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Curbing Illicit Financial Flows: The Post-2015 Agenda and International Human Rights Law

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This policy brief originates from our Institute's Program of Work of 2013 that identified corruption as a cross-cutting theme through Conflict Prevention, Rule of Law, and Global Governance and the Roundtable on November 21, 2013 entitled "Illicit Financial Flows and the Widening Poverty Gap" that convened policy-makers, business representatives, lawyers, researchers, and NGO representatives who, thanks to an inclusive dialogue, sought to operationalize the responsibilities of states, businesses, and lawyers to curb illicit financial flows in a way that benefits developing countries. We thank all of the reviewers of previous versions for their feedback, and acknowledge that all our mistakes are our own. Corresponding author: Jill Coster van Voorhout (j.costervanvoorhout@thehagueinstitute.org)

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Executive summary

Corruption, which was identified as a cross-cutting theme in our Institute's program of work for 2013, is not only a problem in its own right but also part of the "larger" issue of illicit financial flows (IFFs). Simply put, IFFs deprive governments in both developed and developing countries of resources that might otherwise be invested in public goods such as health, agriculture, infrastructure, and education.¹

IFFs concern both illicit money and in- and outflows of money, and corruption is both their cause and consequence. Corruption often "generates" the illicit money, which also can stem from fraud or trafficking of persons, drugs, weapons, or other illegal goods. In addition, abuse of entrusted power for private gain - as corruption is commonly defined - often lures in in- and outflows of money - for instance, when illegal money is laundered to leave via the regular financial system or when local authorities negotiate tax concessions and incentives for (foreign) investment for states, companies, or individuals.

Often corruption and IFFs are mutually reinforcing, and have a negative spiraling effect on a country's economy, weakens governance, and affects the rule of law. For example, illegal money fuels the commission of further crimes and the potential for in- and outflows of capital, whether legally or illegally "earned", poses opportunities for corruption and other illegal acts. Therefore, we include corruption under the definition of IFFs but exclude the legal practice of tax avoidance (as opposed to tax evasion, which is illegal per se).²

A comprehensive approach is taken to IFFs at the intersection of peace, security and justice, by combining perspectives of conflict prevention, rule of law, and global governance. The result is two policy recommendations: (i) to incorporate the rule of law in the post-2015 agenda, also under draft goal 12e aimed at tackling IFFs,³ and (ii) to use human rights obligations and responsibilities to curb IFFs.⁴

These recommendations are made to three audiences: (a) policymakers, who work at the national and international level and through multilateral institutions such as the Organisation for Economic Co-operation and Development (OECD), the World Bank, and the International Monetary Fund (IMF), (b) business representatives, who can contribute both positively and negatively to IFFs and their control, and (c) "facilitators" of IFFs such as lawyers and accountants.

Our ultimate aim with these recommendations is to encourage post-2015 funding by a coalition of public-private and state-nonstate financiers, and promote human rights obligations for states and responsibilities for businesses, including law and accountancy firms, and "facilitators" of IFFs.

1. Introduction

Given the looming deadline of the Millennium Development Goals (MDGs),⁵ this year's negotiations about the post-2015 agenda will likely sustain the ever-increasing attention on IFFs. As the UN High-Level Panel on these new international development goals states, "perhaps the most important transformative shift is towards a new spirit of solidarity, cooperation, and mutual accountability that must underpin the post-2015 agenda.... It is time for the international community 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."⁶

Momentum to tackle IFFs is building in the developed and developing world alike, as evidenced by recent cases of outrage in the media such as the allegation that the customs agency of the Democratic Republic of Congo in Katanga Province is guilty of corruption, even as it is owed \$3.7 billion in tax by mining companies.⁷ The European Commission's anticorruption report notes that citizens expect the European Union (EU) to help member states protect the licit economy against organized crime, financial and tax fraud, money laundering, and corruption.⁸ Although it does not explicitly refer to IFFs, the report estimates that corruption costs the EU economy €120 billion per year, just a little less than its annual budget.⁹

The tested method of following the money trail and a corresponding focus on IFFs introduces an important perspective to problems that are otherwise only seen superficially, such as the referendum about migration in Switzerland caused mainly by corporates seeking to profit from low tax rates and the language spoken by their employees.¹⁰ At the national level, prosecution services in countries such as the United Kingdom (UK) start to prioritize asset recovery¹¹, but the lack of international consensus about crime definitions causes real challenges for conflict-affected countries such as Tunisia, Libya and other Arab Spring states that appear to have lost public money by the practices of former ruling families.¹² Such countries

largely depend on voluntary collaboration of secrecy jurisdictions for asset recovery and can thereby not use the public money that got lost to compensate victims or, if there are no victims, to invest in public goods and to deprive criminals of what in effect is their lifeblood: money.

“It is time for the international community to go beyond an aid agenda and put its own house in order.”

2. Analysis

2.1. Estimates of the size and impact of IFFs

All credible research demonstrates the enormous size and impact of IFFs, particularly on the developing world, which, according to estimates by Global Financial Integrity (GFI) lost US\$859 billion in outflows stemming from corruption, tax evasion, and other crimes (see Figure 1).¹³

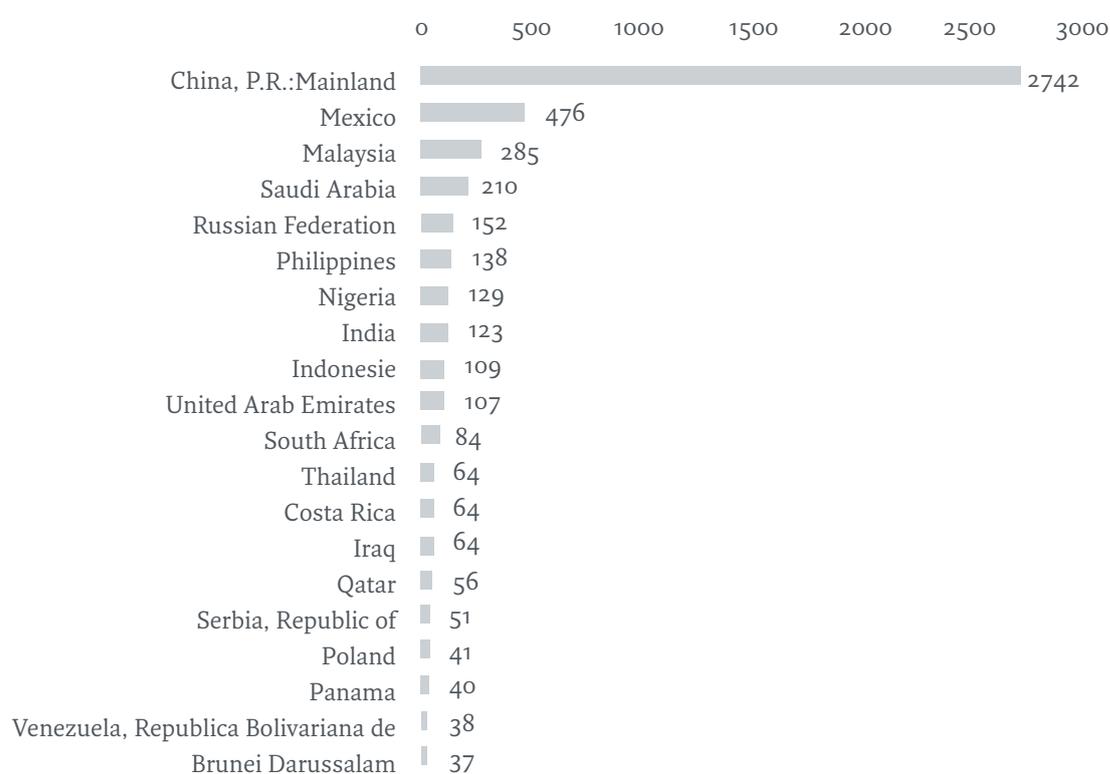


Figure 1. Top twenty cumulative illicit financial flows, 2001–2010 (Source: Kar and Freitas, GFI, 2012; in US\$ billions)

Cumulatively, between 2001 and 2010, a sum of approximately US\$5.86 trillion vanished, according to GFI's calculations for all these countries. In Africa, IFFs are currently estimated to eclipse official development aid (ODA).¹⁴ The projected ratio is 1:10, which means that for each 1 euro of aid into the continent, approximately 10 euros flow out of Africa.¹⁵ IFFs take place as inequality increases - both within and between countries.¹⁶ Fragile conflict-affected states today are home to half the world's extreme poor and evidence indicates a continued trend.¹⁷ Confronted with lack of progress on most MDGs and declining ODA, these states are in economic hardship.¹⁸ In addition, they are also typically dealing with other priorities, such as coping with violent conflict and terrorism, managing international aid flows, and responding upwardly to donor demands for accountability. Their justice and tax authorities are often one step behind the much wealthier and therefore also much better advised individuals, companies and states as well as their advisers such as lawyers or accountants.¹⁹ In light of all these background factors, developing countries will most likely only benefit from sustainable economic growth, peace and stability, conflict prevention and resolution when these are combined with promotion of the rule of law on both the local

and international level. Current efforts to support transparency and accountability by sharing financial information and disclosing beneficiary ownership undertaken by the developed world thus need to adequately reach developing countries, including fragile conflict-affected states and countries in transition. IFFs are therefore analyzed on the intersection of peace, security, and justice by combining perspectives of all three of our Institute's programs.

2.2. Cross-cutting research approach to IFFs

Our cross-cutting research approach to IFFs combines perspectives of conflict prevention, rule of law, and global governance. Conflict prevention and IFFs are intricately linked, particularly in low- and middle-income countries trapped in a vicious circle of development problems such as the resource curse and recurring cycles of violence funded and fueled by illicit money or in- and outflows of capital.²⁰ IFFs are not only a criminal justice and human rights issue and as such require a rule of law perspective, but also undermine both a stable investment climate for public and private funders and adherence to principles of accountability and transparency.²¹ Global governance is germane for IFFs, because it presents a truly worldwide problem, for instance because a lack of financial transparency in one state enables assets and capital to be transferred and hidden in ways that undermine regulation and taxation in another.²² Powers are shifting in a multi-polar world which also hosts several multinational corporations with more economic "clout" than low- and middle-income countries or even developed countries (see Figure 2).²³

Numerous NGOs or powerful individuals appear to have more influence on transparency and financial justice in a country than small governments with weak institutions, while advanced technologies

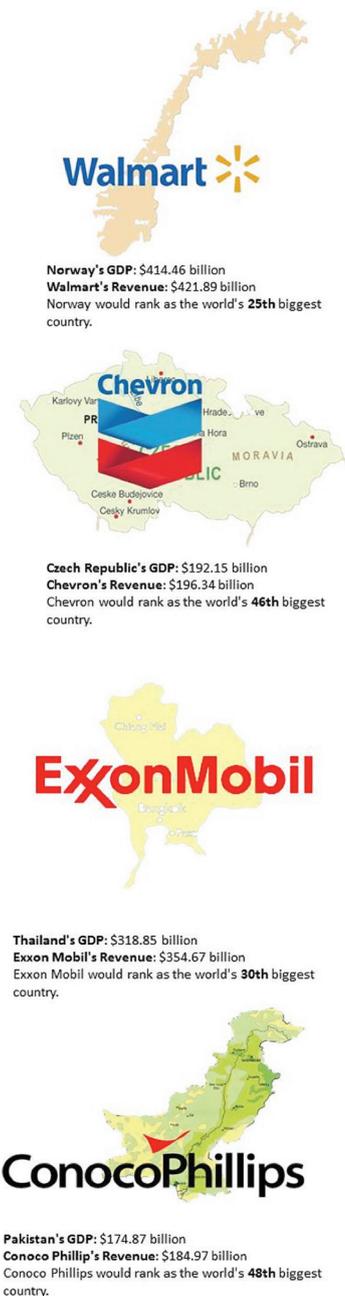


Figure 2. The economic clout of many multinational corporations is equivalent to that of countries in both the developed and the developing world (Source: BusinessInsider.com, data based on Fortune/CNN Money, IMF)."

and travel opportunities seem to not only benefit legitimate actors but also transnational crime networks, which can be either directly or indirectly involved in IFFs. Given these connections between IFFs and conflict prevention, rule of law, and global governance, we use the noted cross-cutting approach to assess existing initiatives, to learn lessons, and to suggest policy recommendations to improve efforts to combat IFFs.

2.3. Existing initiatives

Several actors, such as the Dutch government, provide technical assistance on tax administration, fighting financial terrorism, anti-money laundering, and managing natural resources via the IMF and the World Bank.²⁴ In addition, the Netherlands already renegotiates tax treaties with developing countries and concurrently aims to improve capacity of these negotiators and other authorities who suffer most from IFFs.²⁵ These renegotiated treaties can help developing countries, provided that they comply with minimum standards, such as those set by the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS). That is, acting through multilateral fora such as the BEPS, national governments can address tax planning strategies that exploit gaps and mismatches in rules to make profits "disappear" and thus evade taxes. The aim of initiatives such as BEPS is to target shifts of taxable income out of countries where the income was earned, usually to zero- or low-tax countries, which erodes the tax base of the countries affected and therefore reduces their tax revenues.

At the supranational level, the European Commission has recently proposed amendments to key EU corporate tax legislation in order to reduce evasion (and aggressive tax planning), a move supported by the Dutch government. As a bloc of states, the G8, moreover, agreed to tackle the issue of hidden company ownership and at the G8 Conference in Lough Erne in June 2013 the UK has expressed its commitment to set up a central registry of beneficial ownership. Such activities

can in effect repair the damage done by rules never intended to shield the identity of owners or users of a legal entity such as a business or trust.

Non-state actors such as NGOs, like the Centre for Research on Multinational Corporation's (SOMO), conduct relevant research and advocacy on the extractive industry, corporate social responsibility, tax justice, trade and investment, and policy coherence. Other NGOs such as ONE campaign on transparency, trade, investment, and the MDGs. Transparency International maintains a corruption perception index and promotes transparency and accountability. Grassroots-level NGOs also play their part, for example, by using freedom-of-information laws to ensure that money earmarked for public services such as education is properly disbursed.²⁶

Other non-state actors from the private sector, such as the Netherlands Entrepreneurial Development Bank (FMO), support financial institutions in reaching international best practices through investment.

Many of these actors also join forces in multi-stakeholder initiatives such as the Extractive Industry Transparency Initiative (EITI), a global coalition of governments, companies, and civil society collaborating on improving openness and accountable management of revenues from natural resources.

Another global initiative is promoted by the United Nations (UN), which works on marrying political and legal movements seeking to tackle unaccountable power in both the private and the public sector. On February 6, 2014, UN Deputy Secretary-General Jan Eliasson said, "We are examining how our post-2015 development agenda can address illicit flows and tax evasion while increasing the recovery of stolen assets."²⁷ Curbing IFFs has thus become both a means to an end and an end in itself; freed up capital can both ensure that domestic resources are mobilized and complement the requisite funding for the post-2015 agenda, which urgently requires new donors and financing strategies such as private-public partnerships.

2.4. Lessons learned

Among the lessons learned from these initiatives is that curbing IFFs, as acknowledged in the post-2015 agenda, requires action by states – on both the national and international level, including through multilateral institutions – and nonstate actors such as NGOs and businesses which pursue global governance of finance, trade, and the combat and control of (cross-border) crimes. Most important, the anti-money-laundering regime must be strengthened; initiatives for greater transparency of company ownership – such as that of the G8 – are required; and efforts to trace and freeze and recover stolen assets are instrumental in curbing IFFs.²⁸ The OECD indicates the different levels of effectiveness of means for asset recovery: nonconviction based forfeiture and civil prosecutions seem most successful.²⁹ In addition, the UN Office of the High Commissioner for Human Rights (OHCHR) appears one of the first international organizations to link states' obligations toward human rights and the combat of IFFs for the nonrepatriation of proceeds of corruption (stolen assets).³⁰ This OHCHR report also outlines the negative impact illicit funds have on the rule of law.³¹ Nationally and internationally, financial investigations and corruption control are essential, provided that they are accompanied by accountability measures that solidify adherence to the rule of law. However, the current (over-)emphasis on criminal law will only take us so far, because even the measures suggested are probably not enough to reach its goals such as deterrence or restoration. Because we consider the rule of law in all its dimensions, including administrative and private law, and connect it with perspectives of conflict prevention and global governance, we conclude with two policy recommendations.

3. Policy recommendations

3.1. The post-2015 agenda

Our recommendations to all three target audiences, insofar as they negotiate or otherwise influence the post-2015 agenda, are twofold.

3.1.1. Improvements to the post-2015 agenda by fostering a rule of law culture

The High-level Panel on the post-2015 agenda mentions the importance of the rule of law in its report, but this has not been translated into the draft goals. We recommend to include a goal (or several goals) that aim at the promotion of the rule of law in recipients of the post-2015 funding. Such efforts should not be limited to the more “tangible” and therefore measurable aspects of legislation, institutions, and procedures. Rather, fostering a rule of law culture has to go beyond the top level of a country and ensure that most people in society settle disputes peacefully and are able to check their government's transparent and fair distribution of public services and benefits. A rule of law culture should therefore include bottom up processes that abide by international law. In our opinion, the rule of law will only “function” when government, businesses, and individual citizens commit to and act in accordance with principles such as the supremacy of the law, equality before the law, and accountability to the law.

A post-2015 agenda goal on the increase of access to justice for citizens at the domestic level is relevant, but should certainly not be understood as an easily measurable aim that can be imposed from the top down. Moreover, although quantifiable aspects of the rule of law are important, it is misleading to overlook civic trust in justice institutions and their representatives as well as actual enforcement and delivery of justice, which all can hardly be quantified.

The post-2015 agenda goal (or goals) should therefore allow for measurement by mixed methods that combine both quantitative and qualitative data.

With regard to IFFs, helpful quantifiable goals in the post-2015 agenda are laws that for instance prohibit seizures of land without due process and compensation for the owner; policies that prevent public servants from accepting bribes; and checks and balances on government, which is thereby encouraged to spend funds on the public good rather than for private gain. However, these goals will only support actual rule of law promotion in recipient countries when combined with the less “tangible” opportunities for individuals to fulfil their responsibilities as citizens and to realize their rights. Depending on the country concerned, such opportunities will often have to include access to both formal and informal justice institutions and procedures as well as to nonjudicial mechanisms, particularly where access to courts is physically almost impossible, for instance because of conflict or security reasons. Another aim of the post-2015 agenda should therefore be to build grassroots commitment to the statutes, institutions, and processes that are integral to the rule of law, so that the state treats its citizens as real citizens, rather than as subjects. The government and the state’s elites must therefore also be subject, in theory and in practice, to the same laws as its citizens, as a prerequisite to strengthening the social contract between the state and its citizens. Without civic trust in the rule of law and commitment to its values and norms, citizens in most developing countries will continue to see their futures blighted and their countries’ resources wasted. This emphasis on the relationship between government and citizens based on accountability to the law, also for expenditure of public money and delivery of services to citizens, is closely connected with our second recommendation.

3.1.2. Improvements to draft goal 12e on curbing IFFs under the post-2015 agenda

The proposed post-2015 goal 12e to curb IFFs adopted under the heading of ensuring “a global enabling environment” and catalyzing “long-term finance” is welcome in principle but its weaknesses must be repaired. Goal 12e rightly promotes international

development finance and effective taxation and other public funding in countries that can thereby, also by combatting related crimes, improve service delivery and strengthen rule of law institutions. However, its formulation of “reduce illicit flows and tax evasion and increase stolen-asset recovery by X\$” contains at least three flaws, which must be restored in a joint effort by all negotiators: ³²

1. The current goal implies a 1:1 ratio between tax revenues and capital lost from states through IFFs, which is misleading because taxation only amounts to a percentage. Moreover, public spending of money that now flows out of states usually has far greater effects than the amount spent. After all, each euro invested in security, health, and education has the potential to spiral upwards, thereby ensuring economic growth, conflict prevention, rule of law, and good governance. Merely reducing IFFs and tax evasion with an absolute amount is thus inaccurate and insufficient.
2. Reducing IFFs and tax evasion and increasing recovery of stolen assets requires better and more data for measurements of the size of each IFF. Recovering stolen assets, which currently can be relatively more easily calculated than illicit flows and tax evasion, can already hardly be measured in terms of success rates. Additionally, the deterrent effect of the risk of getting caught as perpetrator is hardly quantifiable, but does have the potential to strengthen accountability and thereby commitment to the rule of law.
3. Progress measurement such as strengthening the anti-money-laundering regime should be adopted in a goal, but even an improved formulation – for example a percentage of stolen asset recovery instead of the proposed absolute amount – currently poses difficulties because of the problems with measurements of the size of each IFF. Again, a mere quantitative output measurement is too simplistic.³³

Better and more data for a calculation of each IFF, improved measurement of progress of curbing IFFs, and impact assessment of each policy intended to

achieve that aim, require improved fact-sharing through “big data.”³⁴ An added benefit is that, in addition to reactive measures such as tips, media reports, protests, audits, and whistleblowers, big data can stimulate proactive approaches that detect and sometimes even predict IFFs. A large pool of data from various sectors and different governmental domains enables problem and impact assessment by examination of patterns, anomalies, warning signs, and suspicious behavior, both cross-sectionally and longitudinally. Three types of problem measurement are especially useful:

1. Stakeholder analyses can reveal perpetrators, victims, and other nodes in the network such as facilitators (whether active or passive). Chains of command and responsibility can be exposed, as can interests and stakes. The results of stakeholder analyses may also help identify niches for different actors in prevention, prosecution, protection, and policy.
2. Big data-based visualizations can show, among other things, the countries most affected by what types of IFFs. Coupled with country-specific data such as the Universal Human Rights Index, GDP per capita and the Human Development Index, manifestations of the impacts of IFFs on human rights and socioeconomic development can be presented. Country- and world-average prices, shipping manifests, incorporation records, and tax records can help analysts identify trade mispricing.³⁵
3. Network mapping can visualize IFFs, both alone and in conjunction with data on other, often-associated transnational crimes such as drug trafficking, illegal logging, human trafficking, and weapons trade. Currently, visualization of measurements on human trafficking³⁶ and weapons trade³⁷ is implemented through projects with Google Ideas (see Figures 3 and 4). In addition, certain projects visualize illegal logging using satellite images and crowd-sourced data.³⁸

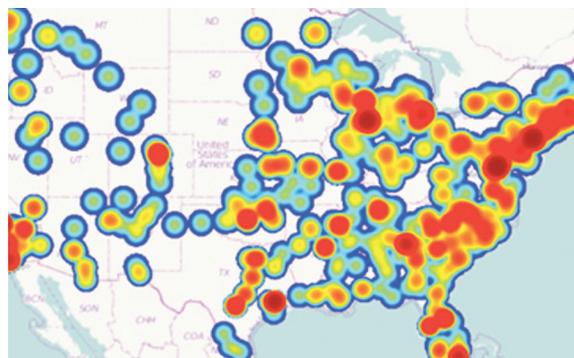


Figure 3. Visualization of human trafficking activities in the United States (Screenshot courtesy of Palantir Technologies, from the website of Google Ideas).



Figure 4. An interactive visualization of government-authorized small arms and ammunition transfers from 1992 to 2010 for the Netherlands (Source: Screenshot of Google Ideas project).

Working with existing visualization projects can facilitate the identification of hotspots of IFFs, which highlight dangers that require more focused action by law enforcement and regulatory agencies. On the basis of such information, these agencies can maximize their scarce resources to invest in the critical investigations.

Ex post impact assessment on the basis of big data can use established baseline scenarios for countries or regions and the noted problem measurements. Visualization of other scenarios, such as business-as-usual as opposed to increased levels of action and types of policies, can also enable ex ante analysis of the best possible policy or combination of policies for tackling IFFs. Currently, big data are, for instance, used by the extractive industry (for example, the OpenOil initiative). Because of its significant role in the generation of IFFs, the OpenOil initiative can offer important lessons.

Sharing and improving the use of big data is most promising in a coalition of public-private and state-nonstate actors under the leadership for instance of a multi-lateral institution like the World Bank when it has developed the requisite expertise, which according to critics is now largely lacking.³⁹ More and better data for (optimal) problem measurement and (policy) impact assessment require information sharing, preferably in multi-stakeholder forums and via multilateral institutions as well as international organizations. Consequently, in addition to national and international law enforcement agencies, Financial Intelligence Units (FIUs) and other such organizations can also leverage big data and thereby help improve capacity building in countries where it is needed. Independent FIUs can do so on their own, and through organizations such as the Egmont Group, an informal international network of 132 FIU members.⁴⁰ Intergovernmental policymaking organizations such as the Financial Action Task Force (FATF) can use big data to inform their work on standard-setting; to promote effective implementation of legal, regulatory, and operational measures; and to monitor countries' progress in implementing recommendations. Other governmental departments can collaborate to provide - either directly or through training - enhanced

capabilities in data warehousing, data security, network analysis, and other capabilities to derive meaningful operational intelligence from big data. Independently and together, these actors can fill the existing data gap by providing good measurements of each flow and the actual impacts of a policy or combination of policies, including any unintended consequences, to counter all IFFs collectively.

3.2. International human rights law

International human rights law has only recently been identified as a helpful framework for curbing IFFs.⁴¹ The UN High-Level Panel for the post-2015 agenda rightly refers to the requirement of “global efforts to reform trade, crack down on illicit capital flows, return stolen assets, and promote sustainable patterns of consumption and production. Finance for the massive investments that will be needed for infrastructure in developing countries will require new ways of using aid and other public funds to mobilize private capital.”⁴² However, the panel does not point out existing obligations or responsibilities for curbing IFFs under international human rights law. Recipients of post-2015 agenda funding can also mobilize the domestic resources lost in IFFs so that they might no longer need international development finance. Such countries can potentially use that capital to enforce the institutions that uphold civil and political rights and the programs that promote and provide social, economic, and cultural rights. Therefore, the domains of finance and development need to be integrated with human rights law, in our view.

Human rights law continues to evolve and, in addition to the more established first-generation civil and political rights, it is increasingly appreciative of social, economic, and cultural rights as binding instead of as merely aspirational principles. States are still considered to be primary duty-bearers, while the framework is also progressively expanded to nonstate actors such as businesses and have some implications for individuals, particularly if they “facilitate” IFFs.

Proactive human rights approaches to IFFs include setting up relevant structures, whether legal, policy-based, or voluntary; raising awareness; abiding by the “do no harm” principle; ensuring transparency; and providing learning and capacity building.⁴³ Reactive approaches include providing access to remedies, facilitating asset recovery, and reinvesting recovered revenues. At the center of both approaches is international cooperation.⁴⁴

3.2.1. Human rights obligations of states

States must combat IFFs on all three levels: national, international, and through multilateral institutions. In brief, states are to increase transparency, enable access to the information necessary to combat IFFs, and strengthen governance so that public money is spent in a manner that promotes human rights. States are required to establish both appropriate laws to hold to account those who use or promote IFFs and competent institutions to enforce regulations. With law enforcement and prosecution or tort mechanisms in place, stolen assets can be recovered and returned to the rightful owning country, business, or individual. When held to account, individuals and companies will face difficulties in any attempts to circumvent tax systems (through, for example, impervious company ownership and accounts, or mispriced trade and secrecy jurisdictions). Accountability measures help to combat a range of IFFs that undermine both public finances and governance, including laundering the proceeds of crime, theft of state assets, and bribery of public officials.

States are required to prevent any encouragement or facilitation of IFFs as well as deliberate frustration of efforts by other countries to counter IFFs, particularly where such actions constitute a violation of international human rights obligations. States can therefore implement measures that promote the transparency of ownership of legal entities such as a company and those participating in trust and foundation arrangements, the tax transparency of accounts of corporations and individuals, particularly in secrecy jurisdictions, and the automatic exchange of tax information with all countries. Such laws and policies have to ensure that local inhabitants

or companies working on the state’s territory will gain a “trust” in their government so that paid taxes will indeed be used for improving human rights. Not every element of a state’s budget can or should be earmarked, but states must guarantee that accountability becomes a two-way street: countries, which rely on their citizens for income, should become obliged to take their demands into account. Transparency and accountability serve the further purpose of tackling social, political, and administrative obstacles that many developing countries face because they are particularly vulnerable to both individual and corporate tax evasion. States should labor to improve transparency, to better enable effective regulation and taxation of economic and financial activities, promote confidence by private sector actors, and guarantee that civil society - including the media - can help in holding all public and private actors accountable should they fail to abide by the rules.

States are also required to respect economic, social, and cultural rights such as those to food, health, education, social security and principles of non-discrimination, participation, transparency and accountability, included in the UN Guiding Principles on Eradicating Extreme Poverty.⁴⁵ Nonstate actors should take an active role in examining whether government’s expenditures of public money promote human rights. They can, for example, use participatory budgeting, assessments of human rights impacts of budgets (and free trade agreements and business operations in the state), and a human-rights-based approach to budget monitoring.

3.2.2. Human rights responsibilities of businesses

Businesses have human rights responsibilities, for example, as spelled out under the UN Guiding Principles on Business and Human Rights (UNGPs).⁴⁶ Businesses are at least encouraged to avoid IFFs' negative impacts on human rights, inter alia by exercising due diligence related to their operations and business relations. The UNGPs and other international corporate social responsibility standards can also contribute to articulating improved due diligence requirements to prevent or decrease IFFs in different economic sectors (including financial, accounting, and legal).

Businesses such as anonymous shell companies and trusts often play a negative role in money-laundering and concealing the identity of corrupt individuals and irresponsible businesses involved in activities from arms, drug, and human trafficking to theft of public funds to tax evasion. Therefore, businesses who stay clear from such practices can help states and other actors by improving best practices in their sector, thereby identifying norms that can disclose the practices of the spoiling businesses in their field. A level playing field requires businesses to be active, if only by furthering country-by-country reporting and cooperating in (big) data sharing. Moreover, it would help if responsible businesses are encouraged by state laws and policies that contribute to countering the negative roles played by some of their counterparts.

3.2.3. Human rights responsibilities of “facilitators”

“Facilitators” such as lawyers and accountants who act as intermediaries in international business transactions have responsibilities to respect human rights and use their influence and leverage to encourage their clients to not engage in conduct that might violate human rights.⁴⁷ They have an important role in assisting states and businesses in confronting negative impacts of IFFs on human rights. With their knowledge of trends and dynamics of the legal and financial systems, “facilitators” should take up a more forward-looking role. They should decide, on the basis of their codes of conduct, whether they

should warn their clients, whether enterprises or individuals, that their present conduct could later be deemed illegal. For example, codes of conduct or individual ethics should take into account the possibility of an emerging international norm against IFFs, perhaps already implicit in human rights law, or a ruling of a domestic court that a certain financial practice is unconstitutional.

3.2.4. Holding all three actors to their human rights obligations or responsibilities

NGOs, the media, and the general public each play a significant role in holding states, businesses and “facilitators” to their human rights obligations or responsibilities. The effect of these “catalysts” of transparency is visible in recent initiatives addressing secrecy in business practices by institutionalizing, among other things, country-by-country reporting and automatic exchange of information. NGOs, the media and members of the general public should therefore continue to bring IFFs to light, push for accountability for perpetrators, check the actual delivery on human rights obligations of states and responsibilities of businesses and “facilitators”, and advocate access to information, participatory budgeting, and budget monitoring.

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4. Conclusions

The post-2015 agenda provides a new framework that enables states, businesses and “facilitators” of IFFs to (continue to) further international development, with IFFs both as a means and an end, particularly when integrated with international human rights law. States have obligations to adequately respect, protect, and fulfill human rights by engaging in both proactive and reactive practices and international cooperation to prevent and combat IFFs. Companies and facilitators have related responsibilities. The efforts to curb IFFs would be strengthened by increased availability of big data, of which advantage can be taken to measure the consequences of IFFs as well as to conduct ex-ante and ex-post impact assessments, and policies aimed at curbing IFFs.

In the spirit of the “Leave no one behind”-motto of the UN High-Level Panel on the post-2015 agenda, efforts to curtail IFFs should not only take place unilaterally by a national government but also be extended beyond developed countries’ backyards, particularly if the often-advocated level playing field is to be created.⁴⁸ Momentum appears to be gathering around proposals for concerted international cooperation and multilateral agreements on automatic information exchange as means to fulfill their human rights obligations. Our policy recommendations seek to extend these efforts to benefit those who suffer most: developing countries, including fragile conflict-affected states and countries in transition. Several elements are essential:

1. An improved post-2015 agenda prompting a global partnership between all-state and nonstate and public and private-actors that can jointly counter IFFs;
2. Promotion of obligations for states and responsibilities for businesses and “facilitators” under international human rights law; and
3. Continuation of the incorporation of lessons learned in capacity building, practical tools for research on IFFs and combatting them, and impact assessment and monitoring, together with ongoing initiatives on country-by-country reporting and beneficiary ownership.

“In the spirit of the “Leave no one behind”-motto of the UN High-Level Panel on the post-2015 agenda, all three target audiences have the following obligations or responsibilities.”

Endnotes

- 1 | International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights (IBAHRI), "Tax Abuses, Poverty and Human Rights," October 2013, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4A0CF930-A0D1-4784-8D09-F588DCDDFEA4>.
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