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Does Swiss Bank Secrecy Violate International Human Rights?

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The enormous impact of offshore accounts and bank secrecy on developing countries raises a critical question: Do states like Switzerland, which provide a tax haven for wealthy citizens of developing countries, violate internationally recognized human rights?

The implementation of FATCA has begun to end bank secrecy and to require automatic information reporting of income earned by *U.S.* citizens in offshore investment accounts. Moreover, recent commitments by Austria, Luxembourg, and Switzerland mark a beginning to the end of bank secrecy in Europe and movement toward automatic information reporting of income earned by *European citizens* in offshore accounts in *European countries*.[1] In addition, in June the G-8 issued a call for world-wide automatic information reporting,[2] and the OECD is expected to issue a similar call.

Nevertheless, other than hortatory statements from the G-8 and probably the OECD, there is no concrete progress yet toward ending bank secrecy and instituting automatic information reporting for the offshore accounts of citizens from *developing* countries outside the U.S. and Europe. Moreover, for the developing world, the tax gap created by offshore accounts is a much larger problem than for already developed, industrialized economies. Only about 2% of North American private wealth and 8% of European wealth is

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[1] Andrew Higgins, Europe Pushes to Shed Stigma of a Tax Haven, The New York Times, May 23, 2013, page 1.

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207543/180613_LOUGH_ERNE_DECLARATION.pdf

invested offshore, compared with more than 25% of Latin American and 33% of Middle Eastern and African private wealth.[3]

What is the magnitude of the tax gap created for developing countries by offshore accounts? Information about the income and assets in most offshore accounts is currently subject to laws that require confidentiality and make disclosure of such information a crime. Thus, estimates of the tax gap caused by offshore accounts are difficult to produce and may be unreliable. According to one estimate, tax revenues lost each year by offshore tax evasion, including offshore accounts, may approximate all official worldwide development assistance, on the order of $120 billion a year.[4] More recent estimates by the Tax Justice Network suggest that the total offshore wealth held by citizens or residents of the developing world is two or three times more than previously thought and that the lost tax revenue may consequently be much greater.[5]

What is certain is that the magnitude is growing. According to the leading authority, Prof. Itai Grinberg, "The capacity to make, hold,

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[3] BOS. CONSULTING GRP., GLOBAL WEALTH 2011: SHAPING A NEW TOMORROW 13 (2011) at 5, 7, 13 and n.3, available at http://www.bcg.com.pl/documents/file77766.pdf.

[4] Remarks of Jeffrey Owens, then-director of the Committee on Fiscal Affairs, Meeting of the OECD's Informal Task Force on Tax and Development (May 10-11, 2012). OECD Development Assistance Committee, Investing in Development: A Common Cause in a Changing World, OECD 3 (2009), available at http://www.oecd.org/dataoecd/14/1/43854787.pdf.

[5] Available at http://www.taxjustice.net/cms/front_content.php?client=1&lang=1&parent=91&subid=91&idcat=103&idart=114

and manage investments through offshore financial institutions has increased dramatically in recent years, while the cost of such services has plummeted. Individuals now find it substantially easier to underreport or fail to report investment earnings through the use of offshore accounts, and experience suggests that such accounts may also be used to help evade tax on income earned domestically by closely held businesses. Consequently, the principal held in offshore accounts, as well as the investment earnings generated through such accounts, may go untaxed."[6]

Moreover, according to Prof. Grinberg, "In many [developing] economies, the bulk of the individual income tax base is often comprised of a concentrated group of well-off individuals. Domestic financial institutions are also often relatively undeveloped. [I]t is commonplace for the wealthy to hold investments through offshore accounts. . . . Thus, the taxation of offshore wealth should be of greater relative importance to Latin America, the Middle East, and Africa, than to the United States and Canada or the major European economies."[7]

No international human rights agreement mentions bank secrecy or tax evasion. Moreover, no international tax treaty mentions human rights. Nevertheless, bank secrecy has a significant human rights impact if governments of developing countries are deprived of resources needed to meet basic economic rights

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[6] Itai Grinberg, The Battle Over Taxing Offshore Accounts, 60 UCLA Law Rev. 304, 308 (2012).

[7] Id., p. 309.

guaranteed by the United Nations Covenant on Economic, Social, and Cultural Rights. The Covenant came into force in 1976 and currently has 160 member state parties. Among states that are parties to the Treaty are even several notorious offshore account jurisdictions, including Switzerland and Luxembourg (but not Singapore).

The Covenant explicitly recognizes individual rights to adequate food, clothing, and housing (Article 11); health care, clean water, and sanitation (Article 12); and education (Article 13). The Covenant also imposes obligations on member states to implement these rights. Article 2 states:

"Each State Party to the present Covenant undertakes to take steps . . . , to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . . ."

The Covenant acknowledges constraints on government ability to meet these obligations due to limits of available resources but also imposes an obligation to progressively improve, that is, to take steps to realize the rights enumerated in the Covenant. Thus, under the Covenant, states have the obligation of "progressive realization."

One issue is whether obligations under the Covenant extend extraterritorially. Do parties have an obligation to progressively improve the enumerated rights, not only in those territories over which they have jurisdiction, but also in territories over which they do not? Although there is no explicit language restricting the obligations to a state's own territory, one has the sense in reading the Covenant that extraterritorial obligations were not considered or intended.

When referring generally to rights to food, clothing, health care, clean, water, sanitation, housing and education in Articles 11, 12, and 13, the Covenant appears to mean the obligations of a government with respect to individuals within its territorial jurisdiction. Article 14 refers specifically to the obligation of a state to provide **primary** education "in its metropolitan territory or other territories under its jurisdiction [emphasis added]. . . ."

Nevertheless, at least one committee of legal experts, convened by Maastricht University and the International Commission of Jurists, interprets the Covenant to impose extraterritorial obligations. In February 2012, this committee proposed the so-called "Maastricht Principles," under which:

"A State has obligations to respect, protect and fulfill economic . . . rights recognized by the ESC Covenant in . . . situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory" and in "situations in which the State . . . is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law."[8]

More specifically, Articles 19 and 20 of The Maastricht Principles call on states to "refrain from conduct which nullifies or impairs the enjoyment and exercise of economic . . . rights of persons

[8] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, available at http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf.

outside their territories . . . or which impairs the ability of another State to comply with that State's . . . obligations as regards economic rights."

There are two further possible objections to concluding that a state providing a tax haven for offshore accounts violates human rights recognized by the Covenant. Even if the government of the account holder receives information about the offshore account, it may lack the capacity to collect the revenue that is legally owed. Even if the revenue is collected, there is no assurance that it will be used to progressively realize the rights recognized by the Covenant. Thus, there is no certainty of an actual connection between one country providing secrecy for investment accounts of the taxpayers of another country and the resulting failure of the second country to progressively realize Covenant rights.

There are also varying degrees of state responsibility for the offshore accounts within its jurisdiction. The degree of responsibility may depend on whether a state enacts bank secrecy laws criminalizing the disclosure of financial information to tax authorities, fails to apply a withholding tax on offshore accounts at a rate sufficient to deter their use for tax evasion, evades requests for information about offshore accounts from other governments conducting taxpayer investigations, or otherwise limits efforts to allow for more extensive automatic information exchange. The responsibility is particularly great in the case of Switzerland, which manages 30% of all individual wealth held through offshore accounts, has a legal regime that has criminalized the disclosure of financial information, and has refused to withhold tax on offshore account

income or provide financial information about offshore accounts, except when under enormous pressure from powerful governments, such as Germany, the UK, and the United States, or when it views agreeing to provide withholding to a given group of countries (weak EU states) as a mechanism to limit pressure to help other, often poorer (at least on a GDP/capita basis) states.

No international mechanism exists for actually enforcing the Covenant, even when a clear violation is established. Parties to the covenant are required to submit regular reports to a UN Committee on implementation and an optional protocol, not yet in force, would permit individuals to submit complaints of violations.

Thus, it may not be crucial to definitively determine whether, as a technical matter, the maintenance of secrecy for offshore accounts constitutes a violation of internationally recognized human rights. Whether state obligations under the Covenant are extraterritorial, whether revenues owed would actually be collected, and, whether, if collected, revenues would be appropriately used is less important than recognizing the fact that secrecy for offshore accounts makes it difficult for developing countries to implement Covenant obligations. It therefore seems indisputable that offshore accounts impede the fulfillment of internationally recognized human rights. Recognition of this fact could accelerate the growing international effort to curb bank secrecy for offshore accounts and establish a multilateral automatic information exchange system so that developing countries, as well as industrialized countries, benefit.