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

Non-binding set of practical guidelines for efficient asset recovery

Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Attiya Waris

Summary

In its resolution 46/11, the Human Rights Council requested the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, to conduct a new study, in connection with the previous relevant studies conducted by the mandate holder and the Advisory Committee, 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. She presents a set of 13 draft non-binding and practical guidelines on human rights and the repatriation of State assets that are consistent with existing international human rights law in this context.

The Independent Expert believes that States are obliged to ensure the prompt repatriation of funds of illicit origin to the countries of origin and to actively participate in adopting renewed, decisive and proactive commitments to tackle the phenomenon of illicit financial flows, including tax abuse, and the ensuing negative impacts on human rights.



I. Introduction

1. Curbing the loss of crucial revenue through illicit financial flows¹ and retrieving those resources has become ever more urgent. The economic and social consequences of the coronavirus (COVID-19) pandemic and the mutually reinforcing multiple crises that have ensued have meant lesser investment in public services in the areas of health, education and social protection, pushing more than 77 million people into extreme poverty by 2021.² Global sovereign debt is expected to remain high, at 91 per cent of gross domestic product, with 60 per cent of low-income countries either already in debt distress or highly vulnerable to it.³

2. The Global Financial Integrity think tank estimates developing countries lose between \$620 and \$970 billion annually in illicit financial flows. For the African continent alone, an estimated \$89 billion is lost to illicit capital flight every year.⁴ In order to prevent, track, curtail and recover these illicit funds, States are forced to divert already scarce resources – an issue that predates the pandemic. In March 2021, the Human Rights Council adopted resolution 46/11, requesting the Independent Expert on foreign debt and human rights to conduct a new study, in connection with the previous relevant studies conducted by the mandate holder and the Advisory Committee, 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.⁵

3. The impact of illicit financial flows on human rights on the development of countries is well documented in the work of the mandate holder. The present report presents draft non-binding and practical guidelines on human rights and the repatriation of State assets. It focuses on the question of the repatriation of State assets from a human rights perspective and looks forward to the next steps in the evolving linkages between the two.

4. Over the course of 2022, the Independent Expert sought to map the human rights obligations relating to the repatriation of State assets in greater detail. She held a series of bilateral consultations, launched an open call for contributions⁶ from around the world and reviewed hundreds of statements and reports of treaty bodies, special procedure mandate holders and other human rights authorities that had either applied or not applied human rights norms to the repatriation of State assets. The Independent Expert found that, despite the diversity of the sources, the views expressed on the relationship of human rights law and the repatriation of State assets were only partially delineated. Virtually every source reviewed identified human rights whose enjoyment was infringed or threatened by the failure to repatriate State assets and agreed that States had obligations under human rights law and standards to protect against such harm. These State obligations include procedural obligations (such as duties to provide information, facilitate participation and provide access to remedies), substantive obligations (including to regulate financial institutions and designated non-financial businesses and professions) and heightened obligations to protect the rights of those in particularly vulnerable situations.

5. Also in preparation of the present report, in February 2022, the Independent Expert participated in the intersessional seminar on the negative impact of the non-repatriation of

¹ “Illicit financial flows” comprise activities that are illicit either by virtue of their origin (e.g., stemming from criminal activities), their utilization (e.g., to finance terrorism, which is illegal, or to avoid taxes in an aggressive, unethical way, which is detrimental to sustainable development) or by the nature of the transfer itself (e.g., money-laundering). See United Nations Office on Drugs and Crime and United Nations Conference on Trade and Development (UNCTAD), *Conceptual Framework for the Statistical Measurement of Illicit Financial Flows* (Vienna, 2020).

² See United Nations, Inter-Agency Task Force on Financing for Development: *Financing for Sustainable Development Report 2022: Bridging the Finance Divide* (New York, 2022).

³ Karim Karaki, “Debt reform for climate action: Demand grows louder, but will Europe respond?”, Centre for Africa-Europe Relations (7 November 2022).

⁴ See UNCTAD, *Tackling Illicit Financial Flows for Sustainable Development in Africa: Economic Development in Africa Report 2020* (New York, 2020).

⁵ Para. 24.

⁶ Submissions from States and other stakeholders in response to the call for input by the Independent Expert are available from <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-new-study-proposed-non-binding-set-practical-guidelines-efficient>.

funds of illicit origin to the countries of origin on the enjoyment of human rights, convened pursuant to Human Rights Council resolution 46/11, to discuss challenges and best practices in this regard and to make recommendations, with the participation of States, the Advisory Committee and other relevant stakeholders.⁷ On the basis of these consultations and contributions received by Member States, civil society and other stakeholders, the Independent Expert also identified positive practices, which are set out in the commentary to the guidelines that follow.

II. Guidelines on human rights and the repatriation of State assets

6. To facilitate implementation of the human rights obligations and commitments of States relating to the repatriation of State assets, the Independent Expert was urged to develop the present guidance, which describes the relevant norms in an easily understandable and applicable tool. In August 2022, the Independent Expert published her call for contributions and invited written comments. The Independent Expert also held bilateral consultations with different stakeholders and mechanisms, like the Conference of the States Parties to the United Nations Convention against Corruption⁸ and the Open-ended Intergovernmental Working Group on Asset Recovery. In preparing the present report, the Independent Expert considered the inputs received during these consultations and the intersessional seminar, and in response to her call for input, as well as other relevant resources, such as the recommended principles on human rights and asset recovery developed by the Office of the United Nations High Commissioner for Human Rights (OHCHR).⁹

7. The 13 guidelines that follow, setting out the basic obligations of States and other stakeholders on human rights and the repatriation of State assets, were distilled from this diverse input. Most of the guidelines have a short commentary that clarifies and develops their content. The guidelines and commentary do not create new obligations; rather, they reflect the application of existing human rights obligations in this context.

8. While many of the obligations described in the guidelines and commentary are based directly on treaties or binding decisions from human rights tribunals, others draw on statements of United Nations human rights bodies (which have the authority to interpret human rights law but not necessarily to issue binding decisions) and the diverse contributions received from States, academia, civil society and other institutions.¹⁰ The coherence of these interpretations, however, is strong evidence of converging trends towards a greater uniformity and certainty in the understanding of human rights obligations in this area. These trends are further supported by State practice, as evidenced, among other things, in international instruments and the decisions of fiscal tribunals and other relevant decision-making bodies. As a result, the Independent Expert believes that States should accept the draft guidelines as a reflection of the actual or emerging nexus between international human rights law and the laws on the repatriation of State assets. She is confident that, at a bare minimum, States will see them as promising practices that they should move to adopt as expeditiously as possible.

9. After consideration, the Independent Expert chose the name “guidelines” because she thought that it best reflected the nature and language of the mandating resolution. She also felt that guidelines were well understood in fiscal circles, where such tools exist with regard to debt and international financial obligations, including taxation and illicit financial flows. The guidelines and commentary provide a sturdy basis for understanding and implementing

⁷ A webcast of the seminar is available from <https://media.un.org/en/asset/k1q/k1qgxlyigh>.

⁸ One of the fundamental principles of the United Nations Convention against Corruption is the principle of asset recovery, as set out in its chapter V (arts. 51–59).

⁹ *OHCHR Recommended Principles on Human Rights and Asset Recovery* (Geneva, March 2022).

¹⁰ While the guidelines and commentary do not attempt to restate obligations in areas other than human rights law, they do take into account relevant international environmental instruments, such as the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines), adopted by the Governing Council of the United Nations Environment Programme in 2010.

human rights obligations relating to the repatriation of State assets, but they are in no sense the final word. The relationship between human rights and the repatriation of State assets has countless facets, and the understanding of this nexus will continue to grow for many years to come as more and more information continues to emerge and more jurisprudence develops. These guidelines do not purport to describe all of the human rights obligations that can be brought to bear on State assets and its related issues today, much less attempt to predict those that may evolve in the future. The goal is simply to describe the main human rights obligations that apply in this context, in order to facilitate their practical implementation and further development. To that end, the Independent Expert urges States, international organizations, private actors, academia and civil society organizations to disseminate and publicize the guidelines, and to take them into account in their own activities.

III. The repatriation of State assets from a human rights perspective

10. An unusual aspect of the development of human rights norms relating to the repatriation of State assets is that they have not relied primarily on one right but rather rest on the underlying principles that underpin human rights: international cooperation and assistance; equity and non-discrimination; participation; and access to information. Although the need to repatriate stolen assets has been recognized, and courts in many countries have instituted legal proceedings to do so, in regional agreements and in most national constitutions a human rights approach has rarely been adopted. The United Nations Office on Drugs and Crime (UNODC) has drafted a model law on in rem forfeiture¹¹ to support asset recovery in Latin America. This is a legal instrument that countries can use to draft civil laws that act retroactively upon assets that have been illicitly acquired or used. Colombia and Peru have since drafted and adopted in rem or non-conviction-based forfeiture laws and have enforced them internationally. Articles 54, 55 and 57 of the United Nations Convention against Corruption provide for extraterritorial jurisdiction for victim countries, which allow States to file legal actions for the return of stolen assets located in other jurisdictions.¹² In a cross-border case of non-conviction confiscation, Peru was able to recover the equivalent of \$8.5 million from a corruption and money-laundering scheme in 2016. The case involved recovering frozen assets, including the interest accrued since 2004, from a bank account in Switzerland. While this case provides a successful example of mutual cooperation on asset recovery, the complexity surrounding such cooperation efforts still merits further discussion.

11. According to a survey by the Stolen Asset Recovery (StAR) Initiative,¹³ some of the barriers to international recovery of assets were: (a) lack of availability of effective freezing mechanisms in jurisdictions where the assets were located; (b) differences in evidentiary requirements and standards of proof between legal systems; (c) the high cost of asset management during the recovery process; (d) a lack of clarity concerning the responsibilities of the different domestic government services; (e) a lack of clarity regarding the correct channels for such procedures; and (f) a lack of information on focal points in foreign jurisdictions, among others.

12. Treaty bodies, regional tribunals, special procedures and other international human rights bodies have applied human rights law in this area but are yet to directly address the issue of domestic resource mobilization and repatriation of stolen assets.¹⁴ The absence of fiscal and non-fiscal resources interferes with the full enjoyment of a wide spectrum of human

¹¹ See https://www.unodc.org/documents/colombia/2013/septiembre/MODEL_LAW_ON_IN_REM_FORFEITURE_--UNODC--.pdf.

¹² See the Stolen Asset Recovery (StAR) Initiative publication: Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, D.C., International Bank for Reconstruction and Development and World Bank Group, 2009).

¹³ Kevin M. Stephenson and others, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., International Bank for Reconstruction and Development and World Bank Group, 2011).

¹⁴ See *OHCHR Recommended Principles on Human Rights and Asset Recovery*.

rights, and the obligations of States to respect, protect and fulfil human rights apply in this context no less than in any other.

13. The absence of adequate financial and non-financial resources for the realization of human rights in many States is well recognized. At the same time, the great majority of the countries in the world have recognized the law on the repatriation of State assets at the national or regional level, or both. Based on the experience of the countries that have adopted a law on repatriation of assets, the process can be further strengthened. When applied by the judiciary, such laws can create opportunities to build strong and transparent institutions. This in turn allows for the better use of resources for the eradication of poverty, the achievement of sustainable development and the raising of living standards, in addition to ensuring access to justice. On the basis of this experience, the Independent Expert recommends that the Human Rights Council consider supporting the draft guidelines on human rights and the repatriation of State assets set out in the present document.

IV. The way forward

14. 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.

15. For example, more work is necessary to clarify how human rights norms relating to State assets apply to specific areas, including in relation to discrimination on the basis of gender, discrimination against minorities and Indigenous Peoples or other types of discrimination; the responsibilities of businesses in relation to human rights; the responsibilities of the different States in the process of the movement of a State asset and its return; the effects of armed conflict on human rights and the repatriation of State assets; the historical illicit movement of State assets and how they ought to be repatriated; and obligations of international cooperation in relation to multinational corporations and transboundary harm.

16. More work, too, can be done to institutionalize support for capacity-building, including by instituting an annual forum on issues related to human rights and the repatriation of State assets; holding conferences on the repatriation of State assets and related matters, such as the regulation of shadow banks, for all stakeholders in the justice system, ministries of finance, the treasury, financial institutions, central banks and national human rights institutions; continuing to hold judicial and intergovernmental workshops on human rights and the repatriation of State assets; and instituting similar workshops for officials across the different private and public sectors that operate in the spheres of accounting, law, investment, banking, information technology, history and culture.

V. 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

17. A State asset for the purpose of the present guidelines includes any item of value, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or an interest in such assets and which can be utilized in the realization of any or all human rights. These include but are not limited to social security funds, financial and non-financial, environmental and physical or intangible assets, assets moved by licit or illicit means and recent or historical assets, and which can be referred to as State or national assets or resources.

Commentary

18. 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 bedrock of the definition used in these guidelines. The payment of a bribe to a government official may cause damage in the State in which it takes place, but usually the bribery proceeds do not represent the funds or property of the State whose official was corrupted. A bribery payment instead represents an “undue advantage” received by a public official from an actor in the private sector. Likewise, requesting State parties typically cannot assert an ownership claim with respect to the proceeds of organized crime, though such criminal conduct may cause damage in the requesting State.

19. 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, in particular, the economic, social and cultural rights, as well as protecting the right to development, of its populations. An asset derived as a benefit from an unlawful activity, and where the owner did not have a legitimate source of income sufficient to justify his interest in the property or the benefit derived by him, is deemed to be an asset of illicit origin.¹⁵ Furthermore, any asset the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of that property, or which is held by a person for another person to an extent that is disproportionate to the emoluments or other income of that other person, and which cannot be satisfactorily accounted for, is also considered as an asset of illicit origin.

20. 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 enshrined in the International Covenant on Economic, Social, and Cultural Rights (art. 2 (1)). This obligation is further clarified by the Committee on Economic, Social and Cultural Rights, in its general comment No. 3 (1990) on the nature of State parties’ obligations. Article 1 (2) of Declaration on the Right to Development recognizes the inalienable right of peoples – and by extension States – to full sovereignty over all of their natural wealth and resources. Regardless of the status of their economic development, in mobilizing their maximum available resources to implement human rights, States are obligated to uphold the principle of non-discrimination, in line with the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Right to Development.

21. Asset recovery is the identification, freeze, seizure and confiscation of illegally derived assets and, where authorized by law, the return of confiscated property to the prior legitimate owner of a confiscated asset or to those victimized by corruption, which in some instances might be a community or a State.¹⁶

22. 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. It would still be at the discretion of the other State to accept the claim and to investigate it. The ambit of recovery of assets should be broader than those associated with crime, bribery, corruption or theft of State assets, as the definition of illicit financial flows more broadly includes tax and business-related activities. Illicit financial flows also include activities that may not necessarily be of an illegal nature but may nonetheless undermine the spirit of the law and contravene human rights, fundamental principles and constitutions, or other principles and norms set out by States in treaties. This includes tax abuses and also other types of illicit financial flows, as well as market abuses and manipulation, as set out in the report of 2015 by the High-level Panel on Illicit Financial Flows from Africa.

¹⁵ Pursuant to article 20 of the United Nations Convention against Corruption, illicit enrichment is described as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

¹⁶ See United Nations Convention against Corruption. See also UNODC, “Stolen Asset Recovery Initiative (StAR)”.

Part B

Principles of human rights and fiscal legitimacy

Guideline 2

Fiscal legitimacy for the common good and the raising of living standards

23. States should respect, protect and fulfil human rights in the actions they take to address fiscal challenges and pursue sustainable development by ensuring that not only State institutions but all private and public actors and institutions within their areas of operation are guided by the principles of fiscal legitimacy: fairness, justice, transparency, accountability, responsibility, effectiveness and efficiency.

24. 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 to, or at particular risk from, harm, taking into account their needs, risks and capacities.

Commentary

25. 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. In cases where the asset is in a foreign jurisdiction, recovery of the asset may take months or years, and is often not achievable at all due to legal obstacles, the dissipation of funds or a lack of resources. As noted in one submission, often another challenge faced in this process is the gap between what is required by the requesting State and what the requested State can provide.¹⁷

26. Among the recommendations received in submissions was for countries to issue a statutory notice to the suspect to prevent the sale, disposal or other dissipation of the assets. Authorities may also choose to issue a notice of seizure of the immovable property and submit a motion for the payment of the monetary equivalent of any asset that has been disposed of.¹⁸ At times, the prosecutor's office may choose to pursue civil proceedings over criminal proceedings.

27. From the perspective of State obligations to respect, guarantee and promote the rights of individuals, the illegal transfer of State assets violates human rights, and may directly or indirectly affect multiple rights, but it is usually more evident with regard to the principles of equality and non-discrimination and the negative effect is greater on the rights of individuals or groups in situations of vulnerability. 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, it is necessary to analyse the link between the movement of the State asset and the failure to comply with a State obligation and, in this way, to be able to determine what constitutes the violation of a human right due to the failure to repatriate State assets.

28. Regarding the administration of public funds, through all its organs and public institutions in general, the State has the obligation to correctly and transparently administer the funds at its disposal, including those coming from donations and external cooperation, 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, since the contrary would imply that the resources available to the State for the benefit of its inhabitants would not be used to the maximum. This translates into a violation of the progressive realization of economic, social and cultural rights, which deepens poverty and inequality and also discourages economic investment. A fiscally legitimate system that incorporates human rights principles includes an equitable, progressive and transparent tax system.

¹⁷ See submission of Mauritius (State response).

¹⁸ Ibid.

Guideline 3

Non-discrimination

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

Commentary

30. As recognized by the Human Rights Council in its resolution 40/8, the issue of foreign debt, both public and private – which substantially contributes to extreme poverty worldwide – creates obstacles to sustainable human development, including to the achievement of the 2030 Agenda for Sustainable Development through adequate financing. In this sense, the General Assembly has already expressed its concern, in its resolution 71/215, about rising private and public indebtedness in many developing countries, and stressed the need for continuing efforts to address systemic fragilities and imbalances and to reform and strengthen the international financial system.

31. Similarly, in its resolution 46/11, the Human Rights Council has underscored that repatriation of funds of illicit origin is key for States that are undergoing a reform process and for improving the realization of economic, social and cultural rights, including the right to development, and for fulfilling their obligation to meet the aspirations of their people.

Guideline 4

International cooperation and assistance

32. 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.

Commentary

33. The extraterritorial dimensions of human rights obligations surrounding the recovery of stolen public assets and curbing of the illicit transfer of funds by States require improved international cooperation and mutual assistance.¹⁹ The importance of a human-rights based approach in the repatriation of illicit funds was underscored in the report of a former Independent Expert on foreign debt.²⁰

34. Principle 13 of the guiding principles on human rights impact assessments of economic reforms says States have an obligation to provide international assistance and cooperation in order to facilitate the full realization of all rights. As part of their obligations with regard to international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights of people outside their borders. This involves avoiding conduct that would foreseeably impair the enjoyment of human rights by persons living beyond their borders, contributing to the creation of an international environment that enables the fulfilment of human rights, as well as conducting assessments of the extraterritorial impacts of laws, policies and practices.

35. In the guiding principles on extreme poverty and human rights,²¹ it is recommended that States put in place procedures, including adequate and accessible complaints mechanisms, to prevent, identify and counteract corruption, in particular in social and other programmes that directly affect persons living in poverty.

¹⁹ 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, also underlines the importance of the principles of equality, legality, efficiency, priority in social spending and participation, along with other principles generally included in national constitutions, for the protection and management of public assets in accordance with current legislation, with integrity and due diligence and ensuring quality expenditure.

²⁰ See [A/HRC/25/52](#).

²¹ Adopted by the Human Rights Council in its resolution 21/11.

36. Determining when an asset is recoverable requires the issuance of a judgment or decision by a competent court. In the submissions shared by States, it was noted that one of 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 in conducting the necessary investigation of suspects residing in foreign jurisdictions.²² These assets are often not registered under the suspect's name, which makes the identification and tracing of the asset difficult. Moreover, with the rapidly evolving ecosystem around virtual financial assets, tracing such assets is the new challenge faced by both international and national enforcement and legal agencies. Ownership of virtual assets is not easily identifiable. Thus, the current international process still needs to take into account whether the national legislative framework is in conformity with the United Nations Convention against Corruption while responding to these rapid developments. Chapter V of the Convention provides a framework for the return of stolen assets, requiring States parties to take measures to restrain, seize, confiscate and return the proceeds of corruption.

37. International cooperation in asset recovery should be carried out in a non-politicized manner. Priority should be given to promoting and protecting people's right to an adequate standard of living and the right to development, particularly in those countries with a high illicit outflow of assets. The repatriation of funds of illicit origin requires close and transparent coordination and the cooperation of requesting and requested States, including between competent authorities, in particular the judicial authorities, within the shared responsibility to facilitate efficient international cooperation for the prompt recovery of assets of illicit origin.²³

38. In the return of the proceeds of crime, requesting and requested States²⁴ remain cognizant that requesting States must seek return as part of their duty to ensure the application of the maximum available resources for the full realization of all human rights for all, including the right to development, to address human rights violations and to combat impunity, and that requested States, on the other hand, have a duty to assist and facilitate the return of the proceeds of crime, including through judicial assistance, as part of their obligation of international cooperation and assistance under the United Nations Convention against Corruption (chaps. IV–V) and in the field of human rights.

39. The Lausanne process initiative on practical guidelines for efficient asset recovery, the Stolen Assets Recovery Initiative of the World Bank Group and UNODC, and UNCTAD,²⁵ encourage coordination among existing initiatives as instrumental to international cooperation and assistance. In October 2022, the Assembly of Heads of State and Government of the African Union adopted the Declaration on the African Anti-Corruption Year, in which the member States committed to progressively abolish bank secrecy jurisdictions and tax havens on the continent, to establish public beneficial ownership registers and to ensure that public officials declared their assets. The Assembly also called upon international partners and allies to agree on a transparent and efficient timetable for the recovery and return of stolen assets to Africa, with due respect for the sovereignty of States and their national interests.²⁶

40. There is a need for further international cooperation through, inter alia, the United Nations system, in support of national, subregional and regional efforts to prevent and combat corrupt practices and the transfer of assets of illicit origin, in accordance with the principles of the United Nations Convention against Corruption, and also for close cooperation at the national and international levels among anti-corruption agencies, law enforcement agencies and financial intelligence units.²⁷

²² See submission of Iraq (in Arabic).

²³ See Human Rights Council resolution 46/11.

²⁴ *Stolen Asset Recovery (StAR) Initiative*, p. 6, footnote 3. See also the glossary of terms of the StAR initiative, available from <https://star.worldbank.org/glossary-asset-recovery-terms>.

²⁵ See the outcome document of the fourteenth session of UNCTAD, held in Nairobi, 17–22 July 2016: *UNCTAD XIV Outcome: Nairobi Maafikiano and Nairobi Azimio* (UNCTAD/ISS/2016/1).

²⁶ See African Union, “Africa’s fight against illicit financial flows and renewed calls to return stolen assets”, 24 December 2022.

²⁷ See Human Rights Council resolution 46/11.

41. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights also demand that States take measures either individually or through international cooperation in order to protect the economic, social and cultural rights of people within and beyond their territory. While article 2 (1) of the International Covenant on Economic, Social and Cultural Rights refers in particular to economic and technical assistance and cooperation, it does not limit the undertaking to such measures. Thus, according to the commentary to the Maastricht Principles, international assistance must be understood as a component of international cooperation: 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.²⁸

42. International assistance and cooperation are critical to the successful recovery of stolen assets.²⁹

Part C

Transparency and access to informed participation

Guideline 5

Transparency

43. 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.

Commentary

44. Procedures imposed by foreign judicial authorities that allow certain countries and not others to be parties to asset recovery claims remain an obstacle to effective, transparency and meaningful cooperation. In order to be parties, some States are challenged by requirements such as special reservations or guarantees imposed by foreign judicial authorities in asset recovery claims. Furthermore, requesting States may not always be authorized or provided with complete access to the necessary evidence, contravening or restricting the enforcement of national legal processes and frameworks.³⁰

Guideline 6

Freedom of expression, association and peaceful assembly

45. 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

46. 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

47. 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.

²⁸ [A/HRC/25/52](#), para. 38.

²⁹ *Ibid.*, para. 43.

³⁰ See submission of Tunisia (in French).

Commentary

48. A combination of both formal and informal processes for accessing crucial information is more efficient and effective. Law enforcement agencies have recourse to both formal and informal processes for information-gathering. Information may be obtained through informal processes, whereas evidence to ensure admissibility must be obtained through formal processes. Moreover, for international requests, information may be obtained formally or informally, for example, through the International Criminal Police Organization (INTERPOL), and then subsequently used in the formulating a formal request for mutual legal assistance.³¹ Furthermore, the informal exchange of intelligence through agreements between the governors of central banks will make it possible to gather very useful information with the necessary speed; the same applies to agreements between customs services, which has facilitated the informal exchange of information.³²

49. In its submission, one State recommends the formation of an internationally recognized body on asset recovery for effective information-sharing and standardization of asset recovery regimes.³³ It also highlights the importance of spontaneous exchanges on certain details between practitioners from different countries. Such exchanges make it possible to consolidate relationships of trust, and above all to better target any requests for mutual assistance that may subsequently be drawn up.³⁴

Guideline 9**Public asset management and participatory budgeting****Guideline 9.1**

50. To avoid taking or authorizing actions with financial impacts that negatively interfere with the full enjoyment of human rights, States should require the 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.

Commentary

51. Developing a national framework on public asset management is crucial to manage and preserve recovered assets and, where appropriate, realize them at an early stage to minimize their loss in value.³⁵ Mauritius in this regard made an amendment to section 58A of its Prevention of Corruption Act, which provides for asset realization pending criminal proceedings.³⁶

52. States are obliged to ensure the prompt repatriation of funds of illicit origin to the countries of origin and to actively participate in adopting a renewed, decisive and proactive commitment to tackle the phenomenon of illicit financial flows and their ensuing negative impact on human rights and the right to development, and to take urgent action to push forward the procedures aimed at the recovery of assets.³⁷ It is important to encourage States parties to the United Nations Convention against Corruption to respond to requests for assistance and to adopt such measures as may be necessary to enable them to provide a wider scope of assistance, pursuant to article 46 of the Convention, in the absence of dual criminality.³⁸

53. States could achieve this by setting up asset management systems that ensure the safety, preservation, maintenance and administration of assets during the asset recovery process. In addition to having the physical asset management system, it would also be necessary to have guidelines in place. Proper asset management requires appropriate

³¹ See submission of Mauritius (State response).

³² See submission of Tunisia (in French).

³³ Ibid.

³⁴ Ibid.

³⁵ See submission of Mauritius (State response).

³⁶ Ibid.

³⁷ See A/HRC/25/52.

³⁸ Human Rights Council resolution 46/11, para. 8.

legislation and accompanying regulations that ensure the transparency, accountability, impartiality and efficiency of the system. These elements will inspire public confidence in and maintain the functioning of the asset recovery system.

Guideline 9.2

54. 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.

Commentary

55. Civil society, bankers, investment brokers, accountants and others can act as whistle-blowers and play a role in exposing the activities of enablers³⁹ of illicit financial flows by drawing attention to the movement of the asset in contravention of human rights principles and to the negative impact of the non-repatriation of funds of illicit origin on the rule of law and the realization of economic, social and cultural rights. This is reiterated in the context of the obligation of States to protect reporting persons in accordance with the United Nations Convention against Corruption (art. 33) and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.⁴⁰ In a background paper⁴¹ on the return of stolen assets by corrupt public officials intended for the High-level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, it is recommended that States impose high penalties on such professionals who facilitate the hiding of assets. It is further recommended that States should ensure that national law does not permit such activities to be shielded from disclosure by the legal professional privilege.

56. 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 in the context of asset recovery efforts for activities that are deemed illegal.⁴² In Mauritius, under the Law of Good Governance and the Integrity Reporting Act of 2015, for example, interest accrued on illicit funds in bank accounts, certain types of bonds, debentures and other investment products is considered as part and parcel of the proceeds of crime. It is therefore recoverable by the State on obtention of the final Confiscation/Recovery Order or Unexplained Wealth Order.⁴³

57. Bilateral agreements and proper procedures may help to ensure no one unfairly benefits from inefficient asset recovery processes. A database shared among law enforcement agencies with the appropriate information technology infrastructure would be helpful.⁴⁴ There is a need for transparency in financial institutions and for effective due diligence measures to be applied by financial intermediaries. States should seek appropriate means in accordance with their international obligations to ensure the cooperation and responsiveness of financial institutions to foreign requests to freeze and recover funds of illicit origin and the provision of an efficient mutual legal assistance regime to States requesting repatriation of those funds, and should promote human and institutional capacity-building in that regard.⁴⁵

58. Article 52 of the United Nations Convention against Corruption requires banking and financial institutions to determine the natural person(s) or beneficial owner(s) of any accounts with large deposits. The legislation in Tunisia, for example, identifies beneficial owners of legal entities using criteria such as the holding by a natural person of 20 per cent or more of the capital or voting rights in a legal entity; the exercise by a natural person of de facto or de jure control over the management or administration of the legal entity; or the holding by a

³⁹ Enablers or gatekeepers are individuals, bankers, dealers, bookkeepers, intermediaries, accountants, lawyers, notaries, associations, industry professionals and others who are suspected of or responsible for facilitating illicit financial flows.

⁴⁰ Human Rights Council resolution 46/11, para. 17.

⁴¹ See https://factipanel.org/docpdfs/FACTI%20BP7_return%20of%20assets.pdf.

⁴² See submission of Mauritius (National Procedures for Confiscation).

⁴³ See submission of Mauritius (State response).

⁴⁴ Ibid.

⁴⁵ Human Rights Council resolution 46/11, para. 23.

natural person of the position of principal executive officer of the legal entity. However, States need to address the opacity of information on the beneficial ownership of companies (listed or unlisted, assets or holdings), trusts and other legal instruments, arrangements and entities (foundations, cooperative societies, associations, including unincorporated or incorporated, or body of persons, different classes of investment funds and limited liability partnerships) through which the proceeds of corruption, tax abuse and other kinds of illicit funds are often channelled. This should also include bonds traded in primary and secondary markets as well as all other layers of investment.

59. Based on the advocated best practices, the Independent Expert recommends that the threshold appointed by countries to identify a beneficial owner should be at zero to deter any possibility of additional abuse. Some countries have real estate or land registers at the national level, but information may not always be updated or current. To circumvent time delays and ensure public scrutiny, beneficial and asset ownership registers should be made public, as they are essential in combating illicit practices that result in cross-border tax abuse, corruption and money-laundering. States must include information on the amounts lost through illicit financial flows, the factors driving such flows and a comprehensive analysis of the impact of the flows, as well as challenges facing them in the repatriation of State assets, in their reports to the United Nations treaty bodies and under the universal periodic review.⁴⁶

60. 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. Not only because control is exercised when accountability is demanded, but also because knowing the information can encourage the practice of analysing the facts and, in case of finding irregular situations, making the respective complaints. The more information is made publicly available, the greater the power of the public to claim its rights.

61. Human rights are universal, indivisible, interrelated and interdependent. The commitment to ensure the effective enjoyment of all civil, political, economic, social and cultural rights for everyone and the primary responsibility of States to promote, protect and respect all human rights and fundamental freedoms should be reiterated.⁴⁷

Part D

National and international governance

Guideline 10

Accountability

62. 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.

Commentary

63. Accountability for transnational crimes at the international level has been an elusive debate. Transnational crimes have traditionally been prosecuted under the rules of national jurisdictions.⁴⁸ The traditional legal source of criminal prohibitions and enforcement on corporations and individuals for these crimes is national law.⁴⁹ A groundbreaking development in this area has been the adoption by the African Union of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which incorporates a criminal mandate for international and transnational

⁴⁶ [A/HRC/25/52](#), p. 15.

⁴⁷ See Human Rights Council resolution 46/11.

⁴⁸ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure*, 2nd ed., (New York, Cambridge University Press, 2010), pp. 5–6; and Evelyne Owiye Asaala, “Fighting impunity through prosecution of international crimes in Africa” PhD thesis, University of Witwatersrand, 2019, p. 15.

⁴⁹ *Ibid.*

crimes within the structure of the African Court of Justice and Human and Peoples' Rights.⁵⁰ This development has attracted different reactions. Apart from the contextual criticisms, some scholars are sceptical of the elevation of these crimes into the category of international crimes, contrary to existing customary international law.⁵¹

64. In its study on illicit financial flows, poverty and human rights, the International Bar Association concluded that 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.⁵² While this observation focuses on tax evasion and avoidance, the Independent Expert considers that it is equally applicable to other forms of licit and illicit financial flows, including those generated through corruption, bribery and theft of public funds, as long as they involve a State asset.

Guideline 11 **Responsibility**

65. 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**

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

Commentary

67. The process of recovery of such assets ought to be rooted in a human rights approach. This includes, but is not limited to, identifying the asset and the transaction, identifying stakeholders and enablers and ensuring that the processes followed are all in keeping with human rights principles. 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, and the promotion of international cooperation to combat illicit financial flows and strengthen good practices on assets return to foster sustainable development and the full realization of human rights. The Human Rights Council, in its resolution 46/11, has called upon States to consider enacting legislation to address offences by business enterprises, including multinational corporations, that deprive Governments of legitimate domestic sources of revenue for the implementation of their development agendas, in compliance with their international obligations, including international human rights law.⁵³

68. As set out in the Guiding Principles on Business and Human Rights,⁵⁴ there is a corporate responsibility to comply with all applicable laws and human rights, and a need for greater access to effective remedies by victims in order to realize the effective prevention of, and remedy for, business-related human rights harm. This could be contextualized to include all those parties involved in ensuring that an asset moves from one State to another by licit or illicit means.

⁵⁰ Malabo Protocol, art. 14.

⁵¹ Ademola Abass "The proposed international criminal jurisdiction for the African Court: Some problematical aspects", *The Netherlands International Law Review*, vol. 60, No. 1 (May 2013); and Evelyne Owiye Asaala "A Critique of the Subject Matter Jurisdiction of the African Court of Justice and Human and Peoples' Rights", in H.J. van der Merwe and Gerard Kemp, eds., *International Criminal Justice in Africa, 2016* (Nairobi, Konrad Adenauer Stiftung/Strathmore University Press, 2016).

⁵² *Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights* (London, International Bar Association, October 2013), p. 2.

⁵³ Para. 10.

⁵⁴ *Ibid.*, para. 11.

69. There is a need to have regional asset registries in neutral spaces, such as within existing regional economic communities. The focus should be on the management of the assets pending the resolution of disputes. Receivers should have no control over the return of the asset but should ensure its revenue and asset value is preserved, while a monitoring committee, including regional States that have the political oversight and technical skills ensure the assets may be swiftly returned, should be responsible for the return of the assets to the requesting State.

Guideline 13

Laws, policies and regulations

70. 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.

Commentary

71. States play a crucial role in reducing opportunities for tax avoidance by corporates and wealthy individuals. Inserting anti-abuse clauses in all tax treaties and enhancing disclosure practices and transparency in the reporting of income and profits in source and destination jurisdictions, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities, can be useful.⁵⁵ States ought to consider waiving or reducing to the barest minimum reasonable expenses deducted when recovering assets, particularly when the requesting State is a developing country, bearing in mind that the return of illicitly acquired assets contributes to the achievement of the Sustainable Development Goals.⁵⁶

⁵⁵ Ibid., para. 12.

⁵⁶ Ibid., para. 13.