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HUMAN RIGHTS
SPECIAL PROCEDURES

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PRACTICAL GUIDELINES FOR EFFICIENT ASSET RECOVERY

Report of Independent Expert on debt,
other international financial obligations
and human rights

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A/HRC/52/45





SUMMARY

In its resolution 46/11, the Human Rights Council requested the Independent Expert on the effects of foreign debt to conduct a new study on a proposed non-binding set of practical guidelines for efficient asset recovery aiming at curbing the illicit transfer of funds and mitigating its negative effects on the enjoyment of human rights.

In the present report, the Independent Expert states that the accumulation of stolen assets and illicit transfer of funds to foreign jurisdictions and countries undermines State obligations to mobilize maximum available resources for the progressive realization of human rights.

The Independent Expert believes that States are obliged to ensure the prompt repatriation of funds of illicit origin to the countries of origin to tackle the negative impacts on human rights.

INTRODUCTION

The repatriation of State assets from a human rights perspective

The development of human rights norms relating to the repatriation of state property has an unusual aspect, this is due to the fact that these norms are not primarily based on law, but rather are based on principles that underpin human rights: international cooperation, fairness and non-discrimination, participation and access to information:

The need to repatriate stolen assets has been recognized and the courts of many countries have initiated legal proceedings to this end, but in regional agreements and most national constitutions, there is rarely a human rights approach.

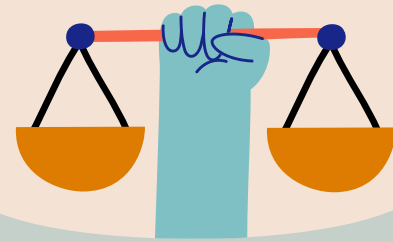
Some of the barriers to international recovery of assets were:

- **Lack of availability** of effective **freezing mechanisms** in jurisdictions where the assets were located;
- **Differences standards of proof** between legal systems;
- The **high cost of asset management** during the recovery process;
- **A lack of clarity concerning the responsibilities** of the different domestic government services;
- **A lack of clarity** regarding the correct channels for such procedures;
- **A lack of information** on focal points in foreign jurisdictions, among others.

As human rights obligations are applicable to the repatriation of State assets, the Independent Expert encourages the Human Rights Council to continue to be actively involved in the development of guidance on this issue, including the draft guidelines on human rights and the repatriation of State assets.

GUIDELINES ON HUMAN RIGHTS AND THE REPATRIATION OF STATE ASSETS

Part A



RIGHTS REQUIRE RESOURCES AND RESOURCES ARE FOR RIGHTS

GUIDELINE 1

A HUMAN RIGHTS APPROACH TO STATE ASSETS

A State asset for the purpose of the present guidelines includes any item of value which can be utilized in the realization of any or all human rights.

- Article 2 (d) of the United Nations Convention against Corruption defines property as “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets”. It is the basis of the definition used in these guidelines.
- State or national assets are resources with economic, financial, social, cultural and environmental value that are owned or controlled by the State to equitably deliver goods and services for the purposes of realizing the human rights.
- The accumulation of stolen assets and illicit transfer of funds to foreign jurisdictions and countries undermines the State’s obligation to mobilize maximum available resources for the progressive realization of the rights.
- This is referred to as asset recovery, which is the identification, freezing, seizure and confiscation of assets of illicit origin and, where authorised by law, the return of confiscated assets to their previous rightful owner. Ideally, all assets linked to illicit financial flows, including unpaid tax charges arising from various forms of tax abuse, should be subject to asset recovery, as they belong to the country of origin.

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PRINCIPLES OF HUMAN RIGHTS AND FISCAL LEGITIMACY

GUIDELINE 2

FISCAL LEGITIMACY FOR THE COMMON GOOD AND THE RAISING OF LIVING STANDARDS



States should respect, protect and fulfil human rights in the actions they take to address fiscal challenges and pursue sustainable development. In the protection of and repatriation of State assets, States should take all necessary and possible measures to protect the rights of all within their borders, especially those who are most vulnerable.

- Guideline 2 refers to the State responsibility to use its resources efficiently, and to the maximum possible, to realize the human rights of the population, given the public's right to benefit from State assets.
- Unfortunately, in this process there is a gap between what the requesting State require and what the requested State can provide : thus, recovery of the asset may take months or years, is often not achievable at all due to legal obstacles or lack of resources.
- From the perspective of State obligations to respect, guarantee and promote the rights of individuals, the illegal transfer of State assets violates human rights (especially regarding the principles of equality and non-discrimination). In order to determine whether or not the failure to repatriate a State asset violates a human right, it is necessary to clarify what the State is obliged to do with respect to a specific right, then analyse the link between the movement of the State asset and the failure to comply with a State obligation.
- Regarding the administration of public funds, the State has the obligation to correctly and transparently administer the funds at its disposal, as well as to ensure that they are used to cover the needs of the population and not for private purposes outside the public context.
- A fiscally legitimate system that incorporates human rights principles includes an equitable, progressive and transparent tax system.



GUIDELINE 3

NON-DISCRIMINATION



States should prohibit any form of discrimination in ensuring that fiscal resources are used for the equitable and effective realization of human rights.

- As recognized by the Human Rights Council in its resolution 40/8, the issue of foreign debt contributes to extreme poverty worldwide and creates obstacles to sustainable human development (i.e. Agenda 2030).

The General Assembly has already expressed its concern in its resolution 71/215 emphasising the need to continue efforts to address systemic imbalances and reform the international financial system.

Similarly, in its resolution 46/11, the Human Rights Council has underscored that repatriation of funds of illicit origin is key for States for improving the realization human rights.



GUIDELINE 4

INTERNATIONAL COOPERATION AND ASSISTANCE



States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy national, cross-border and global harm with regard to the repatriation of State assets that interferes with the full enjoyment of human rights.

- The extraterritorial dimensions of human rights obligations surrounding the recovery of stolen public assets requires improved international cooperation and mutual assistance, as stressed by the Principle 3.2 (justice in public spending) of the Principles for Human Rights in Fiscal Policy, developed by a consortium of civil society organizations, experts and academics.
- In the guiding principles on extreme poverty and human rights, it is recommended that States put in place procedures to prevent and counteract corruption in particular when affect persons living in poverty.
- Determining when an asset is recoverable requires the issuance of a judgment or decision by a competent court.

OBSTACLES

- The challenges faced by countries is a **lack of cooperation** between the **financial intelligence units** of the requesting State and the State where the suspect resides.



OBSTACLES:



- Assets are often not registered under the suspect's name, which makes the identification and tracing of the asset difficult.
- Tracing virtual financial assets is a new challenge.



International cooperation in asset recovery should be carried out in a non-politicized manner and requires close and transparent coordination and the cooperation of requesting and requested States, including between competent authorities in particular the judicial ones, i.e. :

- Stolen Asset Recovery (StAR) Initiative
- UNCTAD XIV Outcome: Nairobi Maafikiano and Nairobi Azimio UNCTAD/ISS/2016/1
- Human Rights Council resolution 46/11
- The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

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Part C



TRANSPARENCY AND ACCESS TO INFORMED PARTICIPATION

GUIDELINE 5

TRANSPARENCY



States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights and their fiscal realization can operate free from threats, harassment, intimidation and violence in the prevention and disclosure of the illicit movement and repatriation of State assets.



GUIDELINE 6



FREEDOM OF EXPRESSION, ASSOCIATION AND PEACEFUL ASSEMBLY

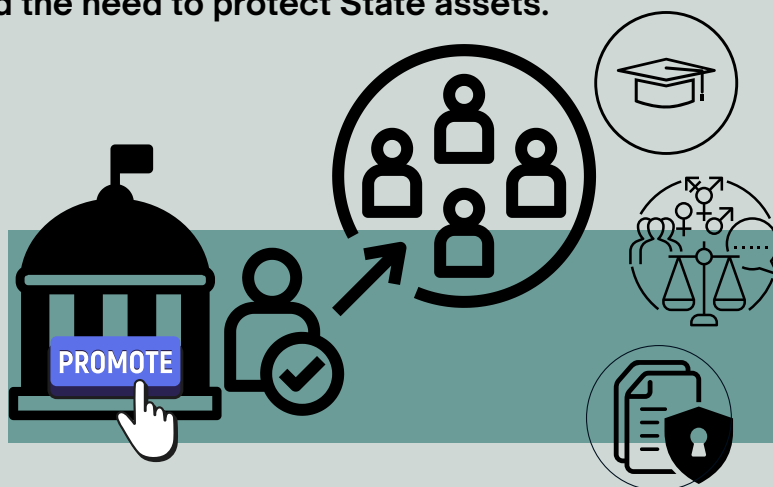
States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to matters of domestic resources and the protection and repatriation of State assets.



GUIDELINE 7

EFFECTIVE PARTICIPATION

States should promote effective participation, which includes but is not limited to education and public awareness-raising on the fiscal realization of human rights and the need to protect State assets.



GUIDELINE 8

ACCESS TO INFORMATION

States should provide unhindered public access to information on repatriated State assets by collecting and disseminating information and by providing affordable, effective and timely access to information.

Information may be obtained through informal processes, whereas evidence to ensure admissibility must be obtained through formal processes. For international requests, information may be obtained through the International Criminal Police Organization (INTERPOL); and via exchange of intelligence through agreements between the governors of central banks.

For the purpose, the formation of an internationally recognized body on asset recovery for effective information-sharing and standardization of asset recovery regimes could be important.

GUIDELINE 9



PUBLIC ASSET MANAGEMENT AND PARTICIPATORY BUDGETING

⇒ GUIDELINE 9.1

States should require a prior assessment of the use of the State asset and the impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

- Developing a national framework on public asset management is crucial to manage and preserve recovered assets.
- In addition to having the physical asset management system, it would also be necessary to have guidelines in place, and appropriate legislation.



⇒ GUIDELINE 9.2

States should provide for and facilitate public participation in decision-making related to State assets and their repatriation and take the views of the public into account in the decision-making process.

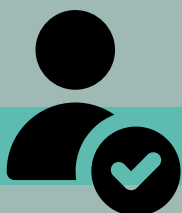
- Civil society, bankers, investment brokers, accountants and others can act as whistleblowers and play a role in exposing the activities of those who facilitate illicit financial flows, contrary to human rights, and on the impact of not repatriating of illicit funds causes on the realization of economic, social and cultural rights.
- Banks and registrars of companies are expected to coordinate with the relevant national authorities in reporting and sharing bank statements, company information and other required information.
- Bilateral agreements and proper procedures may help to ensure no one unfairly benefits from inefficient asset recovery processes.
- The possibility of having broad access to information related to public affairs is a factor that can make the fight against corruption, illicit enrichment and unethical actions in public administration dynamic.



NATIONAL AND INTERNATIONAL GOVERNANCE

GUIDELINE 10

ACCOUNTABILITY



States should ensure a robust human rights-based fiscal environment in collecting and allocating the maximum available resources in order to respect, protect and fulfil human rights while ensuring their progressive realization.

- Transnational crimes have traditionally been prosecuted under the rules of national jurisdictions but a groundbreaking development in this area has been the adoption by the African Union of the **Malabo Protocol**.



- Actions of States that encourage or facilitate tax abuses could constitute a violation of their international human rights obligations, the Independent Expert considers that it is equally applicable to other forms of licit and illicit financial flows, corruption, bribery and theft of public funds.



GUIDELINE 11

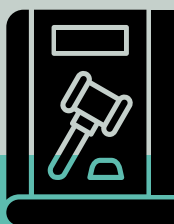
RESPONSIBILITY



States should realize and respect, protect and fulfil human rights obligations in order to ensure a fiscally legitimate collection of the maximum available resources.

GUIDELINE 12

RIGHT TO REMEDY



States should provide access to effective remedies for violations of human rights and domestic laws in the management of State assets.



- The process of recovery of such assets ought to be rooted in a **human rights approach**.
- This is in line with the General Assembly resolutions 73/190 of 17 December 2018, 74/276 of 1 June 2020 and 75/206 of 21 December 2020 on the importance of preventing and combating corrupt practices & set out in the **Guiding Principles on Business and Human Rights**.

GUIDELINE 13

LAWS, POLICIES AND REGULATIONS

States should ensure the effective enforcement of their regulations, laws and policies in line with human rights laws and obligations regarding the protection and repatriation of State assets against all actors, including both public and private actors.

- States play a crucial role in reducing opportunities for tax avoidance by corporates and wealthy individuals: through anti-abuse clauses in all tax treaties and enhancing disclosure practices and transparency in monitoring and reporting illicit income.
- Required states should also consider waiving costs when recovering assets, particularly when the requesting state is a developing country.

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ABOUT THE INDEPENDENT EXPERT



Ms. Attiya Waris took office the 1st August 2021 as Independent Expert on debt, other international financial obligations and human rights.

She is the only Professor of Fiscal Law and Policy in Eastern and Central Africa. She is the first female Director of Research and Enterprise at the University of Nairobi. She holds a PhD in Law and is a specialist in Fiscal Law, Policy and Development.

She is an advocate, company secretary and arbitrator of over 20 years standing and was the founding Chair, Fiscal Studies Committee from 2017-2020. She spearheaded the first agreement on sharing of data between a University and a revenue agency globally in 2016. She is an Observer to the UN Tax Committee.

She teaches at the Law School, University of Nairobi, Kenya and has previously taught in South Africa, Rwanda, Malaysia and the United Kingdom. She has researched and published on global, African, Asian, European as well as Latin American issues. Her book 'Tax and Development' (2013) is the first publication globally that links the areas of tax and human rights and her more recent publication 'Financing Africa' is the first publication globally to map out African fiscal systems.

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