax structures limit the redistributive impact of social programmes since they effectively end up being funded by the very people they are supposed to benefit (ibid §47; Pogge, 2015a). The need to make up revenue shortfalls through regressive taxes thus further undermines the realization of basic economic and social rights for the most vulnerable.

This situation has further implications for gender equality. When low-income households face deteriorating public services, many women and girls are forced to take on the additional costs of unpaid care needs (CESR and Christian Aid, 2014: 9). Moreover, tax systems themselves are not gender neutral, and regressive taxes, such as consumption taxes, tend to disproportionately fall on women (A/HRC/26/28 §46). In both of these ways, regressive taxes and their effects threaten to undermine substantive equality for women.

Additionally, both the Independent Expert on foreign debt and the former Special Rapporteur on extreme poverty have argued that high levels of tax abuse undermines the principle of equality and non-discrimination, given that evaders end up paying less than taxpayers with the same, or less, capacity to pay (A/HRC/28/60 §26; A/HRC/26/28 §60).

iv. Income inequality

Human rights law does not necessarily imply a perfectly equal distribution of income and wealth, but a distribution of resources in society that guarantees individuals to an equal enjoyment of the realization of their basic rights without discriminatory outcomes (Balakrishnan et al, 2015). When income inequality results in such discriminatory outcomes, it becomes a human rights issue.

Global inequality currently stands at extremely high levels. UNDP (2013: xi) reports that the richest 8% of the world's population earn half of the world's total income, leaving half for the remaining 92%. Oxfam (2015: 2-3) has recently shown that in 2014 the richest 1% of people in the world owned 48% of global wealth—up from 44% in 2010—, while the remaining 99% of the world's population owned just 52% of global wealth, and the top 80 individuals currently own as much wealth as the bottom 50% of the entire global population. Over the last two decades, income inequality has increased by 9 percent in developed countries and 11 percent in developing countries (ibid: 7).

The Special Rapporteur on extreme poverty and human rights, Philip Alston, has recently denounced such extreme inequality, calling it a "cause for shame" (Alston, 2015b). In his synthesis report on the post-2015 sustainable development agenda (A/69/700 §67), the Secretary General proclaims that: "We live in a world of plenty, and at a moment of enormous scientific promise. And yet, for hundreds and hundreds of millions across the globe, this is also an age of gnawing deprivation. The defining challenge of our time is to close the gap between our determination to ensure a life of dignity for all, and the reality of persisting poverty and deepening inequality." Addressing income inequality has been a focal point of the SDG process, and the outcome document of the 2015 Sustainable Development Summit (A/69/L.85) includes the following target (10.1): “By 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average.”

As we have seen, tax abuse perpetuates and exacerbates vast income inequality, benefitting the rich at the expense of the poor. Such extreme income inequality undermines both economic, social and cultural rights and civil and political rights. For example, income inequality prevents millions of individuals from enjoying basic access to social and economic rights on a non-discriminatory basis. It has important consequences for human wellbeing as studies have shown that residents in highly unequal societies are more likely to end up sick, unhappy or in jail (FES, 2015: 6). The UNDP has calculated that in 2012, 23 percentage points in the Human Development Index were lost due to inequality (ibid). Economic inequality can also lead to social instability, and even to violence and conflict (UNDP, 2013: 1, 5-6; UNSTT, 2012: 6-7).

Additionally, income inequality can threaten the right to political participation, since outsize political influence by the rich can undermine democratic processes. Moreover, as UNDP (2013: xi) argues, “Reminders of the sharp differences in wealth, education, and other material resources influence the way in which people view themselves and others, and can make the equal participation of citizens in political and public life almost impossible.”

The Special Rapporteur on extreme poverty has recently emphasized the need to draw more attention to the human rights implications of extreme income inequality and has called on the Human Rights Council to recognize explicitly that there are limits to the levels of inequality that can be considered compatible with respect for human rights, as well as on States to make formal commitments to reducing extreme inequality (Alston, 2015b).

IV. International obligations

As discussed by both the former Independent Expert on foreign debt and human rights, Cephas Lumina (A/HRC/22/42; A/HRC/25/52), and the former Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (A/HRC/26/28), international human rights instruments provide certain legal obligations that should guide the response to the problem of tax abuse.

i. Maximum available resources for the progressive realization of economic, social and cultural rights, including minimum essential levels

Under Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Part of this obligation is the requirement to secure and devote the maximum available resources for the progressive realization of human rights. This means not only that governments must use existing resources effectively, but also that, when necessary, they must increase revenue in equitable and non-regressive ways (CESR and Christian Aid, 2014). Moreover, as elaborated by the Committee on Economic, Social and Cultural Rights, each State party has an immediate obligation to ensure the satisfaction of, at the very least, minimum essential levels of all economic, social and cultural rights, and must demonstrate that every effort has been made to use all resources that are at its disposal, to satisfy as a matter of priority those minimum obligations (E/1991/23 §10; E/C.12/2007/1 §4, 6). As the Special Rapporteur on extreme poverty argues, this includes resources that could potentially be collected through taxation, or tackling tax evasion and other illicit financial flows (A/HRC/26/28 §27).

ii. International assistance and cooperation

According to the Committee on Economic, Social and Cultural Rights, "the phrase 'to the maximum of its available resources' refers both to resources existing within a State and those available from the international community through international cooperation and assistance" (E/C.12/2007/1 §5). The duty of States to make every effort to satisfy economic, social and cultural rights therefore includes an obligation to actively seek assistance through international cooperation (A/HRC/26/28 §26; see also item 34 of the Maastricht Principles, 2012).

As the Special Rapporteur on extreme poverty explains, States have a corresponding duty "to provide international assistance and cooperation, commensurate with their capacities, resources and influence…on the basis of the recognition that some countries will not be able to achieve the full realization of economic, social and cultural rights if other countries in a position to assist do not do so" (A/HRC/26/28 §29-32). The obligation of States to provide international assistance and cooperation is established in the Article 2 paragraph 1 of the Covenant.[13]

While the Covenant refers in particular to economic and technical assistance and cooperation, the Commentary to the Maastricht Principles clarify that "International assistance may, and depending on the circumstances, must, comprise other measures, including provision of information to people in other countries, or cooperation with their state, for example, to trace stolen public funds or to cooperate in the adoption of measures to prevent human trafficking" (De Schutter et al, 2012, quoted in A/HRC/25/52 §38). This interpretation could be easily extended to apply to assistance in tackling tax evasion. Indeed, tax information exchange, a key measure for international tax cooperation, is becoming the new global standard and has been repeatedly emphasized throughout the SDG process, including most recently in the outcome document of the Third International Conference on Financing for Development, the Addis Ababa Action

[13] See also the United Nations Charter (Articles 55 and 56), as well as the Convention on the Rights of the Child (Article 4) and the Convention on the Rights of Persons with Disabilities (article 32).

Agenda.[14] The Committee on the Rights of the Child also argues for a broad understanding of resources, including "human, technical, organizational, natural and information resources" (A/HRC/25/52 §17-18).

iii. Extra-territorial obligations

In our globalized world, policies implemented in one country can have impacts in other countries. This includes taxation policies, which can undermine the enjoyment of human rights abroad. International human rights law does not only include an obligation for States to cooperate with each other to progressively realize economic, social and cultural rights; there is also an obligation to refrain from conduct that could harm the enjoyment of these rights outside their own territory. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) specify that States should not interfere or deliberately undermine efforts by other States to realize social, economic and cultural rights. Articles 20 and 21 of the Principles affirm: (20) "All States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories"; (21) "States must refrain from any conduct which…impairs the ability of another State or international organization to comply with that State's or that international organization's obligations as regards economic, social and cultural rights."

Following this line of reasoning the report of the International Bar Association on tax abuse, poverty and human rights (2013: 2**)** has argued "Actions of States that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other States to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights." This concern has been shared by the former Independent Expert on foreign debt (A/HRC/25/52 §25), the former Special Rapporteur on extreme poverty (A/HRC/26/28 §30-32, §61-62, §74-77), and the current Independent Expert on foreign debt in his Interim Report (§24). A similar argument is made in CESR and Christian Aid (2014) and Cohen (2013).

iv. Further Discussion

(1) One objection that sometimes gets raised to this line of argument is that even if States had the additional tax revenue currently lost to tax abuse, it would not be used towards the realization of human rights. What this objection points out is that stopping tax abuse is not sufficient for fulfilling human rights—the funds must, of course, be appropriately spent, in line with the obligation of States to use the maximum available resources for the progressive realization or economic, social and cultural rights. However, stopping tax abuse may nevertheless be necessary for enabling in particular developing States to enjoy sufficient fiscal space to fulfill this obligation.

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[14] It calls on countries "to work together to strengthen transparency and adopt appropriate policies, including … progressively advancing towards automatic exchange of tax information among tax authorities as appropriate" (Addis Ababa Action Agenda §27).

(2) A further objection, however, is that the revenue lost to tax abuse is not even necessary to reach the maximum resources required to fulfill economic, social, and cultural rights—that existing resources would be sufficient, were they properly spent. This claim is surely least plausible with respect to the world's poorest and most aid-dependent nations, including the Least Developed Countries (LDCs), amongst others.[15]

Poor countries have much smaller tax revenue bases than developed countries, due to having smaller per capita GDPs, as well as the fact that they raise a much smaller proportion of their gross GDP as government revenue (Pogge, 2015b: 15-16; Pogge, 2015a). As a result, many of these countries are dependent on external aid. For example, according to a UNDP report, in 2009 LDCs received approximately 24.1% of total ODA. Yet at the same time, as a group it has been estimated that they lost 60 cents off every dollar of ODA to illicit financial flows. For some of these countries, illicit outflows were several times greater than the amount ODA received (UNDP, 2011: 16). The report also found that illicit outflows averaged 4.8% of LDCs' GDP, a large proportion of already vulnerable economies (ibid: 3).

A recent study by GFI also confirms that illicit financial flows[16] have outsize impact on the worst-off developing countries, including LDCs and heavily-indebted poor countries, amongst others. GFI found that of 82 developing countries studied, 20% have illicit outflows greater than their ODA and FDI combined; for close to 25% of countries the ratio of illicit outflows to GDP is 10% or greater; and for 40% of countries the ratio of illicit outflows to total trade value was 10% or greater (Spanjers and Foss, 2015: vii). The study also shows that there is a strong connection between high levels of illicit outflows and the poverty gap (the number of people living below the poverty line), as well an inverse relationship between high levels of illicit outflows and a country's ranking on the Human Development Index (ibid: viii-iv).

Next to government revenue losses, tax abuse also strains the capacity of governments that have the fewest resources to spare. As the High-Level Panel on Illicit Financial Flows from Africa (n.d. §58) explains, **"**In addition to digging deep to find the resources to undertake negotiations that would help stem IFFs, African countries also have to reallocate resources to tackle this growing scourge… Anti-corruption agencies, financial intelligence units and transfer pricing units are examples of the creation of additional cost centres to combat IFFs. We are aware of studies that show that the additional cost of building capacity, especially for revenue authorities, often pays off through increased tax collection. The key thing is that the resources have to be found first in a context of competing priorities, while the results will take time in coming."

It is also important to remember that tax abuse is problematic from a human rights perspective not only in terms of resources for fulfilling socio-economic rights, but

[15] According to the UNDP's classification, "LDCs satisfy three separate criteria: (i) an income per capita of less than US$905 per annum (ii) a low level of 'human assets' based on indicators of nutrition, health, education and literacy (iii) and a high degree of economic vulnerability measured in relation to population size and remoteness, dependency on agriculture, forestry and fisheries, exposure to natural disasters, export concentration and instability in exports" (UNDP, 2011: 5).

[16] Recall that trade misinvoicing accounts for 80% of GFI's illicit financial flows estimates.

because of its effects on governance and political institutions, as well. Recall that high-profile tax abuse by the elite can lead to low tax moral and wide-spread non-compliance, and undermines the legitimacy of government and the rule of law, while illicit funds and wealth concentrated in the hands of a small elite can increase the risk of regulatory capture and undermine the ability of the public to participate in political processes.

(3) Finally, a different kind of objection that might be raised to the idea that tax havens violate their obligations of international cooperation by facilitating tax evasion is that having legislation favourable to the offshoring of wealth is part of a jurisdiction's right to self-determination, or sovereignty. A Commission established by the Norwegian Government to investigate capital flight from developing countries has argued in response to this argument that "States do not have an unlimited license to pursue their own self-interest at any cost; indeed, the primary constraint on state sovereignty is that domestic policies should not undermine the sovereignty of another state. Legislation that exclusively or primarily will have effects in other states, such as the financial regulations common to secrecy jurisdictions, is therefore not the exercise of sovereignty, but an encroachment on the sovereignty of others" (Norwegian Government Commission, 2009: 144-6).

v. Obligations of non-state actors

As discussed in the Interim Report of the Independent Expert (A/HRC/28/60 §33-35), tax abuse, and illicit financial flows more generally, is not a human rights concern for States alone. While States have the primary duty to respect, protect and fulfill human rights, Principle 13(a) of the Guiding Principles on Business and Human Rights (OHCHR, 2011) requires that business "Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur."

We have already seen how MNCs are a key actor with respect to tax abuse by employing aggressive tax planning strategies. When it comes to tax evasion, financial institutions are a key actor—including especially some of the world's largest and best-known banks. Henry (forthcoming) identifies, for the period 1998-2014, 845 cases where individual financial institutions received specific declared penalties and assessments for a host of infractions, the most widespread of which was helping wealthy clients and corporations engage in tax fraud. Moreover, he found that a small handful of banks were responsible for a majority of these infractions: looking at the top 14 kinds of infractions, the top 22 banks were penalized a combined 655 times; and the top ten offenders account for more than half of these.[17]

[17] The other top 13 infractions include: (1) defrauding pension funds and other investors in mortgage-backed securities and mortgage CDOs; (2) defrauding investors in corporate securities; (3) money laundering for drug cartels, arms dealers, fraudsters, and other criminals; (4) illegal securities trading, including insider trading and market manipulation; (5) rigging interest rates (especially LIBOR and credit-card charges); (6) rigging foreign exchange and derivatives markets; (7) rigging the US municipal bond market; (8) rigging commodity markets – gold, other precious metals, electricity, and food; (9) the systematic evasion of US and UN trade sanctions with respect to Burma, Cuba, Iran, Libya, North Korea, Serbia, the Sudan, and Zimbabwe; (10) illegal mortgage foreclosures; (11) retail credit card or "payment insurance" fraud; (12) bribery of public officials, municipal bond issuers, and pension fund managers; (13) racial discrimination in lending.

Henry has calculated that the banks have paid a combined $11 billion in fines for facilitating tax evasion. However, as he also argues, these penalties, as well as those for other financial crimes, are only a modest share of their total assets, shareholder equity and market value. Moreover, of the cases reviewed by Henry, in only one did a major bank ever plead guilty to a corporate felony: in May 2014, Credit Suisse pled guilty to a criminal conspiracy to defraud the IRS by aiding US citizens to file false tax returns. In a case too recent to be considered by Henry—from May 2015—4 major banks have also pled guilty to rigging currency and interest rates (see e.g. Corkery and Protess (2015)). But in neither of these cases have any of the banks involved had their licenses revoked; indeed, the plea deals were arranged so that this would not happen (Henry, forthcoming; New York Times, 2015). There is furthermore a sense of impunity in relation to the conduct of senior bankers with respect to the financial crimes of their institutions, as emphasized, for example, by Henry.[18]

Financial institutions that facilitate tax evasion and MNCs that employ aggressive tax planning strategies must recognize that their actions have human rights impacts. They can demonstrate respect for human rights through appropriate policies and due diligence procedures.

While businesses have human rights responsibilities, and have to follow domestic law, States have the duty to ensure that businesses operating in their territory do not abuse human rights. According to the UN Guiding Principles on Business and Human Rights (UNOHCHR, 2011) state: (1) "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" and (2) "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." A similar obligation can be found in the Maastricht Principles: (24) "All States must take necessary measures to ensure that non-State actors which they are in a position to regulate…such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures" and (27) **"**All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected."

[18] The New York Times (2015) has raised a similar point: "An argument has been made that the S.E.C. was right not to revoke the banks' capital-market privileges because doing so might disrupt the economy. That is debatable. What is not debatable is that bringing criminal charges against individuals and even sending some of them to jail would not disrupt the economy. To the contrary, holding individuals accountable is all the more important in instances of wrongdoing by banks that, for whatever reason, have been exempted from the full legal consequences of their criminal behavior."

These requirements are relevant for addressing tax evasion facilitated by financial institutions and tax avoidance by MNCs. Governments must ensure that these organizations cease to be involved in these activities, which are detrimental to the full realization of human rights (CESR and Christian Aid, 2014: 11). Imposing sanctions and penalties on businesses for tax abuse might thus also form part of the human rights obligations of States.

V. Reform proposals

i. General overview

It is crucial for the Post-2015 development framework of the United Nations, to address the problem of tax abuse, and illicit financial flows more broadly. Proposals to address these problems have been present throughout the process of identifying new international Sustainable Development Goals, and in the preparatory process to the Third International Conference on Financing for Development in Addis Ababa.

In its discussion of a new Global Partnership, the High-Level Panel of Eminent Persons wrote in its May 2013 report that "it is time for the international community to use new ways of working, to go beyond an aid agenda and put its own house in order: to implement a swift reduction in corruption, illicit financial flows, money-laundering, tax evasion, and hidden ownership of assets" (High-Level Panel, 2013: exec summary). It further argued that developed countries have a responsibility to "co-operate more effectively to stem aggressive tax avoidance and evasion, and illicit capital flows. Governments can work with business to create a more coherent, transparent and equitable system for collecting corporate tax in a globalised world" (ibid: 5). It proposed to include a goal to (12.e) "reduce illicit financial flows and tax evasion and increase stolen asset recovery" in the SDGs.

Similar views were expressed by the Intergovernmental Committee of Experts on Sustainable Development Financing, which states that, "While each country is responsible for its own tax system, international cooperation on tax policy needs strengthening" (A/69/315 §161) and "Tax evasion, money-laundering and corruption are facilitated by jurisdictions with regulatory regimes that allow companies and individuals to effectively hide money. Both domestic actions aimed at minimizing the flow of funds to secrecy jurisdictions and international cooperation to increase financial transparency will be needed" (ibid §164).

The Secretary General's synthesis report on the post-2015 sustainable development agenda from December 2014 also made explicit references on tax abuse: "We have…heard strong calls to reform international trade, ensure effective regulation of markets and financial actors and to take vigorous action to fight corruption, curb illicit financial flows, combat money-laundering and tax evasion and recover stolen and hidden assets" (A/69/700 §54) and has argued that "effectively addressing illicit financial flows is urgent" (ibid §115).

The outcome document of the Third International Conference on Financing for Development (held in Addis Ababa from July 13-16, 2015)—the Addis Ababa Action Agenda—states that measures to curb illicit financial flows will be integral for achieving sustainable development (Addis Ababa Action Agenda §18). It devotes a significant portion of its discussion of domestic public resources to combatting tax abuse, including the following important statement: “We will redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation. We will also reduce opportunities for tax avoidance, and consider inserting anti-abuse clauses in all tax treaties. We will enhance disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities. We will make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies” (ibid §23). It further states: “We will strive to eliminate safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows. We will work to strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions and the corporate sector, as well as public administrations” (ibid §25).

It also makes commitments to a variety of reform measures to achieve these ends (ibid §22, 24-29, which is particularly significant given that the Addis Ababa Action Agenda will largely determine the means of implementation for the Sustainable Development Goals (ibid §2).

The Independent Expert on foreign debt and human rights has welcomed many elements of the Addis Ababa Action Agenda, including its explicit call to respect human rights in the introduction and the specific attention it gives to tax abuse, including both tax evasion and avoidance. However, several concerns raised by the Independent Expert during the preparatory process of the Conference were ultimately not addressed in the final outcome document. He worried, for example, about the vagueness of the commitments to “substantially reduce” and “eventually eliminate” illicit financial flows, and recommended including a more measurable target with a specific deadline (Bohoslavsky, 2015a). He also argued that to fully do justice to the human rights concerns raised by tax abuse, more explicit references to tackling secrecy jurisdictions, strengthening bank oversight and ensuring that financial service providers exercise due diligence would be needed. Yet according to the Independent Expert the final language adopted remains weak, as it is unclear what counts as a “safe haven” and what exactly states and financial institutions must do in order to reduce the incentives for tax abuse. Similarly, it is unclear how regulative frameworks must be strengthened to increase the transparency and accountability of financial institutions (Bohoslavsky, 2015b). Concrete proposals are crucial to ensuring that progress in curbing tax abuse can be made.

At the United Nations Sustainable Development Summit (held in New York City from September 25-27, 2015), Member States adopted 17 Sustainable Development Goals. The Declaration of the outcome document states that: “The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda" (A/69/L.85 §35). The Sustainable Development Goals include two relevant targets (16.4): "By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime"; and (17.1) "Strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection." The Declaration also states: "We recognize that the full implementation of the Addis Ababa Action Agenda is critical for the realization of the Sustainable Development Goals and targets" (A/69/L.85 §40).

ii. Review and discussion of proposals endorsed by the Independent Expert in his Interim Report

While the inclusion of targets pertaining to illicit financial flows in the Sustainable Development Goals is a huge achievement[19], the targets themselves are nevertheless broad and vague. The final two sections of the background paper discuss proposals for more specific measures to operationalize these targets, to ensure that progress in curbing tax abuse is achieved and that such progress can be tracked and measured. This section discusses proposals offered and endorsed by the Independent Expert in his Interim Report, while the following section proposes further areas for discussion.

(1) Automatic exchange of tax information on a global basis

In his Interim Report, the Independent Expert endorses a proposal to:

> *Reduce to zero the cross-border trade and investment relationships between jurisdictions where there is no bilateral automatic exchange of tax information, in order to prevent hiding of offshore assets and income streams.*[20]

Automatic exchange of tax information has been described as one of the potential to be one of the most effective tools for helping all countries—especially developing countries—combat cross-border tax evasion. It involves the systematic and periodic transmission of large volumes of taxpayer-specific information by the source country to the residence country concerning specific categories of income, which those countries can then use to check the tax compliance of their residents.

[19] As Cardamone (2015: 147) has argued, it represents a substantial alternation to "seventy years of entrenched conventional wisdom regarding the primary components of poverty alleviation."

[20] Automatic exchange of tax information is a widely supported measure. The wording for this particular proposed SDG target, as well as the following two, come from Alex Cobham (2014).

Automatic exchange improves the current regime of information that operates only upon request in various ways. First, it can help free up scarce resources in tax administrations by reducing the need to engage in costly and time-consuming individual information requests (Knobel and Meinzer, 2014: 7). Moreover, since information would be provided on all taxpayers, it eliminates the limiting 'foreseeably relevant' condition of the current regime, on which countries must first have well-founded suspicions concerning their residents to obtain the relevant information. In practice this is very difficult to establish (ibid; Zucman, 2015: 59). The fact that information would be provided on all taxpayers could also help overcome the obstacles posed by corrupt government officials who would otherwise never allow certain information to be requested. As a result, incriminating evidence will become more widely available to tax administrators, increasing the likelihood that corruption may be exposed (ibid: 24). Finally, it can help provide a stronger deterrent against tax evasion, since if taxpayers know their information is being sent to the relevant authorities they will be less likely to attempt to evade tax in the first place (ibid).

Based on an initiative of the G20/OECD, a new regime of automatic exchange of information is emerging. The G20 has pledged to implement automatic exchange of information among its members by 2015, and have called on all jurisdictions to follow suit (G20, 2013 §51-52). The Addis Ababa Action Agenda has also called on countries "to work together to strengthen transparency and adopt appropriate policies, including … progressively advancing towards automatic exchange of tax information among tax authorities as appropriate, with assistance to developing countries, especially the least developed, as needed" (§27). However, for automatic exchange of information to be truly beneficial, several conditions will have to be met.

First, the new system must be universal. A study by Johannesen and Zucman (2014: 89) has shown that bilateral treaties providing for information exchange implemented with tax havens since 2009 have not triggered a significant repatriation of funds. Rather, they have led to a significant relocation of funds by tax evaders to the least compliant jurisdictions, leaving roughly unchanged the total amount of wealth managed offshore. This suggests that a piecemeal approach to automatic exchange of tax information will not lead to its desired effect of reducing tax evasion; indeed, it can even become counterproductive, as it increases the incentives for remaining havens not to cooperate (Zucman, 2015: 61). A global system is needed.[21]

The new system must also be uniform. According to Itai Grinberg (*forthcoming*), "even mildly inconsistent sets of rules for automatic information exchange promulgated by the United States and the European Union could limit the set of countries that eventually benefit from those rules... A fragmented regime would ensure that the benefits of automatic information exchange are largely limited to the developed economies, with

[21] Zucman (2014, 2015) argues that to achieve this, incentives and sanctions for tax havens will be required. His proposal is for coalitions of countries to impose trade tariffs equal to the costs of havens maintaining financial secrecy. See Zucman (2015: 75-81) and Grinberg (forthcoming) on securing haven compliance.

little or no benefit for tax administrations in emerging and developing economies." Uniformity will also increase the likelihood of compliance by financial institutions, which is also beneficial to developed countries (ibid).

To ensure an effective system for all, special consideration must be given to the unique situation of developing countries. However, many critics are worried that their needs are not being taken into account in the OECD process, and that they will be excluded from the full benefits of the system. For example, the High-Level Panel on Illicit Financial Flows from Africa has written that: "We acknowledge the various efforts to tackle IFFs at the global level and through a number of forums and initiatives. While there is emerging convergence of principles and practices, such as exist among the G8, G20 and OECD states, much more needs to be done to promote and achieve this convergence. Because membership in the forums dealing with IFFs is often limited to developed and emerging economies, the related processes are not universal and reflect the interests of the concerned countries and groupings. The lack of participation of African countries means that their interests are not necessarily being taken into account." (High-Level Panel, n.d §48).

One criticism of the current OECD model is the requirement to provide data reciprocally. The concern is that, for some developing countries, this will far exceed their current capacities. As Christian Aid (2013: 3-4) has pointed out, for example, in order for sub-Saharan Africa to have the same number of tax officials per capita as the OECD average, it would require more than 650,000 new tax officials. As a result, these countries will either be excluded from participation in the program, or, if they do sign on under conditions of reciprocity, then overstretched revenue authorities will have to stretch themselves even thinner in order to put in place the systems that will allow them to share tax information automatically (Hearson, 2013; Christian Aid, 2013: 5). Either way the results are counter-productive, as far as developing countries are concerned.

In response to this problem many experts have called for a fixed transition period during which developing countries would be able to receive information asymmetrically (see e.g. UNCTAD, 2014: 177). Moreover, it has been argued that this kind of flexibility would be an appropriate application of the principle of 'common but differentiated responsibilities' (see e.g. the High-Level Panel on Illicit Financial Flows from Africa, n.d. §58-9; Christian Aid, 2013: 6).

It is unlikely that the effectiveness of the new system would be seriously compromised during the period in which developing countries receive information asymmetrically since, as we have seen, as many important tax havens are in developed countries. The High-Level Panel (n.d. §58-9) makes a similar point in arguing in favour of asymmetrical obligations: "After all, the flow of illicit finance is mostly one way, and developed countries are unlikely to demand from African countries taxes deriving from the activities of their multinational companies." However, as a safeguard, Christian Aid (2013: 6) has proposed that if a developing country has a financial sector that exceeds some predetermined limit (e.g. a high ratio of financial services to GDP), then it would be required to provide information reciprocally in order to prevent it from developing tax haven characteristics.

Another concern regarding developing countries is with their ability to make use of the information they receive. In order to ensure that this is the case, the data must be comprehensive, in a standard format, and accessible to tax administrations. Additionally, Christian Aid (ibid: 5) has argued that the countries providing information must commit to cooperate and act on feedback to improve the provision and utility of information.

(2) Public registries of beneficial ownership

The Independent Expert has also endorsed the following proposal regarding disclosure of beneficial ownership:

> *Reduce to zero the legal persons and arrangements for which beneficial ownership information is not publicly available, in order to eliminate the potential for anonymous ownership of companies, trusts and foundations.*

As we have already seen, secrecy regulations such as the ability to hide beneficial ownership are a main facilitator of all types of illicit financial flows. It is widely recognized that beneficial ownership information is an important element of the financial transparency agenda. For example, the Financial Action Task Force, the international standard-setting body on money laundering and other finance-related crimes, recommends that "Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities" (FATF, 2012: 22, Recommendation 24).

One improvement to the FATF standards, demanded by several experts, is that the information on beneficial ownership must be available not merely to the authorities and law enforcement, but also to the public. For example, the High-Level Panel on Illicit Financial Flows from Africa has written: "To combat these problems, the Panel feels strongly that public registry of beneficial ownership is important. It welcomes the passage by the European Parliament of a resolution calling for beneficial owners of companies, foundations and trusts to be listed in public registers and looks forward to the final EU legislation to serve as a model for other jurisdictions" (High-Level Panel, n.d. §46).

However, many transparency advocates are concerned that this legislation, the European Union's Fourth Anti-Money Laundering Directive (2015/849, in force since June 26, 2015) also does not go far enough since it does not make the registries fully accessible to the public. Rather, only those with a 'legitimate interest' in the relevant information will be able to access them unless individual member states make their registries available to all. So far only four countries, Denmark, France, the Netherlands and the United Kingdom have promised to do this (Watson, 2015). Global Witness (2013: 6) has argued that full public access is crucial "because it can be exceptionally difficult for other countries to access closed sets of information through the often cumbersome, expensive and time-consuming process of mutual legal assistance. This is especially true for developing countries that may have limited capacity. Having beneficial ownership information in the public domain also allows citizens, journalists and civil society to hold companies (and their owners) to account for their actions." Knobel and Meinzer (2014: 25) have argued that until public registries of beneficial ownership become widespread, this information should be included within the scope of the automatic exchange system.

While there is widespread agreement to make public ownership information accessible to tax authorities, there is no consensus to establish public beneficial ownership registers accessible to all. While initially the draft outcome document of the Third International Conference on Financing for Development called for "public beneficial ownership registries" (§23) the final Addis Ababa Action Agenda includes only a commitment to provide "access to beneficial ownership information for competent authorities" (§27).

(3) Country-by-country reporting

Another proposal endorsed by the Independent Expert pertains specifically to the problem of profit shifting by MNCs:

> *Reduce to zero the number of multinational businesses that do not report publicly on a country-by-country basis, in order to expose major misalignments between the distribution of profit and the location of real economic activity.*

Currently, MNCs are only required to account for trade with unrelated companies, and not for trade between affiliates of the same company. Country-by-country reporting calls on MNCs to report all sales, profits, and taxes paid in all jurisdictions in their audited annual reports and tax returns—including those belonging to the same parent company—, providing a global picture of an MNC's activities. This will help make unusually-priced transactions easier to identify, which should have two important outcomes: first, it will help deter MNCs from engaging in abusive transfer pricing because there will be greater transparency and therefore public scrutiny of their activities, and second, the data needed to resolve transfer pricing disputes will be available for the first time (Murphy, 2009; 2012). The Independent Commission for the Reform of International Corporate Taxation (ICRICT) has called for country-by-country reports to be "freely available to all tax administrators, without requiring separate treaty or other agreements, so as not to disadvantage developing countries compared to developed countries and to facilitate efficient and cost-effective tax administration. States should make country-by-country reports available to the public within 30 days of filing" (ICRICT, 2015: 4).

Country-by-country reporting forms part of the OECD's Action Plan on Base Erosion and Profit shifting, another project supported by the G20, intended to address corporate tax avoidance. However, recently released details of how it will be implemented go against these recommendations, making it, as Alex Cobham (2015) argues, "to the minimum possible benefit of developing countries…" Instead of making the reports freely available to all tax administrations, data will only be collected by host countries and then exchanged through formal processes. This may exclude some developing countries as a result and will also prevent timely provision of the relevant information, meaning that tax authorities may not receive the data during the tax year in which they would want to investigate. Furthermore, Cobham explains, the data sharing will not occur on a common database, making it impossible to track progress.

A commitment in the May 6 draft of the Addis Ababa outcome document to adopt "country-by-country reporting by multinational enterprises" (§23) now appears in the final Addis Ababa Action Agenda as a commitment to adopt "multinational enterprises reporting country-by-country to tax authorities where they operate" (§27).

(4) Strengthen the United Nations Committee of Experts on International Cooperation in Tax Matters

Policy responses to combat tax abuse must take account of the special needs of developing countries if they are to be fully effective, and there is widespread concern that existing processes to this end, primarily housed within the OECD/G20, will be of limited benefit to developing countries. Recognizing this, the Independent Expert made the following recommendation:

> *Consider the establishment of an intergovernmental committee on tax cooperation, under the auspices of the United Nations, to ensure that all countries, including the least developed countries, will benefit from the emerging new system of automatic exchange of tax information and can fully participate in its further design and implementation.*

The same considerations apply to the emerging system of country-by-country reporting, and initiatives to combat tax abuse more broadly.

In order to fill the need for more broad-based cooperation in international tax policy, many experts have recommended updating the current UN Committee of Experts on International Cooperation in Tax Matters to an Intergovernmental Committee. The Secretary General, in his report on this issue, has written: "During a time in which fundamental changes to international tax standards are being devised, with what is by many perceived to be an inadequate representation of developing countries, a 'full seat at the table' for developing countries remains a fundamental gap in the area of international tax cooperation… In its work, the Committee proposes solutions focused on needs and priorities of developing countries…. However, because of its non-governmental status and limited resources, the Committee cannot fully bridge the gap [in terms of representation]" (E/2015/51 §20-21).

While the G77 States strongly expressed their wish in Addis Ababa to upgrade the Committee of Experts to an Intergovernmental Committee, as recommended by the Secretary General (E/2015/51 §5), no consensus was found on this proposal and the Addis Ababa Action Agenda in the end called only for strengthening the Committee by increasing the frequency of its meetings and increasing its engagement with the

Economic and Social Council through a Special Meeting. The Action Agenda does, however, have a lengthy discussion on the importance of international tax cooperation, including the need for more inclusive participation to ensure that proposed measures are to the benefit of all (§28-29).

Given this outcome it would interesting to discuss whether the Independent Expert should make any further recommendations in the area of institutional strengthening of the existing Committee of Experts on International Cooperation in Tax Matters. As mentioned above, it would also be helpful to discuss whether the Independent Expert could make more specific proposals to ensure that developing countries can benefit from the emerging system of automatic exchange of tax information.

(5) Curbing trade misinvoicing

Given the massive volume of resources lost just to trade misinvoicing, it is essential that efforts to curb tax abuse and illicit financial flows more broadly address this problem specifically. For this reason the Independent Expert has endorsed Global Financial Integrity's proposal to:

> *Reduce illicit financial flows from trade misinvoicing by 50 per cent by 2030.*

Unlike initiatives like automatic exchange of tax information and country by country reporting which are already being worked out in other fora, specific actions to address misinvoicing as part of the SDG agenda would significantly advance the state of play concerning efforts to reduce illicit financial flows. GFI has argued that this proposed target has numerous strengths, including focusing on the largest part of the problem (80% of all illicit financial flows from developing countries are lost through trade misinvoicing, by their estimates). Other benefits are that the target could be measured using official government statistics, would complement transparency initiatives already under way, enhance domestic resource mobilization and tax revenue and ensure that a far larger amount of capital would remain in developing countries" (Cardamone and Kar, 2014: 12). Addressing trade misinvoicing will be crucial if the world is to make progress in reaching the target to reduce substantially illicit financial flows by 2030.

The High-Level Panel on Illicit Financial Flows from Africa has recognized the importance of addressing trade-related illicit financial flows, and their report includes several recommendations to this end. These include: "African countries should ensure that they have clear and concise laws and regulations that make it illegal to intentionally incorrectly or inaccurately state the price, quantity, quality or other aspect of trade in goods and services in order to move capital or profits to another jurisdiction or to manipulate, evade or avoid any form of taxation, including customs and excise duties" and "African States' customs authorities should use available databases of information about comparable pricing of world trade in goods to analyse imports and exports and identify transactions that require additional scrutiny. States should also begin collecting trade transaction data and creating databases from that information, which can then be searched and shared with other States so that a more robust dataset of local and regional comparables is available" (High-Level Panel, n.d. §80). Similarly, Cardamone (2015:

153) has argued that, at the very least, governments should institute laws that make trade misinvoicing illegal, and require companies to attest that the goods they import and export have not been misinvoiced.

(6) More research on illicit financial flows

The final recommendation in the Interim Report considered here is:

> *Support empirical research on illicit financial flows, improve existing data and estimations, and agree on common methodology for the purpose of tracking progress in curbing illicit financial flows by 2030.*

The Addis Ababa Action Accord makes a related proposal: "We note the report of the High-level Panel on Illicit Financial Flows from Africa. We invite other regions to carry out similar exercises…. We also invite appropriate international institutions and regional organizations to publish estimates of the volume and composition of illicit financial flows" (§24). However, an additional commitment to "develop the capacity to track 'to whom, from whom' information on cross-border transactions" was eliminated from the May 6 draft (§21).

The need for more and better data from the Bank of International Settlements have been stressed by the High-Level Panel on Illicit Financial Flows from Africa (n.d. §85) and by CESR and TWN (2015: 7). The limitations of the currently available data have been noted as well by economists working on these issues (e.g. Zucman, 2013: 1361; Henry, 2009: 15-16).

In order to assess how much progress will be made in implementing the internationally agreed-to target to substantially reduce illicit financial flows by 2030 (SDG 16.4), it will be important to agree on a common approach for measuring them, including baseline estimates for 2015. It would therefore be helpful to receive views from experts on these questions and suggestions as to where additional research is needed. Next to tracking whether actual volumes of illicit outflows and inflows have been reduced at the global or country level, suggestions for how to measure policy efforts by countries receiving illicit financial flows would be helpful. For example, Jansky (2015) has argued for including illicit financial flows into the Center for Global Development's Commitment to Development Index by adopting the Financial Secrecy Index's scores as a metric, citing as advantages its disaggregated components and country-specific evaluations (Jansky, 2015: 56).

CESR has stressed the importance of choosing appropriate SDG indicators, and has argued that these must reflect human rights principles in order to give content to the human rights promise of the SDG framework. Key human rights considerations that should be reflected in the SDG indicators include: consistency with international law, measuring effort as well as outcome, reflecting the lived reality of rights holders, and avoiding perverse incentives for policies that may be contrary to human rights (CESR, 2015: 3-4). Metrics like the FSI that focus (at least in part) on policy measures are in line with the recommendation to evaluate not merely outcome but as well effort. Indeed, CESR has emphasized the importance of including a variety of types of indicators, including ones measuring policy effort, especially for the targets under Goal 16, which are broad in nature and not explicitly stated in human rights terms (ibid: 10).

iii. Additional proposals for consideration and discussion

This section discusses proposals for addressing tax abuse not officially endorsed by the Independent Expert in his Interim Report. They are presented here for further consideration and discussion. As the Independent Expert points out in his Interim Report (§74), human rights considerations must be fully integrated into efforts to curb illicit financial flows. Some of the proposals considered here therefore attempt to draw explicit attention to the human rights dimensions of efforts to address tax abuse.

(1) Increase capacity-building for tax administrations

In addition to the reform measures endorsed in the Interim Report, another important proposal endorsed by many experts is increased capacity building for developing countries which, due to insufficient resources or lack of specialized knowledge, are at a disadvantage in dealing with tax abuse. For example, the High-Level Panel on Illicit Financial Flows from Africa (n.d. §44) reports that, "Our interaction with the African Tax Administration Forum reinforced our view that a major constraint on combating IFFs in Africa is the problem of capacity."

Capacity building is an important complement to many of the initiatives discussed above, especially since some of these, including automatic exchange of information and country-by-country reporting, will result in making even more financial information available to governments, increasing the load on their tax administrations.

Increasing the amount of ODA that goes to tax administrations is one important dimension of this goal. According to Christian Aid (2013: 6), "In the UK, only around 0.2% of overseas development aid spending goes towards supporting tax work, despite the significant return on investment. Stronger commitments and monitoring of support for tax authorities, as well as coordination between donors, would clearly be a means of supporting domestic reform."

However, technical and administrative support, in addition to resources, will also be needed. The OECD's Tax Inspectors Without Borders is a promising initiative in this respect. Its objective is "to facilitate the transfer of tax audit knowledge and skills through a real-time, 'learning by doing' approach. Matched through the TIWB mechanism, tax audit experts would work directly with local officials on current audits concerning international tax issues and to share general audit practices" (OECD, 2013b: 1). The High-Level Panel on Illicit Financial Flows from Africa (n.d. §72) has commended this program as a good example of how such support could be rendered.

The Addis Ababa Action Agenda makes the following commitment on capacity building for tax administrations: "We commit to enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection. We will work to improve the fairness, transparency, efficiency and effectiveness of our tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances. In this regard, we will strengthen international cooperation to support efforts to build capacity in developing countries, including through enhanced official development assistance (ODA)" (§22). It also recognizes the need for technical assistance, and acknowledges the TIWB initiative in this context (§28).

The High-Level Panel has also argued that capacity building needs to happen across the board, including also in customs services, anti-corruption agencies and financial intelligence units (§72).

(2) Create a worldwide register of financial products

As a complement to automatic exchange of tax information, Zucman has proposed the creation of a worldwide register for financial products. The register would record who owns all the financial securities in circulation throughout the world. This would provide a way to verify tax haven compliance with information exchange, by giving tax authorities the information they need to ensure that all of the securities held by their taxpayers have been declared, including in particular those held in tax havens (Zucman, 2015: 92).

According to Zucman, creating the register is feasible, as similar registers already exist in most countries (ibid: 93). The idea would be to combine them in order to have a complete dataset, and to transfer ownership of the data to an international institution, such as the IMF, which has global membership and the technical capabilities to manage it (ibid: 95). While in the short term it would include only financial wealth (stocks, bonds, shares of investment funds), as this is the information that is currently available, Zucman argues that it should then be expanded to cover derivative products. This is necessary to prevent tax evaders from converting their assets and thus escaping scrutiny (ibid: 98).

In addition to helping curb tax evasion, Zucman argues that, in conjunction with a global wealth tax (as advocated by Piketty (2013)), the register would also help combat money laundering, bribery and terrorist financing since it would undermine the usefulness of obscuring beneficial ownership through shell companies (ibid: 92). It would thus be an important tool in the fight against illicit financial flows more broadly.

(3) Conduct spillover analyses of tax policies

As the Independent Expert notes in his Interim Report (§35), it is the responsibility of States to ensure that their regulations comply with international recommendations and to address those structures that facilitate illicit financial flows. We have already seen that certain kinds of national policies facilitate tax abuse abroad, thereby undermining the ability of those States to fulfill and protect human rights. This is one way in which States can violate the obligations to assist and not to undermine other States in securing the maximum available resources for progressively realizing economic, social and cultural rights.

In order to enhance the accountability of States with respect to these international human rights obligations, the Center for Economic and Social Rights (CESR) and the

Third World Network (TWN) have proposed that countries conduct periodic assessments of their tax policies, laws and international agreements, to show that these have no foreseeable negative impacts abroad. (CESR and TWN, 2015: 1). Such assessments are feasible: in response to a call by the IMF, OECD, UN and World Bank to G-20 countries to undertake ‘spillover analyses’ of their tax laws on the fiscal circumstances of developing countries, the Netherlands successfully completed a review of the effects of its tax policies and treaties, specifically in terms of facilitating tax avoidance by MNCs. Ireland is currently in the process of doing the same (ibid: 2).

These impact assessments could form an important part of the SDG monitoring and review process, by checking the influence of States on the achievement of the sustainable development goals in other countries, while also ensuring policy coherence across sustainable development and human rights frameworks (ibid: 5). As Lusiani (2015) has proposed, to live up to this integrated nature, impact assessments should analyze not only the revenue implications of a country’s tax policy abroad, but its distributive and governance spillovers, as well. To further integrate human rights considerations, public participation in defining and reviewing potential extraterritorial impacts should be ensured. To be a truly effective element of the monitoring and review process, findings of negative spillovers should be accompanied by recommendations for remedies and redress, with clear deadlines for policy action (ibid; CESR and TWN, 2o15: 5).

(4) Hold businesses and financial institutions to account

As shown in this background paper, States have an obligation to ensure that businesses do not impair the enjoyment of human rights, including economic, social and cultural rights. While signatories to the Addis Ababa Action Agenda have promised to “strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions and the corporate sector” (§25), these commitments are vague. While FATF Recommendations—the international standards on combatting money laundering and terrorist financing—require that financial institutions exercise customer due diligence in their operations (see Recommendation 10), there is a gap in its implementation. As the Independent Expert has argued, more explicit commitments to strengthening bank oversight and ensuring that financial service providers exercise due diligence are needed (Bohoslavsky, 2015a).

Ensuring that financial and service providers follow strict due diligence procedures will nonetheless be an important indicator of countries’ efforts to curb illicit financial flows. One possibility for how to operationalize this is a proposal from CESR and TWN: “Reflecting the duty to protect human rights through the proper oversight and regulation of business and private financial actors, governments should commit to mandating clear and specific integrated human rights and sustainable development reporting guidelines for large companies they are in a position to regulate. This would include due diligence requirements on the human rights impacts of their tax and financial arrangements, as well as their track record in human rights and environmental impacts to date” (CESR and TWN, 2015: 5).

Of course, for strengthened regulation and increased oversight to be truly effective, violators must be held to account. Writing about bribery and corruption, the Independent Expert has said that, “Ending impunity on the supply side must be part of the efforts to reduce illicit financial flows” (A/HRC/28/60 §19). The same must be said about those who facilitate tax evasions. As such, States should enhance their investigative and prosecutorial efforts in relation to tax evasion.

One opportunity may be to push for a more thorough implementation of existing standards, such as the United Nations Guiding Principles on Human Rights and Business, including in the financial sector, and to discuss more thoroughly how they relate to tax evasion and avoidance by business enterprises. In addition, it should be noted that the Human Rights Council has established an Inter-Governmental Working Group to develop an international, legally binding instrument on business and human rights (A/HRC/26/L.22). It may be important that such a new instrument is able to capture adequately due diligence obligations of the financial sector, and adverse human rights impacts that may be related to tax evasion or avoidance by transnational business corporations.

(5) Strengthen legal frameworks for the protection of whistleblowers and civil society participation

Whistle-blowers, journalists and activists have been instrumental in uncovering and exposing tax abuse. As the Independent Expert has emphasized, they need protection from reprisal, and their rights must not be infringed with impunity (Bohoslavsky, 2015a). The United Nations Convention Against Corruption (UNCAC) recognizes the importance of protecting whistleblowers: (Article 33) “Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention” (UNOCD, 2004). However, Transparency International (2013a) has found that many of the 167 countries that have ratified the Convention still lack adequate legal protections for whistleblowers, or the means and will to use them. Moreover, the Independent Expert in his Interim Report (§39) has raised concerns about the potential limits of the Convention in protecting specifically persons exposing tax evasion, an offense the Convention does not explicitly address.

To address the shortcomings of whistleblower protection in practice, Transparency International (2013b: Annex) has developed a series of 30 principles for best practice to strengthen legal frameworks for whistleblower protection. They have also recommended that the UNCAC Implementation Review Group (IRG) prepare special guidance materials informed by their principles, as well as by best practice materials and model legislation from other organizations (ibid: 1.20). They have also recommended that the IRG undertake more rigorous country reviews to test whether whistleblower systems are in place and how well they work in practice (ibid: 1.14).

Transparency International (2013b) emphasizes the important role that civil society can and should play with respect to whistleblower protection. However, concerns have been raised by numerous NGOs about the exclusion of civil society from the

UNCAC Implementation Review Mechanism and its overall lack of transparency. For example, a letter submitted to the IRG by the UNCAC Coalition, a global network of over 350 civil society organizations, states that "It is a serious flaw in the UNCAC review mechanism, that it makes it optional to consult with civil society in national reviews and to publish relevant information" (CAC/COSP/IRG/2015/NGO/2**).** Similarly, Transparency International (2013b: 1.18) has called in the IRG to publish the full country review reports.

These concerns have been echoed by the Special Rapporteur on Freedom of Association and Assembly (A/69/365 §22): "Most multilateral institutions recognize that citizens must be given a seat at the decision-making table and encourage — or even require — engagement with civil society in their charters or policies… A more restrictive process is in place under the United Nations Convention against Corruption, prohibiting civil society from participating in the Implementation Review Group and working groups. Civil society is involved in a civil society "Briefing Day", but is prohibited from mentioning any "specific country situation". Moreover, although civil society's participation is praised in article 13 of the United Nations Convention against Corruption (General Assembly resolution 58/4, annex), the terms of reference of the Mechanism for the Review of Implementation of the Convention make it optional for States parties under review to include civil society organization in different stages of the review process." States should heed the calls of the Special Rapporteur and concerned civil society organizations and increase transparency and inclusiveness in the UNCAC review process.

(6) Ensure that human rights are respected and advanced in all measures and activities undertaken to curb illicit financial flows

Human rights-based arguments for curbing illicit financial flows should not neglect to emphasize that all measures taken to this end must themselves comply with human rights standards.

With respect to the measures discussed in this background paper, human rights-based concerns have been raised, for example, against automatic exchange of information (see section V, ii, 1). One concern relates to the need to respect confidentiality and security in order to prevent the misuse of information, such as for kidnapping or extortion. As a result of such concerns Grinberg (*forthcoming*) argues that, "the entire global community should firmly commit to the idea that for countries without adequate protections against misuse of information, unfettered access to automatic information exchange is inappropriate." Christian Aid (2013: 4) has argued that capacity building will be essential for those countries that have difficulties meeting the relevant security standards. But they also emphasize that many developing countries are already thought to be meeting these standards, as evidenced by the fact that many have already been encouraged to sign information exchange agreements.

Relatedly, Cohen (2013) worries about the implications of including into the new information exchange system States in which severe or systematic violations of human rights occur. He argues that, "We might reasonably not want to provide such a regime with the ability to collect additional revenue to finance oppressive practices." He also points out that regimes might use information about offshore accounts to target their critics. This highlights the essential need for due process, to protect individuals from undue allegations (e.g. of tax evasion), removal from office, criminalization, freezing or confiscation of their assets, arbitrary detention or deprivation of their property, and to ensure the independence of authorities charged with investigating and persecuting crimes (A/HRC/28/6 §40).

More broadly, CESR has argued that the human rights principle of participation should be respected in the monitoring and review process of the SDGs by including affected populations in data collection and measurement processes. At a minimum, the review process must be transparent and promote accountability, by making the indicators, data and methodologies accessible to the public (CESR, 2015: 11).

VI. Conclusion

This background paper has discussed the ways in which tax abuse hinders the fulfillment of human rights, especially but not only economic, social and cultural rights. It has also shown how the countries and organizations that facilitate and engage in tax evasion and avoidance may be in violation of their international human rights obligations. These actors have special responsibility in the fight to combat illicit financial flows to introduce reforms to address these practices.

The paper has also discussed a variety of reform measures for addressing tax abuse. In addition to reviewing and discussing the proposals endorsed by the Independent Expert in his Interim Report, it makes several suggestions for further possible measures to be taken, including some that draw explicit attention to the human rights dimensions involved.

As noted, combatting tax abuse, and illicit financial flows more broadly, is essential for realizing international human rights obligations. And, as the inclusion of a target in the Sustainable Development Goals pertaining to illicit financial flows makes clear, it is also essential for creating an enabling environment for sustainable development. It should also be stressed, however, that combatting tax abuse alone is not enough. Tax revenues, for example, must be appropriately spent—toward the fulfillment of human rights, including economic, social and cultural rights. These budgetary processes should themselves show respect for human rights in being transparent and open to public participation and regressive tax systems and tax competition, need to also be addressed. So we should not loose sight of the fact that illicit financial flows are one piece of a bigger puzzle. It is a very important piece nonetheless.

References

UN documents:
A/HRC/26/28; A/HRC/22/42; A/HRC/25/52; A/HRC/28/60; A/68/970; A/69/L.85; A/69/315; A/69/365; A/69/700; CAC/COSP/IRG/2015/NGO/2; E/1991/23; E/2015/51; E/C.12/2007/1

ActionAid (2013). 'How Tax Havens Plunder the Poor.' May.

Addis Ababa Accord (2015). Draft as of May 6.

Addis Ababa Action Agenda (2015). *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*. United Nations. New York.

Africa Tax Administration Forum (2013). *A Practical Guide on Exchange of Information for Developing Countries.*

Alston, Philip (2015a). 'Tax Policy is Human Rights Policy: the Irish Debate,' keynote address, February 12. http://www.ohchr.org/Documents/Issues/EPoverty/Alston-Tax_policy.docx

Alston, Philip (2015b). 'Statement by the Special Rapporteur on extreme poverty and human rights at the 29th session of the Human Rights Council.' June 22. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16131&LangID=E

Balakrishnan, Radhika, James Heintz and Diane Elson (2015). 'What Does Inequality Have to Do With Human Rights?' Political Economy Research Institute. University of Massachusetts Amherst, PERI Working Paper No 392. http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_351-400/WP392.pdf

Bohoslavsky, Juan Pablo (2015a). 'Human rights must be at the core of development financing.' May 26.

Bohoslavsky, Juan Pablo (2015b). 'Why the Addis Debt Chapter Falls Short,' United Nations Research Institute for Social Development. September 15. http://www.unrisd.org/80256B3C005BE6B5/search/40467AD69242BC08C1257EC000540EEA?OpenDocument

Bolwijn, Richard (2015). 'The fiscal role of multinational enterpreises: toward guidelines for Coherent International Tax and Investment Policies,' Investment Policy Hub. http://investmentpolicyhub.unctad.org/Blog/Index/42

Boston Consulting Group (2013). 'Global Wealth 2013: Maintaining Momentum in a Complex World.'

Boston Consulting Group (2014). 'Global Wealth 2014: Riding a Wave of Growth.' https://www.bcgperspectives.com/content/articles/financial_institutions_business_unit_strategy_global_wealth_2014_riding_wave_growth/?chapter=2

Cardamone, Tom (2015). 'The Road to Addis and Beyond' in in *Illicit Financial Flows: The Most Damaging Economic Condition Facing the Developing World*. Global Financial Integrity. September.

Cardamone, Tom and Dev Kar (2014). 'Illicit Financial Flows Assessment Paper: Benefits and Costs of the IFF Targets for the Post-2015 Development Agenda.' Copenhagen Consensus Center. August.

CESR (2015). 'The Measure of Progress: How human rights should inform the Sustainable Development Goal Indicators.' October.

CESR and Christian Aid (2014). 'A Post-2015 Fiscal Revolution.' May.

CESR and TWN (2015). 'Universal Rights, Differentiated Responsibilities.' April.

Christian Aid (2013). *Automatic for the People*.

Cobham, Alex (2012). 'Tax Havens and Illicit Flows' in (ed. Peter Reuter) *Draining Development: Controlling Flows of Illicit Funds from Developing Countries*. World Bank.

Cobham, Alex (2014). 'Illicit Financial Flows Assessment Paper: Benefits and Costs of the IFF Targets for the Post-2015 Development Agenda.' Copenhagen Consensus Center. August.

Cobham, Alex (2015a). 'UNCTAD study on corporate tax in developing countries,' *Unacounted.org*. March 26. http://uncounted.org/2015/03/26/unctad-study-on-corporate-tax-in-developing-countries/

Cobham, Alex (2015b). 'OECD country-by-county reporting: Strangled at birth,' *Uncounted.org.* June 8. http://uncounted.org/2015/06/08/oecd-country-by-country-reporting-strangled-at-birth/

Cohen, Stephen B. (2013). 'Does Switzerland's Tax Haven for Offshore Accounts Violate Internationally Recognized Human Rights?' http://academicsstand.org/wp-content/uploads/2013/03/Cohen-Presentation-SROP.pdf

Corkery, Michael and Ben Protess (2015). 'Rigging of Foreign Exchange Market Rates Makes Felons of Top Banks,' *New York Times*, May 20. http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html

Crivelli, Ernesto, Ruud De Mooij and Michael Keen (2015). 'Base Erosion, Profit Shifting and Developing Countries' IMF Working Paper WP/15/118. May.

De Schutter, Olivier, et al (2012). 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,' *Human Rights Quarterly* 34: 1084-1169.

Directive (EU) 2015/849, May 20, 2015.

FATF (2012). *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation*. February.

FES (2015). 'Goals for the Rich: Indispensible for a Universal Post-2015 Agenda.' March.

Findley, Michael, Daniel Nielson and Jason Sharman (n.d.). 'Global Shell Games: Testing Money Launderer's and Terrorist Financier's Access to Shell Companies,' Griffith University Centre for Governance and Public Policy.

G20 (2013). "G20 Leader's Declaration, St. Petersburg Summit." September.

Global Financial Integrity (n.d.). 'Trade Misinvoicing.' http://www.gfintegrity.org/issue/trade-misinvoicing/
.

Global Financial Integrity (2015). 'Illicit Financial Flows Outpace Foreign Aid and Investment; Sustainable Development Goals Address Problem.' September 16. http://www.gfintegrity.org/press-release/illicit-financial-flows-outpace-foreign-aid-and-investment-sustainable-development-goals-address-problem/

Gravelle, Jane G. (2015). 'Tax Havens: International Tax Avoidance and Evasion.' Congressional Research Service. January 15.

Global Witness (2013). 'Anonymous Companies.'

Grinberg, Itai (*forthcoming*). 'Building Institutions for a Globalized World: Automatic Information Exchange' in (eds) Thomas Pogge and Krishen Mehta, *Global Tax Fairness*. Oxford University Press.

Hearson, Martin (2013). 'Some heretical thoughts on automatic information exchange and developing countries.' April 24.

Henry, James S. (2012). 'The Price of Offshore Revisited.' Tax Justice Network.

Henry, James S. (forthcoming). ‘Let’s Tax Anonymous Wealth!’ in (eds) Thomas Pogge and Krishen Mehta, *Global Tax Fairness.* Oxford University Press.

High-Level Panel of Eminent Persons on the Post-2015 Development Agenda (2013). *A New Global Partnership: Eradicate Poverty and Transform Economies Though Sustainable Development*. United Nations. New York.

High-Level Panel on Illicit Financial Flows from Africa (n.d.). *Track it, Stop it, Get It.*

Hollingshead, Ann (2010). ‘The Implied Tax Revenue Loss from Trade Mispricing.’ Global Financial Integrity. Februay.

International Bar Association (2013). ‘Tax Abuses, Poverty and Human Rights.’

Independent Commission for the Reform of International Corporate Taxation (2015). ‘Declaration of the Independent Commission for the Reform of International Corporate Taxation.’ June

Kar, Dev and Jospeph Spanjers (2014). ‘Illicit Financial Flows from Developing Countries: 2003-2012,’ Global Financial Integrity. December.

Knobel, Andres and Markus Meinzer (2014). “Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption.” Tax Justice Network.

Lusiani, Nicholas (2015). ‘Monitoring Tax Spillovers in the Financing for Development Accord,’ presentation at the FfD3 interactive hearings with civil society. April.

Maastricht Principles (2013). ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.’ Heidelberg.

Murphy, Richard (2009). ‘Country-by-country reporting: Holding multinational corporations to account wherever they are.’ Task Force on Financial Integrity and Economic Development. June.

Murphy, Richard (2012). ‘Country-by-country reporting: accounting for globalization locally.’ Tax Justice Network.

New York Times (2015). ‘Banks as Felons, or Criminality Lite,’ *New York Times*, May 22. http://www.nytimes.com/2015/05/23/opinion/banks-as-felons-or-criminality-lite.html?smid=fb-share

Johannesen, Niels and Gabriel Zucman (2014). ‘The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown,’ *American Economic Journal: Economic Policy* 6(1): 65-91.

Norwegian Government Commission on Capital Flight from Poor Countries (2009). 'Tax Havens and Development.'

OECD (n.d.). 'Aid to developing countries rebounds in 2013 to reach an all-time high.' http://www.oecd.org/newsroom/aid-to-developing-countries-rebounds-in-2013-to-reach-an-all-time-high.htm

OECD (2013a). *Addressing Base Erosion and Profit Shifting*. OECD Publishing.

OECD (2013b). 'Tax Inspectors without Borders.' OECD Publishing. July.

OHCHR (2011). *Guiding Principles on Business and Human Rights*. United Nations.

Oxfam (2015). 'Wealth: Having it all and wanting more,' Oxfam Issue Briefing. January.

Pogge, Thomas (2015a). 'How are Human Rights and Financial Transparency Connected?' keynote address, May 18. http://www.gfintegrity.org/press-release/thomas-pogge-how-are-human-rights-and-financial-transparency-connected/

Pogge, Thomas (2015b). 'Illicit Financial Outflows as a Drag on Human Rights Realization in Developing Countries' in *Illicit Financial Flows: The Most Damaging Economic Condition Facing the Developing World*. Global Financial Integrity. September.

Spanjers, Joseph and Håkon Frede Foss (2015). 'Illicit Financial Flows and Development Indices: 2008-2012,' Global Financial Integrity. June.

Story, Louise and Stephanie Saul (2015). 'Stream of Foreign Wealth Flows to Elite New York Real Estate, *New York Times*, February 7. http://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html

Tax Justice Network (2009). 'In trusts we trust.'

Transparency International (2013a). 'Strengthening whistleblower protection: an international imperative.' June 7. http://www.transparency.org/news/feature/strengthening_whistleblower_protection_an_international_imperative

Transparency International (2013b). *Whistleblower Protection and the UN Convention Against Corruption.*

UK Revenue and Customs Public Accounts Committee (2012). 'Tax avoidance by multinational companies.' http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm

UNCTAD (2014). *Trade and Development Report 2014.*

UNDP (2011). *Illicit Financial Flows from the Least Developed Countries: 1990-2008.* New York. May.

UNDP (2013). *Humanity Divided: Confronting Inequality in Developing Countries.* New York. November.

UNODC (2004). *United Nations Convention Against Corruption*. United Nations. Vienna.

UNSTT (2012). 'Addressing inequalities: The heart of the post-2015 agenda and the future we want for all.' May.

Watson, Jonathan (2015). 'Tax evasion and money laundering: EU negotiators agree terms for comprehensive beneficial ownership register,' International Bar Association. February 11. http://www.ibanet.org/Article/Detail.aspx?ArticleUid=48ada369-6b61-48df-9767-95d348857a2f

Zucman, Gabriel (2013). 'The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?, *The Quarterly Journal of Economics* 128 (3): 1321–1364.

Zucman, Gabriel (2014). 'Taxing across Borders: Tracking Personal Wealth and Corporate Profits,' *Journal of Economic Perspectives* 28(4): 121-148.

Zucman, Gabriel (2015). *The Hidden Wealth of Nations*. University of Chicago Press.

Annex:

Questions for Discussion

General Questions

Focus of the final study

Based on the interim report, are there any gaps in analysis or thematic coverage that should be included in the final report?

Legal analysis of illicit financial flows and human rights

Is the interim report missing a particular argument that could be better articulated?

Recommendations

What should be **key messages** of the final study?

Could some of the recommendations be made more **SMART** (Specific, measurable, assignable, realistic, time-bound?)

Should the final study include recommendations addressed **to particular stakeholders?**

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Questions relating to specific recommendations

Automatic exchange of Tax information:

Should the Independent Expert consider making more concrete proposals how to ensure that developing nations can benefit to from the emerging new system of automatic exchange of tax information and can fully participate in its further design and implementation? If so, what would be good to recommend?

Increase capacity-building for tax administrations

In addition to OECD/UNDP initiative of Tax Inspectors Without Borders, are there any other examples of how support for developing countries' tax administrations can be rendered?

Create a worldwide register of financial products

Should the Independent Expert endorse a worldwide register of financial products, and the complementary proposal of a global wealth tax? Are these proposals politically feasible?

Accountability of business and financial institutions

How can the Independent Expert make the Addis Ababa Action Agenda's commitment to "strengthen regulatory frameworks" more specific? How exactly do regulatory frameworks need to be strengthened to prevent tax evasion?

Strengthen legal frameworks for the protection of whistle-blowers

What specific proposals should the Independent Expert endorse with respect to the protection of whistle-blowers? How can whistle-blower protection with respect specifically to tax evasion be guaranteed since this is not explicitly covered by UNCAC?

Ensure that human rights are respected and advanced in all measures and activities undertaken to curb illicit financial flows

How can the general recommendation to ensure adherence to international human rights standards be made more specific?

Spill-over analyses of tax policies

Should spill-over analyses in relation to tax policies be part of SDG monitoring?

Improved research

On what areas relating to illicit financial flows is more research needed? What could and should be the role of UN agencies, IMF/WB in terms of collection of data?

Measurement of Illicit financial Flows and policy efforts to reduce them

Should the Independent Expert make any suggestions how to measure tracking progress in reducing illicit financial flows as agreed by SDG 16.4. If so how can it be ensured that both efforts to curb illicit financial flows by countries of origin and countries of destination can be adequately tracked?

Monitoring the implementation of SDG target 16.4:

How should implementing the SDG 16 and its target on reducing illicit financial flows be monitored? Should there be a role as well for UN human rights mechanism in this?

Comments on the final study of the Independent Expert may as well be provided in written form by 15 November 2015 to: ieforeigndebt@ohchr.org