

MEASURES UNDERTAKEN BY AFRICAN COUNTRIES TO COUNTER ILLICIT FINANCIAL FLOWS: UNPACKING THE AFRICAN REPORT OF THE HIGH-LEVEL PANEL ON ILLICIT FINANCIAL FLOWS

Attiya Waris

Abstract

Numerous papers have been published on illicit financial flows. This includes not only academic papers but policies and reports from international as well as continental and regional organisations and institutions globally. The issue of illicit flows thus are being raised not only at the academic, civil society and public level, but is also discussed by political leaders. There is a growing body of work surrounding the definition of the concept and how much is being transferred which remains disputed. There is also some research into what is being transferred and how it is being moved. This includes research on the global wealth and value chains involved and the methods of transfer through the political, economic, legal and accounting processes in order to facilitate cross-border financial flows. This research has also successfully been made accessible to the general public. Although globally there remains a lack of clarity on certain issues, African states collectively and separately have taken certain steps, first and foremost, building consensus by producing a joint UNECA/AU High Level Panel Report on Illicit Financial Flows (HLP Report). This report reflects the political consensus aimed for by heads of state on the continent. The next almost inevitable step would be to examine how to implement the HLP Report by tracking, controlling and stopping illicit financial flows. The beginning of a meeting of minds between the social, economic, legal, accounting and political domains was a necessity in order to place the issue high enough on a political agenda to release the HLP Report. However, it is now incumbent upon the very same actors and to push for the realisation of legislative, regulation, policy and practical changes.

In light of all the information now available to countries globally and regionally, the issues this chapter deals with are the changes that are actually taking place on the ground in countries to track, control and stop illicit financial flows (IFFs). Some of the key areas that play a part in illicit financial flows include, but are not limited to, anti-money laundering, banking; taxation and corruption. This chapter, however, will be limited to the actions taken in Africa at the international, continental, regional and domestic levels from a treaty, legislative, regulatory, policy and practical perspective on illicit financial flows to establish whether indeed there is change on the continent. Part 1 introduces the issue of illicit financial flows. Part 2 analyses the recommendations made by the HLP Report and

critiques it. Part 3 analyses whether the continent, regions or countries are moving in the direction of countering IFFs based on the recommendations of the HLP Report; what direction is being taken; what steps being considered and implemented and whether they reflect the HLP Report. Part 4 proposes recommendations based on current developments globally on what other alternative or additional steps could be considered by African governments to counter IFFs and Part 5 contains the conclusion.

1 Introduction

Illicit financial flows (IFFs) have been brought onto the international agenda through the reports of think-tanks and civil society organisations in an attempt to understand why countries that are rich in resources remain in a cycle of poverty with growing inequalities.¹ Figures reported are as high as in the trillions of US dollars from developing countries and broken down to 50 to 70 billion US dollars annually from Africa alone.² This data has been correlated to public spending and the Millennium Development Goals (MDGs) to show how these losses could have improved living standards if it had been tracked, controlled or stopped.³ Much of the data that has been released globally has also been with reference to specific cases and information on IFFs and the interconnections in one way or another with many countries globally, and often involve African countries either singly or in groups. The result is that there have been calls to effect changes on the ground.⁴

In addition to the large figures involved and the type of acts undertaken, the stakeholders are also wide-ranging and across the world and it may be said that every single person in the world to one extent or another is included. This includes the users or beneficiaries and the enablers. Beneficiaries of IFFs include, first, the criminals who receive money in exchange for the crime committed and, second, those seeking to merely protect their money due to volatility in their home countries (legally or illegally earned) and, third, those who explore loopholes in the laws and regulations. The enablers include the finance professionals (for example, lawyers, bankers and accountants) involved in the process;

- 1 GFI *Illicit financial flows to and from developing countries: 2005-2014* (2017); TJN 'Financial secrecy index 2015 results' 2016, <http://www.financialsecrecyindex.com/introduction/fsi-2015-results> (accessed 14 December 2017).
- 2 AU/UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa' 2015, http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 14 December 2017).
- 3 K Froburg & A Waris 'Bringing the billions back' (2010) 32 *Global Studies*, http://www.medicusmundi.org/en/playground/rome2013/bringing-the-billions-back.-attiya-waris.pdf/view?set_language=en (accessed 14 December 2017); A Waris & M Kohonen 'Linking taxation to the realisation of the Millennium Development Goals in Africa' in *Rethinking development in an age of uncertainty* Development Studies Association, University of York, 2011, <http://eadi.org/gc2011/waris-109.pdf> (accessed 14 December 2017).
- 4 Action Aid 'Sweet nothings: The human cost of tax avoidance in Africa' Lusaka, Zambia: Action Aid, 2013; NCA *The one billion dollar question* (2012).

government officials that allow and fail to enforce; and those who deliberately break the law. As a result, concerns raised related to IFFs tend to involve multiple issues, but may be broken down into the act: criminal and non-criminal. Criminal activities involved in IFFs are linked to smuggling (children, arms, narcotics, cash, slavery, stolen art, amongst others); money laundering; corruption; and bribery and tax evasion. Non-criminal activities include the use of loopholes in poorly-crafted or absent laws, regulations and policies.

Smuggling and other criminal activities have been a long-term concern in IFF circles and there are treaties⁵ in place as well as diverse organisations and government agencies⁶ working on different parts of the issue. However, the financial area has not been addressed as effectively. The non-criminal concerns remain completely ignored. As a result, initially, tax administrations reacted swiftly across the continent with the realisation of the necessity of cross-border tax audits which had never before taken place in neighbouring countries.⁷ However, IFFs cannot be a silo placed into one department or one part of a government but, rather, concerns all sectors of government and governance.

While this research and public activism have been ongoing, it has also reached the politicians and policy makers, globally⁸ and in Africa.⁹ Since 2012, the African Commission on Human and Peoples' Rights (African Commission), the African Union (AU) and the United Nations Economic Commission for Africa (UNECA) have continued to raise the issue of IFFs to the level of the heads of state of the continent, first through a series of resolutions,¹⁰ then at the Tana Forum in 2012,¹¹ then through a joint audit

5 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna Convention); United Nations Convention Against Transnational Organized Crime 2000 (Palermo Convention); International Convention for the Suppression of the Financing of Terrorism 1999; United Nations Convention against Corruption 2003 (Merida Convention), among others.

6 FATF, Egmont Group, OECD, WB, IMF, UN, StAR, among others.

7 Action Aid 'SABMiller to face tax audit in five African countries ActionAid UK' 6 May 2011, <https://www.actionaid.org.uk/news-and-views/sabmiller-to-face-tax-audit-in-five-african-countries-following-actionaid-report> (accessed 14 December 2017).

8 ICIJ 'The Panama papers', <https://panamapapers.icij.org/> (accessed 23 August 2017); ICIJ 'Swiss leaks: Murky cash sheltered by bank secrecy – International Consortium of Investigative Journalists' <https://www.icij.org/project/swiss-leaks> (accessed 29 August 2017); ICIJ 'Explore the documents: Luxembourg leaks database – International Consortium of Investigative Journalists', <https://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database> (accessed 29 August 2017).

9 Action Aid *Calling time on tax avoidance* (2010).

10 African Commission on Human and Peoples' Rights '236: Resolution on Illicit Capital Flight from Africa Resolutions 53rd ordinary session ACHPR' April 2013; African Commission on Human and Peoples' Rights '193: Resolution on the Renewal of the Mandate of the Working Group on Economic Social and Cultural Rights in Africa Resolutions 50th ordinary session ACHPR' November 2011 <http://www.achpr.org/sessions/50th/resolutions/193/> (accessed 18 August 2017); African Commission on Human and Peoples' Rights '321: Resolution on the Appointment of the Chairperson and Reconstitution of the Working Group on Extractive Industries, Environment and

of several tax agencies on the continent¹² and, most recently, in 2015 through the release of the report of the High-Level Panel on Illicit Financial Flows (HLP Report).¹³

The HLP Report breaks new ground, not only for the African continent, but also for other developing countries and the world. It has made strong recommendations and taken a clear stand on the issue of IFFs that has globally caused ripples. However, enforcement continues to be a weak point. This chapter will reflect on the HLP Report; take stock of the recommendations made in the HLP Report and critique it; and analyse the changes that have taken place since the release of the report in 2015 to establish the level of enforcement that has taken place on the continent as a result of the HLP Report.¹⁴

2 Unpacking the magnitude of illicit financial flows in Africa and the HLP Report

The HLP Report used figures from several authors to set out the magnitude of the problem. Global financial integrity was its main point of reference on the magnitude of IFFs. It supported its approach by quoting Global Financial Integrity's (GFI) data that between 2005 and 2014, IFFs from the south were 4,6 to 7,2 per cent of developing countries' total trade, while such inflows were 9,5 to 16,8 per cent, with about 3,3 per cent of IFFs over this period being attributed to fraudulent trade mis-invoicing or 'transfer pricing'. They state that since 2012, emerging and developing countries have lost over a trillion dollars yearly that could have been invested productively in industry, agriculture, healthcare, education or infrastructure. The breakdown of where these IFFs are most prevalent in developing countries is as follows: transnational criminal activities (counterfeiting (USD923 million to USD1.13 billion)); drug trafficking (USD426 billion to USD652 billion); illegal logging (USD52 billion to

Human Rights Violations in Africa and Renewal of Its Mandate Resolutions 57th ordinary session ACHPR' November 2015, <http://www.achpr.org/sessions/57th/resolutions/321/> (accessed 18 August 2017); 316: Resolution on the Appointment of the Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa and Renewal of the Mandate of its Members.

11 'Tana 2012 Speeches – Tana High-Level Forum on Security in Africa' 378, <http://www.tanaforum.org/old-website-2016/document-view/be28b12a5f4b50eb5378/?ms=c65396cfa5578d4379af&ps=455jksff2295f7308faf&ls=be28b12a5f4b50eb5> (accessed 1 November 2017). See also A Cobham 'The impacts of illicit financial flows on peace and security in Africa' Tana High Level Forum on Peace and Security in Africa Discussion Paper (2014) <http://www.tanaforum.org/old-website-2016/document-view/be28b12a5f4b50eb5378/?ms=6e5bd68f63445602ef8f&ps=455jksff2295f7308faf&ls=be28b12a5f4b50eb5378> (accessed 18 August 2017).

12 Within regional groups of countries, a joint audit was conducted of SAB Miller, a UK multinational corporation (MNC) by the tax officials of South Africa, Ghana, Zambia, Tanzania and Mauritius. Action Aid, 'SABMiller to face tax audit in five African Countries' ActionAid UK.

13 AU/UNECA 'Report of the High-Level Panel on Illicit Financial Flows from Africa'.

14 As above.

USD157 billion); human trafficking (USD150.2 billion); illegal mining (USD12 billion to USD48 billion); illegal fishing (USD15.5 billion to USD36.4 billion); illegal wildlife trade (USD5 billion to USD23 billion); crude oil theft (USD5.2 billion to USD11.9 billion); small arms and light weapons trafficking (USD1.7 billion to USD3.5 billion); organ trafficking (USD840 million to USD1.7 billion); trafficking in cultural property (USD1.2 billion to USD1.6 billion); thus totaling somewhere between USD1.6 trillion and USD2.2 trillion. The GFI report estimates that developing countries lost between USD620 billion and USD970 billion in illicit outflows in 2014. IFFs from the south are estimated at 4.2 to 6.6 per cent of total developing country trade for 2014, while inflows were 9.5 to 17.4 per cent. Total IFFs of all developing countries in 2014 were estimated at USD2.01 to USD3.507 trillion.¹⁵

GFI estimates have been criticised, for instance, for making unrealistic assumptions about trade-related transport costs and ignoring other explanations for 'errors'. For example, estimated GFI outflows include IFFs and trade mis-invoicing estimated from inconsistencies in trade data. Despite these weaknesses in data, there are other general concerns that further limit the validity of the data and will more likely result in them being higher than is being stated. IFFs can only be calculated correctly if all the figures are passing through formal institutions such as banking institutions, or customs databases where they may be documented. Globally, however, cash payments are still prevalent and in Africa as well as other developing countries it is not merely cash but barter trade in the micro, small, medium and/or large-scale, depending on the individual transaction. For example, the exchange of ivory for small arms is a well-known transaction on the African continent.¹⁶ As a result, no exact figures on IFFs in reality are available to measure the true extent of IFFs. The GFI figures set out above that are now infamous are those of the billions and trillions. However, these are limited in different ways to trade mis-invoicing mis-pricing or even customs data. Criminal activities and their financing remain undetermined.

When it comes to actual state-collected data, many African countries, notwithstanding, do not release their actual books of accounts or budgets. The reasons given include that, because loan terms are so heavy, the state is attempting to retain more money for development; hiding corruption; or even a failure to keep proper records. In 2016, the Zimbabwean Commissioner-General for Taxation was suspended and investigated

15 GFI *Illicit financial flows to and from developing countries: 2005-2014*.

16 RCSA 'The nexus between poaching and proliferation of illicit small arms and light weapons regional report: Central African Republic, Democratic Republic of Congo, Kenya, Uganda and Tanzania' (Nairobi, Kenya: Regional Centre on Small Arms, 2017) 4.

regarding issues of corruption.¹⁷ He later resigned in 2017.¹⁸ Countries in conflict or those that have in the past had sanctions may not have accounted at all for certain periods. A recent publication on African data analysis excluded Zimbabwe and Somalia: Zimbabwe due to a lack of access to data for the period when they were subjected to sanctions; and Somalia also lacked access as they were and still are involved in a civil war.¹⁹

There is no data at all on treaty-shopping and abuse for the following reasons: First, no cost benefit analyses have to date been carried out by African countries to actually assess this before a treaty is signed or even periodically after signature to ensure continued relevance and validity of the treaty and the effect of the abuses and shopping. However, Tanzania recently passed a law requiring that this be carried out in future not only before exemptions are granted, but also for capital expenditure separately in the mining sector.²⁰ However, since tax havens or secrecy jurisdictions do not allow access to beneficial owners, one cannot ascertain the true owner of a corporation and its structure in order to do a more detailed analysis. The unpacking of this data continues to occur only through the work of leaks and global scandals, such as LuxLeaks,²¹ Swiss Leaks;²² WikiLeaks;²³ the Panama Papers;²⁴ and, more recently, the Apple-Ireland case²⁵ and the Paradise Papers.²⁶ The HLP Report uses this type of data as this is all that is currently available, but one must remain fully aware that the figures, while at best only estimates, seem to be estimates only of one part of the entire amount of IFFs flowing into and out of the African continent.

With this background in mind, the AU tasked a high-level panel, chaired by Thabo Mbeki, to examine IFFs and their impact on Africa's

17 '#Zimbabwe Revenue Authority (ZIMRA) Commissioner General, Mr Gershom Pasi Suspended' *Zimbabwe Today* (blog), 6 May 2016, <https://zimbabwe-today.com/zimra-commissioner-general-suspended/> (accessed 14 December 2017).

18 'Breaking: Zimra boss Pasi resigns' *The Zimbabwe Independent* (blog) 24 May 2017, <https://www.theindependent.co.zw/2017/05/24/zimra-boss-pasi-resigns/> (accessed 14 December 2017).

19 Waris and Kohonen (n 3 above).

20 N Woodroffe et al *Tanzania's new natural resources legislation: What will change* (2017) 6.

21 ICIJ 'Explore the documents: Luxembourg Leaks Database' International Consortium of Investigative Journalists, <https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database/> (accessed 14 December 2017).

22 ICIJ 'Swiss Leaks: Murky cash sheltered by bank secrecy, International Consortium of Investigative Journalists', <https://www.icij.org/investigations/swiss-leaks/> (accessed 14 December 2017)

23 WikiLeaks, <https://wikileaks.org/> (accessed 23 August 2017).

24 ICIJ 'The Panama Papers'.

25 'Ireland "taking too long" to collect apple tax and may face court', <https://www.irishtimes.com/business/technology/ireland-taking-too-long-to-collect-apple-tax-and-may-face-court-1.3089031> (accessed 29 August 2017).

26 'Paradise Papers: Secrets of the global elite' *International Consortium of Investigative Journalists* (blog), <https://www.icij.org/investigations/paradise-papers/> (accessed 6 November 2017).

development.²⁷ The mandate of the panel was to determine the nature and patterns of IFFs from Africa; to establish the level of IFFs from the continent; to assess the complex and long-term implications of IFFs for development; to raise awareness among African governments, citizens and international development partners of the scale and effect of such financial outflows on development; and to propose policies and mobilise support for practices that would reverse such illicit financial outflows.²⁸

The report recommended that there should be a unified global architecture on the issue of IFFs in the form of a UN declaration on the issue of IFFs; that IFFs are to be included in the post-2015 Development Agenda; and that Africa should initiate steps for the UN to adopt a unified policy instrument on IFFs. On the issue of the methodology to achieve the recommendations, the report suggested that, in order to control and stop IFFs out of the country, with specific reference to multi-national enterprises (MNEs), mis-invoicing, the arm's length principle and transfer pricing needed to be addressed. This effectively ties in with the international debates on base erosion and profit shifting (BEPS) that includes both the legal and illegal activities that MNEs are engaged in.

One of the immediate results of the HLP Report was that the AU raised the issue of IFFs to the presidential level and tasked itself, with the support of UNECA, to begin to work on the issues and the impact it was having on the continent as well as recommending changes required in law and policy. UNECA subsequently released a report by reassessing the data and recalculated the figures using its own methodology. It also began unpacking the IFF data available to set out the region most affected, the countries with the weakest fiscal systems and the sectors with the highest number of IFFs.

Since the release of the HLP Report, there have been attempts to assess the figures by UNECA as well as the United Nations Conference on Trade and Development (UNCTAD). The conclusion currently is that the IFFs from the African continent annually comes to between USD50 and USD70 billion per annum.

3 HLP definition of IFFs and priority areas of IFF losses

The definition of IFF remains contentious globally. The most common definition in the literature is the legalistic interpretation of IFFs, which suggests that IFFs refers to money that is earned, transferred or used in

27 United Nations. Economic Commission for Africa 'Illicit financial flow: Report of the High-Level Panel on Illicit Financial Flows from Africa' (2015) <https://www.unece.org/iff> (accessed 18 August 2017).

28 AU/UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa'.

contravention of existing laws. In some cases, this money is earned illegally, such as through organised crime; money laundering; drug trafficking to embezzlement; terrorist financing; and bribery.²⁹ In other cases, the money could have been earned legally but transferred out of the country illegally by circumventing currency controls or customs control. An example of customs fraud is trade mis-invoicing involving buyers and sellers presenting fraudulent documentation to customs officials. These persons falsify the value of their trade by under or over-invoicing their trade documents so as to be less or more than the actual market value in order to circumvent the payment of customs duties.³⁰ In other cases, money could have been earned legally, but the tax on the same is evaded through illegal means of not complying with countries' tax laws, for instance, by deliberately falsifying tax returns and books of account. Criminal prosecution is required to apprehend the perpetrators of the above illegal activities.

In terms of the legal interpretation of IFFs, tax evasion, which is illegal, forms part of IFFs. However, tax avoidance is considered not to fall under IFFs, since tax literature defines it as involving the arrangement of one's affairs to pay less tax by utilising loopholes in tax laws and exploiting these within legal parameters.³¹ This interpretation is backed up by earlier British court decisions, such as *Duke of Westminster*³² that held the view that 'every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be', and that no legal or moral obligation rests upon a taxpayer to pay higher taxes than he or she is legally bound to under the law.³³

An alternative approach used by many analysts of IFFs is to define these more broadly, based on the understanding that 'illicit' does not refer only to the illegal. Indeed, the *Oxford English dictionary* defines illicit as 'not authorised or allowed; improper, irregular; esp not sanctioned by law, rule, or custom; unlawful, forbidden', which is much broader than only the

29 RW Baker, *Capitalism's achilles heel: Dirty money and how to renew the free-market system* (John Wiley & Sons, 2005). Raymond Baker has witnessed the free-market system operating illicitly and corruptly, with devastating consequences. In *Capitalism's Achilles Heel*, Baker takes readers on a fascinating journey through the global free-market system and reveals how dirty money, poverty, and inequality are inextricably intertwined. Readers will discover how small illicit transactions lead to massive illegalities and how staggering global income disparities are worsened by the illegalities that permeate international capitalism. Drawing on his experiences, Baker shows how Western banks and businesses use secret transactions and ignore laws while handling some \$1 trillion in illicit proceeds each year. He also illustrates how businesspeople, criminals, and kleptocrats perfect the same techniques to shift funds and how these tactics negatively affect individuals, institutions, and countries.

30 A Oguttu, "Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan" (UK: ICTD, 2016).

31 A Rapakko, *Base company taxation* (Kluwer Law and Taxation Publishers, 1989), 39.

32 *Inland Revenue Commissioners v Duke of Westminster*, Appeal Cases 1 (1936).

33 S Blankenburg and M Khan, 'Governance and Illicit Flows,' in *Draining development? controlling flows of illicit funds from developing countries* Peter Reuter (ed) (Washington DC: World Bank, 2012), 21–68.

illegal.³⁴ According to this view, excessive tax avoidance practices should be seen as improper and/or not sanctioned by custom, especially given the backlash against such practices illustrated by the public outrage against illegitimate but legal commercial activities in the wake of the 2008/2009 global financial crisis, when non-governmental organisations (NGOs) raised concerns about companies paying little or no corporation tax in the countries where they do business.³⁵ This prompted investigations by the United Kingdom on corporations such as Google, Amazon, Starbucks, Thames Water, Vodafone and Cadbury (before the takeover by Kraft), which revealed how these companies used aggressive tax avoidance schemes to shift profits to low-tax countries. This was seen as a failure to live up to the expectations of societal norms. In line with this second definition of 'illicit' above, aggressive tax avoidance practices by a multinational enterprise (MNE) would thus be deemed illegitimate and falling under the broad interpretation of IFFs.

The HLP Report brought consensus from an African perspective by defining illicit financial flows as

money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials.

This broader definition of IFFs seems to be truer to the meaning of 'illicit'. An even more powerful argument for including aggressive tax avoidance in illicit financial flows is that it should be considered as harmful and, therefore, illicit, due to the negative impact that it has on development.³⁶ Therefore, it needs to be measured, tracked and stopped. From a practical point of view, given that tax avoidance and tax evasion both result from weak tax laws (that are difficult to interpret and enforce in the case of tax evasion), it would seem important to measure tax avoidance along with tax evasion in order to give a full appreciation of a country's losses due to weaknesses in its tax system. In addition, in many cases it is impossible for the researcher to tell, with the data currently publicly available, whether a particular flow represents tax evasion or tax avoidance, which is another argument for measuring them together.

However, the reason that this broader definition was not only chosen by the HLP Report, but why it continues to be relevant and important is

34 C Soanes & A Stevenson (eds) *The Concise Oxford English Dictionary*, 11th ed., Oxford Reference Online (Oxford: Oxford University Press, 2006), http://www.oxfordreference.com/views/SEARCH_RESULTS.html?y=0&q=tax&x=0&ssid=711209064&scope=global&time=0.740406542854625.

35 Christian Aid 'Death and taxes' (London: Christian Aid, 2008).

36 AU/UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa' (2015) http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf.

made clearer through the information emerging in the past two years. Research conducted, for example, on transfer pricing in Africa reveals that only 18 countries have transfer pricing legislation. This would mean that there is no law regulating transfer pricing in the remaining 36 countries of the continent. Based on this alone, it would mean that the IFFs out of African countries that are not at all documented would be any type of transfer pricing arrangement carried out in these 36 countries where it is neither legal nor illegal: Tax planning thus comes in to take advantage of this weakness in the law in structuring companies to either reduce their tax burden or to whiten their black money through corporate structures.³⁷ This single example, coupled with barter trade as well as cash movements across the continent, highlights why inclusion of tax avoidance in the discussion on IFFs becomes so crucial for the definition of IFF and the need to develop regulatory systems on the African continent.

4 African measures countering illicit financial flows

The HLP Report identified three fields of reform at different geographical levels. This chapter, accordingly, will assess what changes have taken place in anti-money laundering (AML); taxation and corruption in the past two years during and after the release of the report at several levels: globally, continentally, regionally and domestic where possible in their relationship with IFFs.

Without specific reference to African involvement, there already has been some actions taken globally. The United Nations Office on Drugs and Crime (UNODC), after producing a report,³⁸ passed a resolution titled 'Strengthening international co-operation' in preventing and combating illicit financial flows linked to drug trafficking, from the anti-money laundering perspective.³⁹ There also has been much activity at the level of the UN Tax Committee as well as at the OECD. However, at the level of corruption globally, there has been no clear global approach or activity with the actions being undertaken being part of other actions, such as anti-money laundering or tax evasion and avoidance. It has been limited mainly to domestic activity of states and practitioners in conferences with

37 A Waris 'Transfer pricing in Kenya' ICTD Working Paper 69 (2017)

38 *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes* (Vienna 2011).

39 United Nations Office on Drugs and Crime. Strengthening International Co-Operation in Preventing and Combating Illicit Financial Flows Linked to Drug Trafficking, from the Anti-Money-Laundering Perspective, Resolution 58/6, 2015, C Soanes & A Stevenson (eds) *The Concise Oxford English Dictionary*, 11th ed., Oxford Reference Online (Oxford: Oxford University Press, 2006), http://www.oxfordreference.com/views/SEARCH_RESULTS.html?y=0&q=tax&x=0&ssid=711209064&scope=global&time=0.740406542854625 (accessed 18 August 2017).

calls for action, but no specific conventions or policy and, on the other hand, groupings of states like the G20 and G30 (through the OECD).

4.1 Global level recommendations

The global recommendations of the HLP Report were two-pronged. The first was to guide Africa on what stand it should take at international fora and actions they ought to spearhead. The second was with reference to the approach African states should take in their bilateral and multilateral relations with non-African states and their global partners. As a result, this section is divided into these two sub-sections in order to unpack the status of the recommended measures.

4.2 African action on the global level

The HLP Report called for a UN declaration on the issue of IFFs in Africa and that it should initiate steps for the UN to adopt a unified policy instrument on IFFs. However, to date this has not taken place and there has been no action from African states to draft either a declaration or policy instrument to be taken forward to the UN. However, in February 2016 the High-Level Panel on Illicit Financial Flows (HLPFFF) discussed its findings with UN member states at a special briefing of the UN Economic and Social Council (ECOSOC).⁴⁰

In June 2015, after the release of the HLP Report, the AU passed a special resolution on IFFs,⁴¹ where it asked UNECA, the African Development Bank and regional economic communities (RECs) to submit annual reports on the progress of the counter-measures to IFFs.⁴² These reports, however, have as yet not been released and should have been available after June 2016. However, despite several attempts to inquire into the status of this report, nothing has as yet been released.⁴³ The same resolution also called for the AU, UNECA and the African Capacity Building Foundation and other development partners to build capacities of AU member states and institutions, particularly in contract negotiation, tax management, regulatory and legal frameworks, policies, money laundering, asset recovery and repatriation, and resource governance for effective and optimal management and governance of African natural

40 International Institute for Sustainable Development 'Panel: Addressing illicit financial flows could help finance SDGs | IISD's SDG Knowledge Hub | IISD' February 2016, <http://sdg.iisd.org/news/panel-addressing-illicit-financial-flows-could-help-finance-sdgs/> (accessed 18 August 2017).

41 African Union 'Assembly Special Declaration on Illicit Financial Flows: African Union' *The African Union Commission*, February 2015, <https://au.int/en/documents/29831/assembly-special-declaration-illicit-financial-flows> (accessed 18 August 2017).

42 African Union (n 33 above) para 4.

43 The author contacted the AU in late 2006 and was told that once it was ready, the report would be online, but the website accessed on 30 October 2017 showed no report release.

resources. The negotiations here seem to be ongoing, but there has been no official statement on the progress.

The same AU resolution also reiterated that the issue of international cooperation on IFFs be raised in the post-2015 Development Agenda. This was done and, although the Addis Ababa report of 2015 does make reference to IFFs, African states failed to achieve the creation of a UN tax body which could have taken the form of an upgrade of the UN Tax Committee. Interestingly, the countries that broke the deadlock in Addis Ababa included South Africa and Ethiopia, reflecting the fact that, despite the passing of the AU resolution, the actual coherence of a single African standpoint seems out of reach as domestic and possibly regional concerns continue to trump the continental concerns. However, despite this setback, the Addis Ababa tax initiative was set up to build capacity, and African countries that joined include Ethiopia, Liberia, Sierra Leone and Malawi.⁴⁴

The report also recommended that the international community eliminate secrecy jurisdictions, introduce transparency in financial transfers and crack down on money laundering, and that there be stronger collaboration between Africa and the US, EU, G8 and G20 for greater transparency in international banking and the UN, the International Monetary Fund (IMF) and World Bank to play a more coherent and visible role in tackling IFFs. This seems not to have taken place as yet, although negotiations seem to be ongoing.

4.3 Bilateral relations between African and non-African countries and institutions

In the bilateral relations between African and non-African countries and institutions, several specific recommendations were made by the HLP Report. In addition, several other activities continued to take place. These recommendations are a combination of banking and taxation with criminal implications. A series of technical recommendations were made in the HLP Report, some of which already were being implemented.

4.3.1 Mis-invoicing and the Bank for International Settlements

In the case of mis-invoicing, the HLP Report requested that the Bank for International Settlements (BIS) publish the data it holds on international

44 Common African Position (CAP) 'Addis tax initiative launched: Common African position on the post-2015 development agenda' <http://cap.africa-platform.org/news/addis-tax-initiative-launched> (accessed 18 August 2017). Other countries included Australia, Belgium, Cameroon, Denmark, Ethiopia, European Commission, Finland, France, Italy, Germany, Indonesia, South Korea, Liberia, Luxembourg, Malawi, The Netherlands, Norway, Philippines, Sierra Leone, Senegal, Slovenia, Sweden, Switzerland, the United Kingdom and the United States.

banking assets by country of origin and destination in a matrix format, along the lines of the data published by the IMF for bilateral trade; foreign direct investment (FDI) and portfolio investment, so that it can inform the analysis of IFFs from Africa.⁴⁵ It remains unclear whether any attempts have been made to contact the BIS requesting a change to its data matrices. However, a brief analysis of their website in June 2017 revealed that the data still was not available according to the parameters outlined in the HLP Report.

4.3.2 *Arm's length principle and free access to comparables databases*

In order to resolve issues of the arm's length principle availability of comparable pricing data on goods and services, national and multilateral agencies are to make fully and freely available, and in a timely manner, data on the pricing of goods and services in international transactions, according to accepted coding categories. This remains unresolved. However, several African countries have purchased access to pan-European databases. Kenya in 2011 purchased the database on comparables, and the initial use was regarded as successful.⁴⁶ South Africa since 2012 also has had access to a comparable database.⁴⁷ The only other countries that currently have access in Africa are Algeria⁴⁸ and Uganda.⁴⁹ The African Tax Administration Forum (ATAF), however, currently is investigating the possibility of the purchase of a database for collective use.⁵⁰

The use of the information from the pan-European databases continues to be contested and, despite this recommendation, it remains unconvincing whether the databases really are of any long-term use at all.⁵¹ Examples of the use of the database in Kenya seem to be providing

45 Bank for International Settlement BIS Statistical Bulletin, Monetary and Economic Department, March 2016, <https://www.bis.org/statistics/bulletin1603.pdf#page=8> (accessed 18 August 2017).

46 PriceWaterhouseCoopers (PWC) 'Transfer pricing and developing countries – Kenya 2012' https://ec.europa.eu/taxation_customs/sites/taxation/.../trpr_dev_count_app_d.pdf (accessed 18 August 2017).

47 United Nations 'Eighth Session of the Committee of Experts on International Co-operation in Tax Matters' *Financing for Development*, South Africa 2011, http://www.un.org/esa/ffd/tax/eighthsession/Chap10_CPSouthAfrica_20120901_v3_HC-accp.pdf. (accessed 18 August 2017).

48 Deloitte *Global transfer pricing country guide 2015* <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dtl-tax-transfer-pricing-country-guide-2015.pdf> (accessed 18 August 2017).

49 PriceWaterhouseCoopers (PWC) 'Transfer pricing and developing countries – Uganda 2012' <https://www.pwc.com/gx/en/tax/transfer-pricing/management-strategy/asets/pwc-transfer-pricing-africa-pdf.pdf> (accessed 18 August 2017).

50 As above.

51 A Waris 'International Centre for Tax Development, 5th Annual Centre Meeting (Presentations) – ICTD' 2016 <http://www.ictd.ac/news-events/2-uncategorised/170-ictd-5th-annual-centre-meeting> (accessed 18 August 2017).

mixed results.⁵² However, there is a need to build local databases, but it remains unclear as to which actions are being taken in this regard.

4.3.3 Publicly-available disaggregated MNC financial information

In relation to states outside Africa, the report recommended that partners should require: publicly-available disaggregated financial information on their MNCs; require beneficial ownership information for incorporation; elaborate a global governance framework for asset freezing, management and repatriation. Thus far, this is being discussed in the Base Erosion and Profit Shifting (BEPS) project at the OECD and the UN Tax Committee and the actions vary based on whether there is an existing agreement with the partner country for the exchange of information.

In the case of Kenya, a request for information provided a positive response from the UK but a negative response from Germany.⁵³ This illustrates that there is a lack of clarity on the types of information that may be requested and how to make a request, as each country still follows a different domestic law-governed process. However, it identified the need to have a coherent and single approach to access to information and more work on transparency from an African perspective on what all companies working with African states ought to do. Perhaps a template on the exchange of information from an African perspective would be one way of resolving this and bring certainty into the discussions. A global endeavour to counter some issues related to this includes the development of a rule on country-by-country reporting. However, despite this, the recent Kenyan experience shows that even in EU states there is no coherent understanding of what information should be shared despite the OECD having standard forms.

4.3.4 Transparency and public debt audits

An interesting development on the side of lenders is the Norwegian government's plan for an independent audit of all its bilateral debts owed by seven developing countries.⁵⁴ Norway has been in the forefront of efforts to address issues of odious debt. The countries whose debts to Norway will be audited include Egypt, Somalia, Sudan and Zimbabwe. The aims of the audit are to promote financial transparency and to test the new UN Principles on Responsible Lending and Borrowing, which were launched by the United Nations Conference on Trade and Development (UNCTAD) in 2012.

52 A Waris 'Transfer pricing in Kenya' ICTD Working Paper Series 69 (forthcoming).

53 As above.

54 IH Kvangraven 'Exportable' in *How to make the Norwegian debt audit transferable to other countries*. Oslo, Norway: *The Norwegian Coalition for Debt Cancellation (SLUG)* (2012).

5 Continental and regional level multilateral agreements

Continental-level conventions offer a framework to work towards the harmonisation and co-ordination of national initiatives. The most comprehensive existing framework is the African Union Convention on Preventing and Combating Corruption.⁵⁵ A further area in which regional groupings could take a lead in cooperating is in the use of customs data. First, by sharing trade price data, countries automatically expand the data set against which they can judge and identify abnormal pricing – and this can be done in real time. Second, in the Open Government Guide ‘follow-the-money’ partnerships, working with major trading partners to identify abusive pricing happening at each end of the same transactions. Starting such a process on a regional basis could in its own right be powerful, and also provide a demonstration to other trade partners of the value of cooperation. Joint audits, as are being spearheaded by the ATAF, also need to continue through the sharing of technology and databases at the regional and continental levels, and the automatic exchange of tax information among African countries. This is partially being dealt with by the ATAF.

5.1 Domestic level recommendations

At the domestic level, the HLP Report made several recommendations. This section will not only canvass the recommendations made by BEPS and the HLP Report, but also additional attempts that are being made by African countries. The section is divided into two: the technical issues that need reform and the administrative reforms.

5.1.1 *Technical legal and policy reforms*

There have been several reforms of law and policy that have been clearly identified as crucial to reduce and prevent IFFs. These include transfer pricing; beneficial ownership; country-by-country reform; and the review of tax treaties.

First, each African country should establish a transfer pricing laws and policy. Currently, only 18 African countries have transfer pricing laws in their domestic frameworks. This means that whether or not there is a double taxation agreement (DTA) in place on a cross-border tax issue, there still is no possibility of monitoring issues of transfer pricing without

55 African Union, 'Convention on Preventing and Combating Corruption' (2003).

a clear legislative framework in place.⁵⁶ The reform of this law with its required regulations will mean that African states should require multinational corporations operating in their countries to provide the revenue authority and/or their transfer pricing units with a comprehensive report showing their disaggregated financial reporting on a country-by-country or subsidiary-by-subsidiary basis. African governments could also consider developing a format for this reporting that would be acceptable to multiple African revenue authorities, which would allow for the cross-border assessment of the growing African owned multinational enterprises (MNEs).⁵⁷ An Angolan transfer pricing regime was introduced by Presidential Decree 147/13 on 1 October 2013, applying to all domestic and cross-border commercial transactions entered into between qualifying taxpayers and related entities from 1 January 2013. Order 599/14 of 24 March 2014 sets out a list of 'major taxpayers' and their requirements to prepare a transfer pricing report. The transfer pricing rules present a number of challenges for affected taxpayers, including a requirement that transfer pricing documentation should be prepared in Portuguese.⁵⁸

Second, intentional or inaccurate stating of price quantity, quality or other aspects of trade in goods and services to manipulate or evade taxation should be made illegal. This could take the form of strengthening the general anti-avoidance rule (GAAR) in a country. However, there should also be high penalties for the failure to do so as well as criminal sanctions on chief executive officers, directors and their accountants, auditors and lawyers. National legislations not always agree on what is considered a prosecutable financial offence, and this opens avenues for agents to evade taxes, to move money illegally across borders and launder it in banking systems. For example, a case study on Botswana, Tanzania and Zambia found that, while Zambia recognises abusive transfer pricing as a crime, the other two countries do not.⁵⁹ The harmonisation of legislation across countries is necessary to close avenues for 'criminal arbitrage' across national boundaries.

Third, the registry of companies should be bolstered and digitised and there should be a clear register of companies for tax purposes where domestically-registered companies and their foreign-related party data ought to be accessible.

56 The Tanzanian Regulations allow for unilateral, bilateral and multilateral APAs, which are valid for a maximum period of five years, subject to annual compliance requirements.

57 A Waris 'Rwanda – understanding transfer pricing' *International Transfer Pricing Journal* http://www.academia.edu/7077530/Rwanda_-_Understanding_Transfer_Pricing (accessed 18 August 2017).

58 C Becker 'Status of transfer pricing in Africa (Part I) – Tax – South Africa' *Mondaq* September 2014 <http://www.mondaq.com/southafrica/x/340902/tax+authorities/Status+Of+Transfer+Pricing+In+Africa+Part+I> (accessed 18 August 2017).

59 C Goredema 'Combating illicit financial flows and related corruption in Africa: Towards a more integrated and effective approach' (2011) 12 *U4 Issue* 14.

Fourth, customs should use available databases to compare prices. This currently is not in place, and the assessment remains based on an *ad hoc* and often case by case basis relying on documentation like receipts, although the customs officials in some countries check online prices in making an assessment of goods. The World Customs organisation have a role to play in this, which to date remains unoccupied as no institutions have come forward to take up this role as yet at a global level

Fifth, states ought to start collecting trade transaction data. National and multilateral agencies ought to make fully and freely available, and in a timely manner, data on the pricing of goods and services in international transactions. It is not clear whether any countries are specifically doing this. However, the open data revolution currently taking place has opened up much information that still leaves out much transactional data. Since banks already do this through the central bank clearing centre, extending this should not be difficult to enforce with joining of the databases of the central bank and with the revenue authority to triangulate the issue.

Sixth, automatic exchange of tax information globally, subject to national capacity and attention to necessary confidentiality. In several African countries there have been steps to pass freedom of information legislation which would allow the revenue authority (RA) in principle to access the necessary data domestically. However, this remains untested. In addition, there are discussions on the global accessibility of information to which African states have added their call internationally, but no similar issue has been raised domestically. This possibly is as a result of there being a presumption that African countries mainly will be the recipients of information. However, in reality, several African countries, including Egypt, Nigeria, Algeria, South Africa and Tunisia, will be suppliers of information as they also house home-grown MNEs.

Seventh, beneficial ownership information should be provided when companies are incorporated or trusts and foundations are registered. The current status in most African countries is that the companies' registries are not updated and the digitisation is not complete. In some countries, such as Kenya, this process has been pending for almost 20 years. The result is that the issue of a repository that is reliable, up to date and easily accessible, becomes a problem and, with the added nuance of a beneficial ownership registry, the structures remain uncrystallised and laws enabling the collection of this data in most cases have not even been drafted.

Eighth, thus far there seems to have been discussions on country-by-country reporting in the ATAF and, as a result of the Davis Committee recommendations, South Africa has commenced with the implementation of the Country by Country (CbC) Reporting Standard by the South African

Revenue Service (SARS) will come into effect through regulations this year.⁶⁰

Ninth, the review of current and prospective double taxation conventions, particularly those in place with jurisdictions that are significant destinations of IFFs, to ensure that they do not provide opportunities for abuse. Since the discussion on treaty review came to the forefront, Mauritius has reviewed its treaty with India. Rwanda revoked its treaty with Mauritius and subsequently signed a revised version which allowed for the taxation of management services in Rwanda before the repatriation of the amount to Mauritius. In Mozambique, the government ceased to sign tax treaties and has started reviewing old treaties, starting with the treaty with the tax haven of Mauritius. In Nigeria, the Senate and National Assembly raised queries regarding tax incentives and the granting of pioneer status to companies, and one of the nation's anti-corruption agencies took a special interest in the processes for granting incentives. Nigeria's National Assembly issued a directive that the new tax treaties should go to parliament for review.

Tenth, regional integration arrangements to introduce accepted standards for tax incentives to prevent harmful competition in the effort to attract foreign direct investment should be used. Currently there are discussions in the separate regional blocs of the East African Community (EAC), Southern African Development Corporation (SADC), Economic Community for West African States (ECOWAS), the Magreb as well as Common Market for East and Southern Africa (COMESA) to set up the joint sharing of data as well as a shared model double taxation agreement (DTA) developed in the East African Community (EAC). Many countries also are members of ATAF. The harmonisation of legislation across countries is necessary to close avenues for 'criminal arbitrage' across national boundaries.

Eleventh, policy activities, such as a national action plan to counter IFFs, should be developed. Thus far, in Africa the only countries to develop a plan include Burkina Faso, Kenya, Liberia, Mauritius, Niger, Senegal and Sierra Leone. In addition, these countries are part of the Partnership on Illicit Finance that include Burkina-Faso, Kenya, Liberia, Mauritius, Niger, Senegal, Sierra Leone and the US.⁶¹

Finally, join such initiatives as FATF and EITI Institutional support for these measures. Most African countries already are members of the regional bodies under the FATF, including Eastern and Southern Africa

60 A Camay 'Draft regulations for the implementation of country-by-country reporting published in South Africa – Tax – South Africa' *Mondaq*, May 2016, <http://www.mondaq.com/southafrica/x/490030/tax+authorities/Be+Cleared+Online> (accessed 18 August 2017).

61 M Mulikelela 'Times of Zambia: AfDB to curb illicit financial flows' <http://www.times.co.zm/?p=85754> (accessed 18 August 2017).

Anti-Money Laundering Group (ESAAMLG), Middle East and North Africa Financial Action Task Force (MENAFATF), Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) and Task Force on Money Laundering in Central Africa (GABAC). Only 17 countries are Extractive Industry Transparency Initiative (EITI) compliant with four in the process of implementation and one suspended.

5.1.2 Administrative reforms

The HLP Report listed out in detail that there was a need to establish or strengthen the independent institutions and agencies of government responsible for preventing IFFs. Included (but not limited to) are financial intelligence units; anti-fraud agencies; customs and border agencies; revenue agencies; anti-corruption agencies; and financial crime agencies. All these agencies should render regular reports on their activities and findings to national legislatures. Methods should be created for effective information sharing and co-ordination among various institutions and agencies. Robust mechanisms should be put in place for supervision of banks and financial institutions.

First, setting up the institutions and then putting them in close co-ordination with each other is crucial.⁶² The effectiveness of national initiatives in combating financial crimes often is hampered by inadequate co-ordination, harmonisation, and cooperation across African countries. Such discrepancies are widespread across the continent. The framework of collaboration needs to be among anti-corruption agencies, anti-money laundering agencies, financial intelligence units, and specialised offices across other branches of government, including the central bank, the police, customs services, immigration services, mining and trade ministries and company registries. They also need to equip their foreign missions (embassies and official representations at multinational institutions) to operate as centres for collection and dissemination of information on financial crime. This cross-agency co-ordination needs to be organised along the entire length of the 'information value chain', from the detection of suspicious activity to investigation, all the way to prosecution. At present, efficiency often is hampered by rigid specialisation and the compartmentalisation of responsibilities and agency mandates. For example, it often is not clear whether the role of the tax authorities is restricted to investigating the offence of tax evasion, or whether it extends to the investigation of associated crimes such as money laundering and the predicate offences that generated the funds. This lack of clarity on the institutional mandate hampers effective deterrence and prosecution of financial crime. In Swaziland, Shanmuga Rethenam, the director of the defunct iron ore mine, Salgaocar Swaziland, is wanted for a series of crimes, including fraud, tax evasion and theft of close to E1 billion, and has

62 This was the purpose of the July 2016 conference in Pretoria.

been charged by the Deputy Public Prosecutor.⁶³ In South Africa, tax amnesties were being granted to South African nationals with illicit finances abroad. The first offshore exchange control and income tax amnesty appeared in 2003, and a second similar amnesty followed in 2010, with a third announced in the 2016 budget speech. However, in April 2016 the national bank announced that South Africans with illicit offshore portfolios are not likely to get another amnesty.⁶⁴

Second, a section focused on international tax issues as well as transfer pricing should be created. Only nine African countries have transfer pricing units, with the remaining countries, such as Rwanda, opting not to have one as they are not adequately staffed to collect tax generally. Transfer pricing units should as a matter of extreme urgency be situated in revenue authorities and should be well equipped in accordance with global best practices. Establishing transfer pricing units may entail the training of a selection of existing revenue officers in this specialised area. However, as pointed out, after an initial windfall it remains unclear whether the training will provide any additional revenue. Despite this, there remains a necessity for revenue authority staff to have a thorough understanding of the transfer pricing in order to remain vigilant.⁶⁵

Third is the employment and building capacity of more staff dealing in these key sectors. While African countries have undertaken a number of efforts to combat corruption, money laundering, tax evasion and illicit financial flows, the scope of these efforts and their degree of effectiveness remains uneven. Even where relevant agencies have been established, they often face serious financial, technical and human capacity constraints. Recently South Africa collaborated with Kenya, Malawi and Rwanda on different types of capacity-building initiatives.⁶⁶ Moreover, efforts often

63 L Jele 'Observer: Salgaocar boss wanted for fraud' *Swazi Observer* 15 May 2016, <http://www.observer.org.sz/news/80620-salgaocar-boss-wanted-for-fraud.html> (accessed 18 August 2017).

64 IOL Reporter 'No more breaks for tax dodgers | IOL Business Report' 18 April 2016, <http://www.iol.co.za/business/news/no-more-breaks-for-tax-dodgers-2010949> (accessed 18 August 2017). Where the owner wants the funds to remain offshore, there is a 10% penalty on funds that are in breach of exchange control regulations. If the funds are remitted back to South Africa, only a 5% penalty is payable. These penalties must be paid from the offshore funds and where there is a lack of available offshore cash, such as for property holdings, the penalty can be paid from rand-based sources, but an extra 2% additional penalty is added. 'There are, of course, also tax implications, with National Treasury advising that 50 per cent of taxes owing would be due and payable for the last five tax years. This is a point on which some clients may need professional tax opinion as there has been no detail given as to how this 50 percent would be computed.' 'Interest would be charged on outstanding taxes, but no penalties would be levied. It is presumed that applicants would need to re-open previous assessments on their SARS E-filing profile and resubmit tax returns for these periods,' he notes. This amnesty application period ran for six months from 1 October 2016.

65 A Waris 'Taxing intra-company transfers: The law and its application in Rwanda' (2013) 67 *Bulletin for International Taxation* 679.

66 OECD *Tax administrations and capacity building: A collective challenge* (2016) 59.

are spread too thinly across a multitude of agencies, with little systematic co-ordination and few synergies among them.⁶⁷

Finally, improving governance. Ultimately, mechanisms for combating financial crimes must be part of the broader agenda for improving economic and political governance on the continent. The effectiveness of mechanisms for combating financial crime is contingent on the quality of information and the capacity to generate and manage this information. Such capacity is in short supply in the majority of African countries. Most countries lack an adequate stock of qualified forensic statisticians, investigators and financial crime prosecutors. They also lack adequate supply of specialised technology and equipment for collecting, processing, and storing specialised information on financial crime. African governments, therefore, need to invest in capacity building in the investigation and prosecution of financial crime. African countries recognise the importance of tackling IFFs, especially money laundering. Various countries have taken steps to establish legislation and tighten existing laws and create anti-IFF mechanisms. African countries have membership of the Inter-Governmental Action Group against money laundering in the sub-regions; the Financial Action Task Force; the Financial Crimes Enforcement Network; and the Egmont Group of Financial Intelligence Units.

However, despite action with regard to the issue of IFFs, Egypt still is unable to recover an estimated USD11 billion believed to have been transferred illicitly from the public purse during the era of the former President Hosni Mubarak to Switzerland as well as other countries in the European Union (EU) and the US.⁶⁸ However, there are encouraging signs and some successes: Nigeria, leading on the IFF share, is also credited as representing the single most successful case of asset recovery by a state: USD2.3 billion illicitly transferred by Abacha has been recovered. However, even this recovery took 10 to 16 years for the two countries to finalise and, thus, while the money may have been returned, it should never in the first place have been accepted, and the earnings the banks made from the money should also be returned to the countries whose

67 A Ennouri 'Tunisian President Moncef Marzouki refuses to increase investment in IMF' *Tunisia Live* 28 June 2012.

68 'StAR – Stolen asset recovery initiative – Corruption cases – Hosni Mubarak (Switzerland)' <http://star.worldbank.org/corruption-cases/node/18511> (accessed 9 November 2017); 'Prominent journalist gives testimony about Mubarak's wealth' *Egypt Independent* 23 May 2011, <http://www.egyptindependent.com/prominent-journalist-gives-testimony-about-mubaraks-wealth/>; 'The Middle East in revolt' *Time* 22 February 2011, http://content.time.com/time/specials/packages/article/0,28804,2045328_2045333_2049395,00.html.

money it was.⁶⁹ The ‘know-your-client’ principle the banks are supposed to use seems to have little or no weight in these types of scenarios. No bankers have been charged for any illegal acts despite the return of the money.

More recently, the Tunisian government has challenged the legitimacy of debts inherited from the Zine el-Abidine Ben Ali regime.⁷⁰ In 2012, President Marzouki refused to endorse a proposal for an increase in Tunisia’s quota share in the IMF (by about USD370 million), pending the passage of a Bill to audit the debts incurred under the Ben Ali regime. The Bill would authorise an investigation to determine whether these debts were used in the interests of the country or as an ‘instrument of dictatorship and repression’, in the words of the new President. If Tunisia follows through with an audit of the Ben Ali debts, this will set a historic precedent for Africa.⁷¹

6 Other piecemeal reforms

In addition to the reforms identified by the HLP Report as being crucial, additional reforms and actions being undertaken in different countries include changes in mining in several African mineral-rich countries as well as VAT reform in order to catch the resources using a different form of taxation.

6.1 Mining reform in Zambia

In Zambia, the Mines and Mineral Act of 2008 was amended to include some progressive clauses that aims at closing tax loopholes, and the government is in the process of reviewing the Zambia Development Agency Act to ensure that administration of the tax incentive is effective and transparent. In Malawi, the government is reviewing the Mines and Mineral Act which addresses the regulation of tax incentives and tax avoidance.

69 ‘ABACHA loot: Switzerland returns USD723m to Nigeria in 10 years *Vanguard News*, <https://www.vanguardngr.com/2016/03/abacha-loot-switzerland-returns-723m-to-nigeria-in-10-years/> (accessed 9 November 2017); ‘Switzerland to return Sani Abacha “loot” money to Nigeria’ | *World News* | *The Guardian*, <https://www.theguardian.com/world/2015/mar/18/switzerland-to-return-sani-abacha-loot-money-to-nigeria> (accessed 9 November 2017).

70 Y Wong *Sovereign finance and the poverty of nations: Odious debt in international law* (2012).

71 AfricaFocus ‘Africa: Debt audits and debt repudiation – AllAfrica.Com <http://allafrica.com/stories/201211201721.html> (accessed 18 August 2017). See also A Ennouri ‘Tunisian President Moncef Marzouki refuses to increase investment in IMF’ *Tunisia Live* 28 June 2012.

6.2 VAT and tax-incentive reform in Tanzania

The Tanzanian Parliament enacted a new Value Added Tax Act 2014 and Tax Administration Act 2014, which entered into law in February 2015. These new laws contain provisions according to which all multinationals now have to pay value-added tax (VAT). Furthermore, the discretionary powers of ministers in granting tax incentives were removed, tax incentives for multinationals will be reviewed to ensure compliance with legal tax requirements, no multinationals will be granted harmful incentives going forward since a cost-benefit analysis will first have to be conducted, and all tax incentives will first undergo parliamentary scrutiny. Civil society has played a positive role in these changes to the law. After the elections, the increased political will of the new government has seen the restructuring of the revenue authority leadership. Investigations have begun against those involved in suspected corruption and theft as well as those involved in deals that led to the non-payment of taxes and duties by multinational companies to the revenue authority at the port of entry. These measures have already resulted in government increasing tax collection from various sources from 900 billion Tanzanian shillings to 1.7 trillion Tanzanian shillings in a few months' time. At the same time, the budget towards education increased from 3.465 billion Tanzanian shillings (2014/15 FY) to 3.870 billion Tanzanian shillings (2015/16 FY), an increase of about 5 per cent.

7 Recommendations

There are additional recommendations that may be useful on a piecemeal basis, but have not been discussed in the HLP Report and would provide additional and complementary steps to the already existing measures against IFFs, most importantly in recognition of the immense differences that exist in and between African countries, both regionally and across the continent. The levels of development of fiscal systems, and how they stand in relation to each other as well as globally, should be mapped. This mapping must go hand in hand with a strategic approach of not just ranking countries, but also outlining according to a timeline the steps that must be put in place to get these countries to reach the levels of their neighbours and as well as the African standard.

Other recommendations include: first, increasing the remuneration of civil servants; second, providing clear documentation of incentives and subsidies and placing these in line in the national budget; third, preparing publicly available cost benefit analyses of companies before allowing them to invest in a country; fourth, using smart technology to triangulate data by updating company registries and triangulation of their digitised contents with the tax databases as well as the land registries; fifth, changing procurement practices to allow only those not at all related to government

to win tenders which will also allow for a clearer separation of state and business; and sixth, following the Scandinavian concept of placing a politician's companies in trust for the duration of his or her political term and disallowing it from engaging in any government business.

8 Conclusion

The listing and discussion of all the endeavours recommended and those being put into effect show a lack of coherence between the continental recommendations and those being implemented in individual countries. Some heterogeneity is understandable as independent fiscal states must by their very nature first address the problems that are of greatest concern to them. However, some of the important recommendations of the HLP Report presently exist merely on paper in the African context.

The international fiscal crisis began to unfold as early as 2004 and the ripple effect is being felt globally. It is crucial that for countries, such as those in Africa, that reforms be put in place to give a helping hand to not only recently-emerging and conflict states like South Sudan, but also to those struggling to understand the complicated nuances of complex technical issues, such as South Africa and Kenya, while at the same time being cognisant of the diverse types of mineral-rich economies like the Democratic Republic of the Congo (DRC) and Mozambique as well as Zambia.

Bibliography

- 'ABACHA LOOT: Switzerland returns \$723m to Nigeria in 10 years' *Vanguard News* <https://www.vanguardngr.com/2016/03/abacha-loot-switzerland-returns-723m-to-nigeria-in-10-years/> (accessed 9 November 2017)
- Action Aid *Calling time on tax avoidance* (Action Aid: London 2010) 'SABMiller to face tax audit in five African countries | ActionAid UK' 6 May 2011 <https://www.actionaid.org.uk/news-and-views/sabmiller-to-face-tax-audit-in-five-african-countries-following-actionaid-report> – *Sweet nothings: The human cost of tax avoidance in Africa* (Action Aid: Lusaka, Zambia 2013)
- African Union *African Union Convention on Preventing and Combating Corruption* (African Union 2003)
- Ajayi, SI & Ndikumana, L (eds) *Capital flight from Africa: Causes, effects, and policy issues* (Oxford University Press: Oxford 2014)
- Arezki, R, Rota-Graziosi, G & Senbet, LW *Natural resources and capital flight: A role for policy?* International Monetary Fund: Washington DC 2014)
- AU/UNECA 'Report of the High-Level Panel on Illicit Financial Flows from Africa' (2015) http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 14 December 2017)
- Avi-Yonah, RS & Clausing, KA *Reforming corporate taxation in a global economy: A proposal to adopt formulary apportionment* (Brookings Institution: Washington DC 2007)
- Baker, R & Joly, E 'Illicit money: Can it be stopped?' (2009) 56 *New York Review of Books* 61
- Boyce, JK & Ndikumana, L 'Debt audits and the repudiation of odious debts' Association of Concerned Africa Scholars Bulletin No 87 (2012) 36-41
- 'Breaking: Zimra boss Pasi resigns' *The Zimbabwe Independent* (blog), 24 May 2017 <https://www.theindependent.co.zw/2017/05/24/zimra-boss-pasi-resigns/> (accessed 14 December 2017)
- Brixiova, Z & Ndikumana, L 'The global financial crisis and Africa: The effects and policy responses' (2013) *The Oxford Handbook of the Political Economy of Financial Crises* 711-735
- Brun, J-P, Gray, L, Scott, C & Stephenson, KM *Asset Recovery Handbook: A Guide for Practitioners* (Stolen Asset Recovery Initiative, World Bank: Washington DC and UNODC 2011)
- Buchheit, LC, Mitu Galati, G & Thompson, RB 'The dilemma of odious debts' (2006) 56 *Duke Law Journal* 1201
- Calvo, GA & Reinhart, CM 'Fear of floating' (2002) 117 *The Quarterly Journal of Economics* 379-408
- Camay, A 'Draft regulations for the implementation of country-by-country reporting published in South Africa – Tax – South Africa' *Mondaq*, May 2016, <http://www.mondaq.com/southafrica/x/490030/tax+authorities/Be+Clear+ed+Online> (accessed 18 August 2017)
- Cobham, A 'The impacts of illicit financial flows on peace and security in Africa' Tana High Level Forum on Peace and Security in Africa Discussion Paper (2014) <http://www.tanaforum.org/old-website-2016/documentview/be28b12a5f4b50eb5378/?ms=6e5bd68f63445602ef8f&ps=455jksff2295f7308faf&ls=be28b12a5f4b50eb5378> (accessed 18 August 2017)
- De Gregorio, J, Edwards, S & Valdes, RO 'Controls on capital inflows: Do they work?' (2000) 63 *Journal of Development Economics* 59-83
- Devonshire-Ellis, C 'China phasing out more FDI tax incentives' (2010) *China Briefing*
- Epstein, G 'Capital outflow regulation: Economic management, development and transformation' *Regulating global capital flows for long-run development* (2012) 47-58

- Fofack, H & Ndikumana, L 'Capital flight and macroeconomic policy in Africa' in Ajayi, I & Ndikumana, L (eds) *Capital flight from Africa: Causes, effects and policy issues* (Oxford University Press: London 2014)
- Frankel, JA *No single currency regime is right for all countries or at all times*, Working Paper No. 7338, National Bureau of Economic Research (1999)
- Froburg, K & Waris, A 'Bringing the billions back' (2010) 32 *Global Studies* http://www.medicusmundi.org/en/playground/rome2013/bringing-the-billions-back.-attiya-waris.pdf/view?set_language=en (accessed 14 December 2017)
- GFI 'Illicit financial flows to and from developing countries: 2005-2014' (GFI 2017)
- Gallagher, K, Griffith-Jones, S & Ocampo, JA *Capital account regulations for stability and development: A new approach* (Boston: Pardee Center for the Study of the Longer-Range Future, Boston University. 2011)
- Gallagher, K, Griffith-Jones, S & Ocampo, JA 'Regulating global capital flows for long-run development' Pardee Centre Task Force Report (2012) 13-22
- Goredema, C 'Combating illicit financial flows and related corruption in Africa: Towards a more integrated and effective approach' (2011) 12 *U4 Issue*
- Hodel, HR 'Switzerland's Financial Centre, the fight against organized crime, illicit assets and terrorism, Abuja, Nigeria, 4 December' Media briefing by Swiss ambassador to Nigeria, Dr Hans-Rudolf Hodel (2012)
- ICIJ 'Explore the documents: Luxembourg Leaks Database | International Consortium of Investigative Journalists' <https://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database> (accessed 29 August 2017) 'Swiss leaks: Murky cash sheltered by bank secrecy
- International Consortium of Investigative Journalists' <https://www.icij.org/project/swiss-leaks> (accessed 29 August 2017) 'The Panama Papers' <https://panamapapers.icij.org/> (accessed 23 August 2017)
- IMF 'Sovereign debt restructurings – Recent developments and implications for the Fund's legal and policy framework' International Monetary Fund: Washington DC (2013)
- Irish Times* 'Ireland "taking too long" to collect apple tax and may face court' <https://www.irishtimes.com/business/technology/ireland-taking-too-long-to-collect-apple-tax-and-may-face-court-1.3089031> (accessed 29 August 2017)
- Kedir, A 'Capital flight and tax evasion' in Ajayi, I & Ndikumana, L (eds) *Capital flight from Africa: Causes, effects and policy issues* (Oxford University Press: London 2014)
- Keynes, JM *General theory of employment, interest and money* (Atlantic Publishers & Dist 2016)
- Kremer, M & Jayachandran, S *Odious debt*, Working Paper No 8953: National Bureau of Economic Research, 2002
- Kvangraven, IH 'Exportable' *How to make the Norwegian debt audit transferable to other countries. Oslo, Norway: The Norwegian Coalition for Debt Cancellation (SLUG)* (2012)
- Le Billon, P 'Extractive sectors and illicit financial flows: What role for revenue governance initiatives?' (2011) 13 *U4 Issue*
- Ludington, S, Gulati, M & Brophy, AL 'Applied legal history: Demystifying the doctrine of odious debts' (2010) 11 *Theoretical Inquiries in Law* 247-281
- Mitchell, AV & Sikka, P *The pin-stripe mafia: How accountancy firms destroy societies*. (Association for Accountancy & Business Affairs: Basildon 2011)
- Morse, SC 'Revisiting global formulary apportionment' (2010) 29 *Virginia Tax Review* 593-644
- Mulikelela, M 'Times of Zambia | AfDB to curb illicit financial flows' <http://www.times.co.zm/?p=85754> (accessed 18 August 2017)
- Murphy, R 'The benefits of country-by-country reporting' (2012) 87 *ACAS Bulletin* 42-47
- NCA *The one billion dollar question* (Norwegian Church Aid: Oslo, Norway 2012)

- Ndikumana, L & Boyce, JK *Africa's odious debts: How foreign loans and capital flight bled a continent* (Zed Books Ltd 2011)
- Ndikumana, L & Boyce, JK 'Capital flight from sub-Saharan Africa: Linkages with external borrowing and policy options' (2011) 25 *International Review of Applied Economics* 149-170
- OECD *OECD principles of corporate governance* (OECD: Paris 2004)
- OECD *Thin capitalization legislation: A background paper for country tax administrations.* (OECD: Paris 2012)
- OECD Action Plan on Base Erosion and Profit Shifting. Paris. (2013) <https://www.oecd.org/ctp/BEPSActionPlan.pdf> (accessed 14 December 2017)
- OECD A Step Change in Tax Transparency: OECD Report for the G8 Summit. Lough Erne, Enniskillen: OECD. (2013b) https://www.oecd.org/ctp/exchange-of-tax.../taxtransparency_G8report.pdf (accessed 14 December 2017)
- 'Paradise Papers: Secrets of the global elite' *International Consortium of Investigative Journalists* (blog) <https://www.icij.org/investigations/paradise-papers/> (accessed 6 November 2017)
- Pincus, J & Winters, JA (eds) *Reinventing the World Bank* (Cornell University Press 2002)
- 'Prominent journalist gives testimony about Mubarak's wealth' *Egypt Independent* 23 May 2011 <http://www.egyptindependent.com/prominent-journalist-gives-testimony-about-mubaraks-wealth/> (accessed 14 December 2017)
- Regional Centre for Small Arms 'The Nexus Between Poaching And Proliferation Of Illicit Small Arms And Light Weapons Regional Report: Central African Republic, Democratic Republic Of Congo, Kenya, Uganda And Tanzania.' Nairobi, Kenya: Regional Centre on Small Arms, 2017 <http://www/recsasec.org/wp-content/uploads/2017/07/POACHING-pdf> (accessed 14 December 2017)
- Reinhart, C & Todd Smith, R *Too much of a good thing: The macroeconomic effects of taxing capital inflows* (University of Maryland, College Park, Department of Economics. 1998. Online at <http://mpr.ub.uni-muenchen.de/13234/>. MPRA Paper No. 13234 (accessed 14 December 2017)
- Shaxson, N *Treasure islands: Tax havens and the men who stole the world* (Random House 2012)
- Spencer, D & David McNair, D 'Transfer pricing: Will the OECD adjust to reality' (2012) 23 *Journal of International Taxation* 34-52
- 'StAR - Stolen Asset Recovery Initiative – Corruption Cases – Hosni Mubarak (Switzerland)' <http://star.worldbank.org/corruption-cases/node/18511> (accessed 9 November 2017)
- 'Switzerland to return Sani Abacha 'loot' money to Nigeria' | *World News* | *The Guardian* <https://www.theguardian.com/world/2015/mar/18/switzerland-to-return-sani-abacha-loot-money-to-nigeria> (accessed 9 November 2017)
- Sullivan, M 'Combining arms-length and formulary principles' (2010) 126 *Tax Notes* 271-273
- Tana 2012 Speeches 'Tana High-Level Forum on Security in Africa' <http://www.tanaforum.org/old-website-2016/document-view/be28b12a5f4b50eb5378/?ms=c65396cfa5578d4379af&ps=455jksff2295f7308faf&ls=be28b12a5f4b50eb5378> (accessed 1 November 2017)
- 'The Middle East in revolt' *Time* 22 February 2011 http://content.time.com/time/specials/packages/article/0,28804,2045328_2045333_2049395,00.html (accessed 14 December 2017)
- TJN 'Financial Secrecy Index 2015 results' (2016) <http://www.financialsecrecyindex.com/introduction/fsi-2015-results> (accessed 14 December 2017)
- Tobin, J 'A proposal for international monetary reform' (1978) 4 *Eastern Economic Journal* 153-159

- United Nations Office on Drugs and Crime and World Bank. Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan. New York: United Nations and The World Bank (2007)
- United Nations Recommendations of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System A/63/838. New York: United Nations (2009) 40
- United Nations *United Nations Practical Manual on Transfer Pricing*. New York: United Nations Department of Economic and Social Affairs (2013)
- Waris, A 'Taxing intra-company transfers: The law and its application in Rwanda' (2013) 67 *Bulletin for International Taxation* 679
- Waris, A & Kohonen, M 'Linking taxation to the realisation of the Millennium Development Goals in Africa' in *Rethinking development in an age of uncertainty* (University of York 2011) <http://eadi.org/gc2011/waris-109.pdf> (accessed 14 December 2017)
- 'WikiLeaks' <https://wikileaks.org/> (accessed 23 August 2017)
- Wong, Y *Sovereign finance and the poverty of nations: Odious debt in international law* (Edward Elgar Publishing 2012)
- Wood, E & Moll, T 'Capital flight from South Africa: Is underinvoicing exaggerated?' (1994) 62 *South African Journal of Economics* 17-28
- Woodroffe, N, Genasci, M & Scurfield, T 'Tanzania's new natural resources legislation: What will change?' Natural Resource Governance Institute (2017)
- '#Zimbabwe Revenue Authority (ZIMRA) Commissioner-General, Mr Gershom Pasi suspended' *Zimbabwe Today* (blog), 6 May 2016 <https://zimbabwe-today.com/zimra-commissioner-general-suspended/> (accessed 14 December 2017)