

Combating corruption-related illicit financial flows from Africa: legal approaches and challenges

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ABSTRACT: For decades, Africa has been a ‘net creditor’ to the world with resources leaving the continent through illicit financial flows (IFFs) more than combined investments and aid received. IFFs threaten domestic resource mobilisation required for sustainable development and have deleterious effects on human rights in Africa. African countries have shown anti-corruption commitments by dedicating the year 2018 to fighting corruption. Winning the fight against corruption includes successfully combating IFFs from the continent. The paper highlights the role of corruption as a source of IFFs, and as an enabler or facilitator of all other sources of IFFs. Without significant anti-corruption efforts at national, regional and international level, the problem of IFFs will remain a stumbling block to sustainable development and the enjoyment of human rights in Africa. The main argument of the paper is that anti-corruption measures can, and should, play a pivotal role in combating IFFs from Africa. The paper analyses key anti-corruption measures to combat IFFs. It highlights the main challenges faced by each anti-corruption measure and offers possible solutions.

TITRE ET RÉSUMÉ EN FRANCAIS:

Lutte contre la corruption liée aux flux financiers illicites en provenance de l’Afrique: approches et défis juridiques

RÉSUMÉ: La lutte contre les flux financiers illicites (FFI) est devenue l’un des principaux objectifs en Afrique. Pendant des décennies, le continent est resté un « créancier net » du monde, ses ressources ayant quitté le continent dépassant à la fois les investissements étrangers et l’aide reçus. Les FFI menacent la mobilisation des ressources nationales nécessaires au développement durable et ont des effets néfastes sur les droits de l’homme en Afrique. Les pays africains ont pris des engagements contre la corruption en consacrant l’année 2018 à la lutte contre la corruption. Pour lutter contre la corruption, il faut lutter efficacement contre les flux financiers illicites provenant du continent. Cet article souligne le rôle de la corruption en tant que source de FFI. Il souligne aussi la manière dont la corruption facilite toutes les autres sources de FFI. Sans efforts significatifs de lutte contre la corruption sur le plan national, régional et international, le problème des FFI restera un obstacle au développement durable et à la jouissance des droits de l’homme en Afrique. Le principal argument de cet article est que les mesures de lutte contre la corruption peuvent et doivent jouer un rôle central dans la lutte contre les flux financiers illicites en provenance d’Afrique. L’article analyse les principales mesures de lutte contre la corruption pour combattre les FFI. Il met en évidence les principaux défis de chaque mesure anti-corruption et propose des solutions possibles.

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1 INTRODUCTION

The African Union has declared 2018 as anti-corruption year in Africa under the theme ‘Winning the fight against corruption: a sustainable path to Africa’s transformation.’¹ This declaration has come amidst a constant drainage of resources from Africa through illicit financial flows (IFFs) closely linked to corruption. IFFs are defined as money that is ‘illegally earned, transferred or used that crosses borders’.² These illicit funds may be proceeds of illegal activities such as corruption and organised crime, and proceeds of legal business that become illicit when moved between borders in violation of applicable laws and regulatory frameworks.³ IFFs are a major source of domestic resource leakage in Africa, resulting in shortages of foreign exchange, reduction in tax collections, restrictions in foreign investments, and leaving millions of people languishing in poverty.⁴ What is more, IFFs have deleterious effects on the full enjoyment, protection and fulfilment of human rights due to constrained resources. According to a study by the Global Financial Integrity on IFFs in developing countries during the period 2008 to 2012, illicit financial outflows in some countries were greater than public expenditure on education and health, surpassed the total tax revenues in some countries, and outnumbered financial inflows from foreign direct investments and official

1 African Union ‘African Union to launch 2018 as the African anti-corruption year’ (22 January 2018), <https://au.int/en/pressreleases/20180122/african-union-launch-2018-african-anti-corruption-year%E2%80%A6> (accessed 10 June 2018).

2 World Bank ‘Illicit financial flows’ (2017) <http://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs> (accessed 5 June 2018).

3 D Kar & D Cartwright-Smith ‘Illicit financial flows from developing countries: 2002-2006’ (2009) *Global Financial Integrity* 1 <http://www.gfintegrity.org/storage/gfip/executive%20-%20final%20version%201-5-09.pdf> (accessed 10 June 2018).

4 D Kar & B LeBlanc ‘Illicit financial flows from developing countries: 2002-2011’ (2013) *Global Financial Integrity* 1 <http://www.gfintegrity.org/report/2013-global-report-illicit-financial-flows-from-developing-countries-2002-2011/> (accessed 9 June 2018).

development assistance in other countries.⁵ This has led to Africa being called the ‘net creditor’ to the world, with resources illicitly leaving the continent exceeding debts, foreign aid and investments received combined.⁶

The African Commission on Human and Peoples’ Rights (African Commission) passed a resolution on IFFs in 2013 which noted that the continent loses billions of dollars every year and that ‘Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death’ as a result of IFFs.⁷ Due to the deleterious effects of IFFs on human rights and sustainable development, reducing illicit flows was unsurprisingly included as a component of Goal 16 of the Sustainable Development Goals in 2015.⁸ At the regional level, the African Union’s Agenda 2063 calls for the strengthening of domestic resource mobilisation by reversing and eliminating all forms of IFFs from the continent.⁹

The problem of illicit financial outflows from Africa prompted the African Union and the United Nations Economic Commission for Africa (UNECA) to establish a High Level Panel on Illicit Financial Flows from Africa (High Level Panel) to understand and tackle IFFs from Africa.¹⁰ The High Level Panel’s report estimated that the continent is losing at least US \$50 billion per year through IFFs.¹¹ Corruption is regarded as contributing about five percent of IFFs, even though many African respondents to the panel’s questionnaires felt that corruption was the main cause of IFFs from their countries.¹² The low percentage can be attributed to the current macroeconomic approaches to IFFs that mainly concentrate on discrepancies in trade and balance of payments, focusing more on commerce-related IFFs

5 J Spanjers & HF Foss ‘Illicit financial flows and development indices: 2008-2012’ (2015) *Global Financial Integrity* 30-33 <http://www.gfintegrity.org/report/illicit-financial-flows-development-indices-2008-2012/> (accessed 10 June 2018).

6 JK Boyce & L Ndikumana ‘Is Africa a net creditor? New estimates of capital flight from severely indebted sub-Saharan African countries, 1970-1996’ (2001) 38 *Journal of Development Studies* 27-56.

7 Resolution 236: Resolution on Illicit Capital Flight from Africa, adopted by the African Commission on Human and Peoples’ Rights at its 53rd Ordinary Session held in Banjul, the Gambia from 9 to 23 April 2013 paras 4-5.

8 United Nations Sustainable Development Goals ‘Goal 16: Promote just, peaceful and inclusive societies’ (2015) <https://www.un.org/sustainabledevelopment/peace-justice/> (accessed 10 June 2018).

9 African Union *Agenda 2063* (2015) 18, https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf (accessed 10 June 2018).

10 Resolution 886 (XLIV): Resolution of the AU Conference of Ministers of the Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development, adopted at its 4th Joint Annual Meeting held in Addis Ababa, Ethiopia, from 28 – 29 March 2011 AU doc AU/CAMEF/MIN/Rpt(VI).

11 High Level Panel on Illicit Financial Flows from Africa ‘Illicit financial flows’ (2015) 13, https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 13 June 2018).

12 High Level Panel (n 11) 32.

than corruption-related IFFs.¹³ Corruption is also clandestine and difficult to measure, and therefore higher than the estimated percentage. According to the High Level Panel, corruption facilitates ‘all other aspects of IFFs’.¹⁴ Finding 8 of the High Level Panel stated that ‘corruption and abuse of entrusted power remains a continuing concern’ to tackling IFFs from Africa.¹⁵ Due to the proximate relationship between corruption and IFFs, it was no surprise that there was a recommendation for IFFs to become a specific component in the African Union Convention on Preventing and Combating Corruption, thereby bringing IFFs into the strategy of the African Union Advisory Board on Corruption.¹⁶

The crucial role of effective anti-corruption regimes in combating IFFs from Africa has not been given enough attention. This anti-corruption year in Africa presents an opportunity to focus on the relationship between corruption and IFFs on the continent. The main proposition of this paper is that anti-corruption measures can and should play a crucial role in tackling IFFs from Africa. The paper argues that effective anti-corruption measures will go a long way to combating IFFs as ‘corruption leaves the door wide open for illicit financial flows’.¹⁷ Effective anti-corruption efforts create a hostile environment for the sources and enablers of IFFs. The paper will attempt to clarify the nexus between corruption and IFFs, giving specific examples. It will proceed to discuss the devastating effects of corruption and IFFs on human rights in Africa. Then, it will analyse how anti-corruption measures can play a critical role in reducing IFFs. The paper will highlight the challenges faced by anti-corruption efforts and will recommend possible remedies.

2 CORRUPTION AND ILLICIT FINANCIAL FLOWS

Corruption plays a significant role as a ‘source and enabler’ of IFFs from Africa.¹⁸ The nexus between corruption and IFFs manifests itself in more than one way, including corruption as the direct source of IFFs, corruption as a means of facilitating the creation of illicit funds and

13 M Hunter ‘Measures that miss the mark: Capturing the proceeds of crime in illicit financial flow models’ (2018) *Global Initiative against Transnational Organized Crime* 10, 14 <http://globalinitiative.net/capturing-proceeds-of-crime-in-illicit-financial-flows-models/> (accessed 6 August 2018).

14 High Level Panel (n 11) 32.

15 High Level Panel (n 11) 69.

16 High Level Panel (n 11) 83.

17 LJM Sène ‘Mobilisation of domestic resources: Fighting against corruption and illicit financial flows’ (2018) *African Union Commission Department of Economic Affairs* 5 https://au.int/sites/default/files/newsevents/workingdocuments/34086-wd-dea_paper_stc_2018_mobilization_of_domestic_resources_fighting_against_corruption_iff_english_o.pdf (accessed 6 August 2018).

18 High Level Panel (n 11) 51.

corruption as a means for enabling an illicit flow itself by the corruption of institutions with anti-money laundering obligations.¹⁹

2.1 Corruption as a direct source of IFFs

Proceeds of corruption leaving the continent contribute to illicit financial outflows from Africa. Hiding the proceeds of corruption is as antique as corruption itself, and the cross-border movement of the proceeds constitute IFFs. Corrupt persons rely significantly on successful laundering to enjoy the proceeds of corruption far away from the victim state. For decades, political elites in African countries have stashed stolen assets in the developed world. Mobutu Sese Seko in Zaire (now the Democratic Republic of the Congo) looted about US \$5 billion from state coffers which were equal to the country's external debt during his time in office.²⁰ Sani Abacha plundered billions of state resources during his term in office as president of Nigeria.²¹ In 2010, the United States of America (USA) reported how politically-exposed persons from Angola, Equatorial Guinea and Nigeria stole public funds from their countries and launder the proceeds in banks across the USA.²² Recently, Vice President Teodorin Obiang of Equatorial Guinea was convicted of corruption and money laundering in France for looting state resources to afford jet-setting lifestyle in France including a €107 million mansion and a fleet of extravagant cars.²³ Previously, Obiang had reached a settlement with USA officials for forfeiture of assets in the country worth more than US \$30 million bought with stolen funds from Equatorial Guinea.²⁴

2.2 Corruption as an enabler and facilitator of IFFs

Corruption plays a huge role in enabling or facilitating the creation for illicit funds. For example, bribery of tax officials to ignore tax evasion

19 See Q Reed & A Fontana 'Corruption and illicit financial flows: The limits and possibilities of current approaches' (2011) 19 <https://www.u4.no/publications/corruption-and-illicit-financial-flows-the-limits-and-possibilities-of-current-approaches-2/pdf> (accessed 13 June 2018).

20 J Svensson 'Eight questions about corruption' (2005) 19 *Journal of Economic Perspectives* 19.

21 M Levi *et al* 'Money laundering and corruption' in JE Campos & S Pradhan *The many faces of corruption: tracking vulnerabilities at the sector level* (2007) 400.

22 United States Permanent Subcommittee on Investigations 'Keeping foreign corruption out of the United States: Four case histories' 4 February 2010, <https://www.hsgac.senate.gov/subcommittees/investigations/hearings/-keeping-foreign-corruption-out-of-the-united-states-four-case-histories> (accessed 25 June 2018).

23 A Chrisafis 'Son of Equatorial Guinea's President is convicted of corruption in France' *The Guardian* 27 October 2017.

24 United States Department of Justice 'Second Vice President of Equatorial Guinea agrees to relinquish more than \$30 million of assets purchased with corruption proceeds' (2014) <https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased> (accessed 10 July 2018).

or to make favourable tax interpretations to the briber.²⁵ Such instances include the US oil company Halliburton which admitted to paying a Nigerian tax official US \$2.4 million to manipulate tax returns in its favour.²⁶ Corruption may also facilitate creation of illicit funds by politicians who abuse their political power to create personal wealth, which will become illicit funds. For example, a report by the World Bank revealed how Tunisia's former President Ben Ali and his family corruptly manipulated regulations for their own personal and commercial benefit, damaging free trade within the country.²⁷ The family was then able to move a large portion of their fortunes offshore with relative ease.

Corruption also facilitates illegal resource exploitation, another source of IFFs.²⁸ Due to poor governance and corruption, Africa has become a hub for high levels of IFFs in the extractive industry. Government officials are bribed to offer unequal contracts which do not reflect the true value of the resources extracted, with the disparity in values often extensive.²⁹ Production companies and exporters may offer bribes to officials for underreporting the volume or value of actual resources extracted. Corruption and illegal resource exploitation have led to underdevelopment in many well-resourced countries in Africa. The Democratic Republic of Congo is a typical point of reference on corruption and mismanagement of natural resources which has facilitated plunder of resources from the country.³⁰ In Zimbabwe, political and economic elites looted diamonds from Chiadzwa diamond field, and the former President Robert Mugabe revealed that at least US \$15 billion of potential diamond revenue remain unaccountable.³¹ In Nigeria, the parliament revealed how US \$6 billion was lost to corruption and mismanagement in fuel subsidy schemes between 2010 and 2013.³² These examples clearly show that corruption is a major factor leading to unfair exploitation of resources in Africa.

Bribery of public officials by international organisations to award contracts facilitates IFFs as well. According to the OECD,

25 Reed & Fontana (n 19) 19.

26 'Halliburton discloses bribe paid to Nigerian tax official' *The Wall Street Journal* 9 May 2003.

27 R Rijkers, C Freund & A Nucifora 'All in the family: State capture in Tunisia' (2014) *Policy Research Working Paper* <http://documents.worldbank.org/curated/en/440461468173649062/All-in-the-family-state-capture-in-Tunisia> (accessed 12 April 2018).

28 P Le Billon 'Extractive sectors and illicit financial flows: What role for revenue governance initiatives?' (2011) 4 <https://www.u4.no/publications/extractive-sectors-and-illicit-financial-flows-what-role-for-revenue-governance-initiatives/> (accessed 26 June 2018).

29 UNECA *A study on the global governance architecture for combating illicit financial flows* (2018) 13.

30 See M Chene 'Overview of corruption and anti-corruption in the Democratic Republic of Congo' (2014) *Transparency International* 4 https://www.transparency.org/whatwedo/answer/overview_of_corruption_and_anti_corruption_in_the_democratic_republic (accessed 26 June 2018).

31 R Chidza 'Chiadzwa \$15 billion diamonds plunder' *NewsDay* 16 March 2016.

32 J Brock & C Eboh 'Nigeria fuel subsidy graft cost \$6.8 billion: Parliament' *Reuters* 19 April 2012.

Corruption in awarding business contracts has social, political, environmental and economic costs which no country can afford. Serious consequences result when public officials take bribes when awarding contracts to foreign businesses for public services such as roads, water or electricity. A USD 1 million dollar bribe can quickly amount to a USD 100 million loss to a poor country through derailed projects and inappropriate investment decisions which undermine development.³³

Even though the actual bribery may not constitute IFFs, the illicit gain obtained through bribery may constitute illicit financial outflows.³⁴ The report of the High Level Panel also revealed how corrupt practices facilitate organised crime such as trafficking of drugs, illegal currency trafficking, illegal weapons and wildlife trafficking which are sources of IFFs, indicating the cross-cutting edge of corruption in IFFs.³⁵

2.3 Corruption of institutions with anti-money laundering obligations

Financial institutions and designated non-financial businesses or professionals have anti-money laundering obligations as ‘gatekeepers’ responsible for preventing the laundering of proceeds of crime. These gatekeepers “protect the gates to the financial system” through which potential users of the system, including launderers, must pass in order to be successful.³⁶ If a gatekeeper has reasonable grounds to suspect that funds are proceeds of a criminal activity, or are related to terrorist financing, it is obligated to report the suspicion to the country’s financial intelligence unit.³⁷ Criminals are aware of the ability of gatekeepers to provide access to the financial system in order to clean proceeds of their illegal activities. In certain instances, the personal position or reputation of the gatekeeper may be useful to the launderer due to the gatekeeper’s presumed ethical standards or the gatekeeper’s expertise in concealing suspicious transactions.³⁸ The World Bank has reported how these gatekeepers can be employed to facilitate the creation or abuse of legal persons and legal arrangements (such as trusts) to conceal the proceeds of corruption and other criminal activities.³⁹ Criminals hide behind the corporate veil to disguise their involvement as ultimate beneficiaries of the corporation.

33 OECD *Better policies for development 2014: Policy coherence and illicit financial flows* (2014) 34.

34 As above.

35 High Level Panel (n 11) 3, 79.

36 Financial Action Task Force ‘Global money laundering & terrorist financing threat assessment’ (2010) 44 <http://www.fatf-gafi.org/publications/methodsandtrends/documents/globalmoneylaunderingterroristfinancingthreatassessment.html> (accessed 20 July 2018).

37 Financial Action Task Force ‘International standards on combating money laundering and the financing of terrorism & proliferation’ (2012) recommendations 20, 21 & 22.

38 Financial Action Task Force (n 36) 44.

39 E van der Does de Willebois *et al* *The puppet masters: how the corrupt use legal structures to hide stolen assets and what to do about it* (2011) 11, 20.

Money launderers may offer bribes to institutions with anti-money laundering obligations in order to successfully launder proceeds of crime. It has been argued that 'where money launderers cannot achieve their aims through the use or threat of the use of violence, corruption will be the alternative.'⁴⁰ Hence, anti-money laundering agencies and financial institutions may be induced to turn a blind eye to detecting money laundering, or even facilitate illegal transactions.⁴¹ Once anti-money laundering institutions and persons have been corrupted, illicit funds from different sources can easily flow out of Africa. The High Level Panel reported the role of corruption in enabling IFFs at every stage including bribery of customs officials, tax inspectors, security officials, bankers and judges; and the use of political power to prevent state officials from vetting mineral exports, searching private planes or from preventing smuggling of cash.⁴² What is more, these illicit funds can be used by criminals to set up companies, to control financial institutions and to bribe public officials in a bid to further their illegal objectives.⁴³

This paints a clear picture of the close link between corruption and IFFs from Africa, with corruption as an indispensable instrument in facilitating all sources of IFFs. The paper will proceed to analyse the impact of corruption and IFFs on human rights in Africa.

3 CORRUPTION, ILLICIT FINANCIAL FLOWS AND HUMAN RIGHTS IN AFRICA

In 2014, the African Union estimated that Africa had lost US \$148 billion, 50 per cent of tax revenue, 25 per cent of the continent's GDP and US \$30 billion through corruption.⁴⁴ Even though corruption is not *per se* recognised as a direct violation of human rights under international law,⁴⁵ there is general consensus that it leads to a

40 N Mugarura 'Uncoupling the relationship between corruption and money laundering crimes' (2016) 24 *Journal of Financial Regulation and Compliance* 77.

41 C Goredema 'Money laundering in Southern Africa: incidence, magnitude and prospects for its control' (2004) 4 <https://issafrica.org/research/papers/money-laundering-in-southern-africa-incidence-magnitude-and-prospects-for-its-control> (accessed 29 June 2018).

42 High Level Panel (n 11) 51.

43 HPB Moshi 'Fighting money laundering: The challenge in Africa' (2007) 3 <https://issafrica.org/research/papers/fighting-money-laundering-the-challenges-in-africa> (accessed 29 June 2018).

44 Governance and Public Administration Division of the Economic Commission for Africa & the African Union Advisory Board on Corruption 'Combating corruption, improving governance in Africa: Regional anti-corruption programme for Africa (2011-2016)' (2011) 4 [https://www.uneca.org/sites/default/files/Publication Files/combating-corruption-improving-governance-in-africa-2011-2016.pdf](https://www.uneca.org/sites/default/files/Publication%20Files/combating-corruption-improving-governance-in-africa-2011-2016.pdf) (accessed 13 June 2018).

45 There have been arguments for the recognition of a right to a corruption-free society. See N Kofele-Kale 'The right to a corruption-free society as an individual and collective human right: Elevating official corruption to a crime under international law' (2000) 34 *The International Lawyer* 163; M Murray &

violation of human rights.⁴⁶ UN bodies such as the Human Rights Council have adopted resolutions on the negative impact of corruption on the enjoyment of human rights.⁴⁷

There is an increased focus on the impact of IFFs on human rights. For instance, the African Commission in 2013 requested its Working Groups on Economic, Social and Cultural Rights in Africa and on Extractive Industries, Environment and Human Rights Violations in Africa to conduct an in-depth study on the effects of IFFs on human rights in Africa.⁴⁸ In 2014, the UN Human Rights Council tasked an independent expert to analyse the negative effects of IFFs on human rights.⁴⁹ The interim UN report indicated that IFFs divert resources meant for development and may interfere with governments' compliance with international human rights obligations.⁵⁰ Pertinent among international obligations is article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that each state party:

undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

According to the African Commission, IFFs erode the capacity of African states to implement the African Charter on Human and Peoples' Rights (African Charter).⁵¹ IFFs threaten the right of citizens to freely dispose of their natural resources and the right to their

A Spalding 'Freedom from official corruption as a human right' (2015) <https://www.brookings.edu/research/freedom-from-official-corruption-as-a-human-right/> (accessed 14 June 2018).

- 46 See for example A Munyai & AA Agbor 'The impact of corruption on the right to development in Africa' in CC Ngang, SD Kamga & V Gumede (eds) *Perspectives on the right to development* (2018) 70-82; MK Andersen 'Why corruption matters in human rights' (2018) 10 *Journal of Human Rights Practices* 179-190.
- 47 Resolution 25: Resolution on the negative impact of corruption on the enjoyment of human rights, adopted by the UN Human Rights Council at its 35th Session held in Geneva, Switzerland, from 27 February – 24 March 2017 UN Doc A/HRC/RES/35/25 (2017). The Human Rights Council has adopted several resolutions, decisions and reports on the human rights impacts of corruption <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/Documentation.aspx> (accessed 10 June 2018).
- 48 Resolution 236: Resolution on Illicit Capital Flight from Africa, adopted by the African Commission on Human and Peoples' Rights at its 53rd Ordinary Session held in Banjul, the Gambia from 9 to 23 April 2013, para 12.
- 49 Resolution 25/9: Resolution on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation, adopted by the UN Human Rights Council at its 25th Session held in Geneva, Switzerland, from 3 - 28 March 2014, UN Doc A/HRC/RES/25/9.
- 50 JP Bohoslavky 'Report on illicit financial flows, human rights and the post-2015 development agenda: Interim study by 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' (10 February 2015) UN Doc A/HRC/28/60 para 23.
- 51 Resolution 236: Resolution on Illicit Capital Flight from Africa, adopted by the African Commission on Human and Peoples' Rights at its 53rd Ordinary Session held in Banjul, the Gambia from 9 to 23 April 2013 para 3.

economic, social and cultural development.⁵² The Working Group on Extractive Industries, Environment and Human Rights (WGEI) of the African Commission has expressed discontent over exploitative and non-beneficial mining contracts responsible for IFFs from DRC and has contended that this violates the right to natural resources enshrined in the African Charter.⁵³ The African Commission has held that the deprivation of the citizens' right to freely dispose of their wealth and natural resources affects their right to economic, social and cultural development and the general responsibility of states 'to individually or collectively ensure the exercise of the right to development.'⁵⁴

IFFs deplete resources for the government to increasingly realise economic, social and cultural rights. It hinders the commitment by African countries in Agenda 2063 to increase domestic resource mobilisation in order to reduce aid dependency, lessen unsustainable debts and elevate Africa-multilateral lending institutions to global status.⁵⁵ In Zimbabwe, the discovery of diamonds was celebrated as an opportunity for economic recovery and poverty alleviation. To date however, three quarters of Zimbabweans live beneath the poverty line, a third of the Zimbabwean population faces food insecurity and the country has an external debt exceeding US \$10 billion.⁵⁶ In the Democratic Republic of the Congo, IFFs from the extractive industry have left many people living below the poverty line despite the country's wealth in natural resources.⁵⁷ These examples clearly show the deleterious effects of IFFs on the right to natural resources and the right to development espoused in the African Charter.

In the case of *SERAP v Nigeria* before the Court of Justice of the Economic Community of West African States, the applicants argued that the embezzlement of public funds in the department of education violated the right to education and was illegal and unconstitutional as it violated articles 21 and 22 of the African Charter.⁵⁸ Even though the Court did not declare the illegality or unconstitutionality of embezzlement of public funds, it noted the negative impact of corruption on the right to education and ordered the Nigerian government to provide necessary funds to cover the shortfall to ensure

52 Arts 21 & 22 of the African Charter. See also art 2(1) of the of the International Covenant on Civil and Political Rights (1966).

53 African Commission 'Statement of the African Commission on Human and Peoples' Rights on illicit financial flight and other concerns arising out of the Paradise Papers' 12 December 2017 <http://www.achpr.org/press/2017/12/d380/> (accessed 2 October 2018).

54 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

55 African Union (n 9) 18.

56 Global Witness 'An inside job Zimbabwe: The state, the security forces, and a decade of disappearing diamonds' (2017) 13 <https://www.globalwitness.org/en/campaigns/conflict-diamonds/inside-job/> (accessed 30 June 2018).

57 D Kar *et al* 'Capital flight from the Democratic Republic of Congo' (2014) *Global Financial Integrity* 15 <https://www.gfintegrity.org/report/capital-flight-democratic-republic-congo/capital-flight-from-the-drc/> (accessed 30 June 2018).

58 *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (30 November 2010).

a smooth implementation of the education programme.⁵⁹ The decision is important as it recognised the destructive effects of corruption and related IFFs to the full enjoyment and realisation of the right to education provided in article 17 of African Charter.⁶⁰

The African Charter places an obligation on individuals to pay taxes imposed by law in the interest of the society.⁶¹ Taxation is one of the major sources which contribute to the state's financial resources. Corruption and IFFs reduce revenue collection as individuals and corporations engage in illegal activities to maximise profits and evade taxes. Also, embezzlement and mismanagement of revenues by tax officials further drain state coffers. According to the Commission, the duty to pay taxes implies an obligation on the state to 'institute an effective and fair taxation system and a budgeting process that ensures that economic, social and cultural rights are prioritised in the distribution of resources'.⁶² Therefore, states have an obligation to establish effective measures to reduce IFFs and increase tax revenue. These efforts are compromised by corruption and mismanagement in the tax department. Reduction in tax collections aggravates the state's obligation to progressively realise social, economic and cultural rights of citizens such as the right to access to health enshrined in article 16 of the African Charter and the right to an adequate standard of living provided in article 11(1) of the ICESCR.

IFFs also have detrimental impact on civil and political rights.⁶³ For example, corruption and IFFs from the health department threaten the rights to life,⁶⁴ health and dignity⁶⁵ of patients where public funds meant for medication and essential equipment are embezzled by senior authorities. Economically disadvantaged patients are exposed to an unwarranted danger to their well-being as a result of such embezzlement. Olaniyan argues that corruption and the illicit transfer of 'critical resources to offshore accounts and the failure of states to hold suspects to account may satisfy the requirement of "arbitrary deprivation" of life'.⁶⁶ Moreover, inadequate police resources affect the recruitment and training of police officers, and may lead to the arbitrary exercise of law enforcement including arbitrary arrests and unlawful detentions. It is a common feature in African countries such as Zimbabwe for police officers to be expected to collect a certain amount of fines per day in order to support the operations of the police

59 *SERAP v Nigeria* (n 58) para 28.

60 See also art 13 ICESCR.

61 Art 29(6) African Charter.

62 African Commission 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights' (2010) para 15, <http://www.achpr.org/instruments/economic-social-cultural/> (accessed 30 June 2018).

63 Bohoslavsky (n 50) para 31.

64 Art 4 African Charters.

65 Art 5 African Charter.

66 K Olaniyan *Corruption and human rights law in Africa* (2014) 208.

department and to 'feed' top ranking officials.⁶⁷ The United Nations Working Group on Arbitrary Detention has expressed how economic crime disintegrate the credibility of the criminal justice system and threatens the rights of those who cannot pay bribes, including facing arbitrary detention.⁶⁸ As a result, arbitrary exercise of power by police offers threatens the right to liberty and security provided in article 6 of the African Charter.

Illicit funds held in offshore accounts may be used to finance political parties or election campaigns contrary to domestic regulations, risking capture of state institutions and undermining the right to vote or to participate in public affairs. Senior state officials and political elites may use their ill-gotten gains to support their political agendas and create an unfair advantage to keep unpopular and corrupt politicians in power.⁶⁹ The use of illicit funds for vote buying and election rigging violates the right of citizens to participate in their own government and undermines their right to freely elect their government espoused in article 13(1) of the African Charter.⁷⁰

IFFs breed funding for other criminal activities such as drug trafficking, illegal acquisition of weapons, terrorist financing and corruption.⁷¹ These criminal activities further create a perception of corruption, bad governance and economic deprivation which frustrate citizens, thereby resulting in political instability in the country, region or continent. In 2011, the Arab Spring demonstrated how corruption-related IFFs can spark political instability. Massive protests broke out in Egypt, Tunisia and Libya, with the elimination of corruption being a main rallying call. The High Level Panel reported how consultations in North Africa showed frustration by participants over stolen assets moved abroad and the thorny processes to recover them.⁷² Incentives and opportunities for illicit financial flows and related corruption undermine the rule of law as a result of the weakened judiciary, law enforcement and financial institutions. IFFs deprive states of resources to establish and strengthen well-equipped and independent institutions to fight financial crimes.⁷³

The above discussion indicates the impact of corruption and IFFs on human rights in Africa. It has been noted correctly that 'curbing illicit financial flows will be essential for realising human rights and

67 See D Matyszak 'Zimbabwe's shady police roadblocks reflect its failing governance' 20 September 2017 *ISS Today* <https://issafrica.org/iss-today/zimbabwe-shady-police-roadblocks-reflect-its-failing-governance> (accessed 30 June 2018).

68 Report of the United Nations Working Group on Arbitrary Detention (16 February 2019), UN Doc A/HRC/10/21 paras 56-63.

69 Olaniyan (n 66) 233.

70 See also art 25 ICCPR.

71 Bohoslavsky (n 50) para 31.

72 High Level Panel (n 11) 51.

73 Bohoslavsky (n 50) para 32.

achieving sustainable development.⁷⁴ Due to the undeniable link between IFFs and violations of human rights, there have been suggestions to combat these illicit flows from a human rights perspective. For instance, the Global Financial Integrity has argued that the active cooperation by states required to fight IFFs can be achieved easier by showing the real effects of IFFs on human rights. It further argued that ‘the right to economic well-being is a key component of global human rights norms and IFFs are ... in distinct violation of these rights.’⁷⁵ In this sense, a rights-based approach to IFFs will demonstrate the practical impact of IFFs from developing countries whilst simultaneously invoking developed countries’ moral or ethical consciousness for their complicity in human rights violations by providing safe haven for illicit funds.⁷⁶ According to a report by the United Nations High Commissioner for Human Rights,

[r]ights violation due to corruption-related diversion of funds is particularly apparent when States cannot fulfil their minimum core obligations regarding each right. In this context, under certain conditions a successful procedure of asset repatriation might remedy the State’s corruption-related failure to complying with human rights obligations. Being a component of any anti-corruption strategy, the asset-recovery process should be understood in light of the human rights framework, as part of the several efforts that States must make in order to comply with their human rights obligations.⁷⁷

It went on to contend that a human rights-based approach to the asset-recovery process of illicit funds demands that recipient countries of IFFs should not exercise discretion over return of assets, but understand asset recovery ‘as a duty derived from the obligations of international cooperation and assistance’ in ensuring victim states maximise resources to the full realise the economic, social, and cultural rights of citizens.⁷⁸ Similarly, a report by the International Bar Association demonstrated the relationship between IFFs (tax abuse), poverty and human rights, and argued that both developing and developed countries should cooperate and offer technical assistance to counter IFFs in terms of the legal obligations stemming from economic, social and cultural rights.⁷⁹

74 UN Human Rights Council ‘Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development 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’ 15 January 2016 UN Doc A/HRC/31/61 para 4.

75 Global Financial Integrity ‘Illicit financial flows, human rights, and the post-2015 Development Agenda’ 1 October 2014 1 <https://www.gfintegrity.org/report/illicit-financial-flows-human-rights-post-2015-development-agenda/> (accessed 30 June 2018).

76 As above.

77 UN Human Rights Council Comprehensive study on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights 14 December 2011 UN Doc A/HRC/19/42 paras 23-24.

78 Global Financial Integrity (n 75) para 26.

79 SB Cohen et al ‘A report of the International Bar Association’s Human Rights Institute Task Force on illicit financial flows, poverty and human rights’ (2013) *International Bar Association* 115 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=4AOCF930-AOD1-4784-8D09-F588DCDDFEA4> (accessed 3 July 2018).

Therefore, the human rights perspective to IFFs shifts the focus from figures and statistics, and shows the real impact of these illicit flows on human rights. It is without any doubt that corruption and IFFs have devastating effects on the full enjoyment, promotion and protection of human rights in Africa. The inclusion of the crimes of corruption and money laundering in the Statute of the African Court of Justice and Human and Peoples' Rights indicates the human rights concern of corruption and IFFs from Africa.⁸⁰ Article 28I provides the Court with criminal jurisdiction to prosecute acts of corruption of 'a serious nature affecting the stability of a state, region or the Union.' Article 28I *bis* provides for the crime of money laundering and limits the predicate offence to corruption. However, the Statute has been criticised for not using its text to show the link between corruption and violations of human rights, despite the existence of such.⁸¹

To sum up, the negative effects of corruption and IFFs on human rights in Africa is well documented. It is no surprise that African governments are pushing to block this 'major leakage' of resources. Left unchecked, corruption and IFFs can trigger political instability in a country, region or the continent at large.

4 ANTI-CORRUPTION MEASURES TO COMBAT IFFS

The paper has shown the crucial role played by corruption as a source and enabler or facilitator of all sources of IFFs from Africa. Only by tackling corruption seriously can African governments and leaders be able to reduce incentives that allow IFFs to flourish.⁸² Without significant anti-corruption efforts at national, regional and international levels, the problem of IFFs will remain an obstacle to sustainable development and human rights in Africa. According to Schlenther, 'reducing corruption and bribery reduces the opportunities for illicit gains and hence illicit financial flows.'⁸³ A study conducted by Yepes, a member of staff of the International Monetary Fund, has indicated that countries experiencing high-levels of corruption tend to

80 The yet-to-be operational African Criminal Court will have jurisdiction over 14 international and transnational crimes. The Court's criminal jurisdiction was provided by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) to which the Statute is an annexure.

81 LD Fernandez 'Corruption (article 28I) and money laundering (article 28I*bis*)' in G Werle and M Vormbaum (eds) *The African Criminal Court: a commentary on the Malabo Protocol* (2017) 105.

82 K Olaniyan 'Stemming Africa's illicit financial flows' *Premium Times* 18 February 2015 <https://opinion.premiumtimesng.com/2015/02/18/stemming-africas-illicit-financial-flows-by-kolawole-olaniyan/> (accessed 28 May 2018).

83 BO Schlenther 'Addressing illicit financial flows in Africa: how broad is the whole of government approach supposed to be?' (2016) 23 *Journal of Financial Crime* 1083.

struggle to comply with anti-money laundering measures, resulting in increased illicit financial outflows.⁸⁴ Poor governance manifested by generalised corruption facilitates IFFs as corrupt institutions and weak regulations make it easier to create and move illicit funds.⁸⁵ Hence, significant anti-corruption measures at national, regional and international levels are required to tackle the problem of IFFs. It is unrealistic to combat IFFs effectively without substantially reducing corruption.

The regional anti-corruption programme for 2011 to 2016 by the African Union Advisory Board on Corruption and UNECA included a special project on IFFs including establishment of the High Level Panel.⁸⁶ This indicates that there is an increasing focus on illicit financial flows as a corruption problem that allows multinational companies and individuals to employ corrupt means to loot resources from the continent. The High Level Panel recommended that IFFs become a specific component in the African Union Convention on Preventing and Combating Corruption, thereby bringing IFFs into the strategy of the AU Advisory Board on Corruption.⁸⁷ Specifically, it recommended the expansion of article 22 of the African Union Convention on Preventing and Combating Corruption, regarding the functions of the AU Advisory Board on Corruption, to include:

Develop[ing] methodologies for analysing the nature and extent of illicit financial flows from Africa, and disseminate information and sensitize the public on the negative effects of illicit financial flows from Africa.

This recommendation shows that IFFs from Africa should best be tackled from an anti-corruption perspective. The Advisory Board, which plays an important role in promoting and encouraging the adoption of anti-corruption measures by African states, can play a greater role in combating IFFs from Africa. There are several international anti-corruption instruments that combat IFFs from Africa. The United Nations Convention against Corruption (UNCAC) is the sole global anti-corruption instrument and has been ratified by most African countries. The African Union Convention on Preventing and Combating Corruption (AUCPCC) is the regional anti-corruption legal instrument in Africa. At sub-regional level, the Southern Africa Development Community Protocol against Corruption (SADC Protocol), the Economic Community of West African States Protocol on the Fight against Corruption (ECOWAS Protocol) and the draft East African Community Protocol on Preventing and Combating Corruption (EAC Protocol) have been put in place to add muscle to the fight against corruption in Africa. To begin with, these legal instruments make it

84 CV Yepes 'Compliance with the AML/CFT international standard: Lessons from a cross-country analysis' 2011 *IMF Working Paper* 19.

85 High Level Panel (n 11) 41.

86 Governance and Public Administration Division of the Economic Commission for Africa & the African Union Advisory Board on Corruption (n 44) 7, 22.

87 High Level Panel (n 11) 83.

mandatory to criminalise acts such as bribery, embezzlement of public funds and laundering of proceeds of corruption.⁸⁸ This should be the first step taken by African states to combat corruption and IFFs.

The paper proceeds to analyse anti-corruption measures which can play a significant role in combating corruption-related IFFs from Africa, with reference to the provisions of the above instruments. The measures discussed are not exhaustive; they are meant to demonstrate the importance of anti-corruption in combating IFFs.

4.1 Transparency in public procurement

According to the High Level Panel, '[n]on-transparent government procurement and supply chains can provide opportunities for corruption-related IFFs'.⁸⁹ Public officials involved in procurement processes may develop corrupt relationships with interested parties where transactions occur outside official channels and in disregard to due process. In Zimbabwe, there is an ongoing case of a business contractor who allegedly was awarded a contract by a minister with no due process and controversially received a payment of US \$5 million with no significant development to show how the forward payment was used.⁹⁰ He allegedly got permission to transfer money abroad for payment of equipment which was never delivered, and this is potentially a case of IFFs from Zimbabwe through public procurement. Corruption in public procurement increases the costs of service and results in delivery of poor services. It is estimated that about US \$2 trillion disappear annually from procurement budgets.⁹¹ Corruption in public procurement dissuades fair competition as contracts are awarded to the most corrupt and politically connected firms. Corrupt firms may be incentivised by their corrupt networks to engage in further illicit activities such as tax evasion with assurance of political protection from accountability.

To reduce the risk of corruption and IFFs, the entire public procurement process should be anchored in 'integrity, transparency, accountability, fairness, efficiency and professionalism'.⁹² Article 9 of UNCAC requires state parties to 'take the necessary steps to establish appropriate systems of procurement, based on transparency,

88 Arts 15-24 of the United Nations Convention against Corruption; art 4 African Union Convention on Preventing and Combating Corruption; SADC Protocol art 3; art 6 Economic Community of West African States Protocol on the Fight against Corruption and; art 3 Draft East African Community Protocol on Preventing and Combating Corruption.

89 High Level Panel (n 11) 83.

90 T Rupapa 'Chivayo remanded in custody' *Chronicle* 4 August 2018.

91 S Kuhn & LB Sherman 'Curbing corruption in public procurement: A practical guide' (2014) *Transparency International* 8 https://www.transparency.org/whatwedo/publication/curbing_corruption_in_public_procurement_a_practical_guide (accessed 10 July 2018).

92 Kuhn & Sherman (n 91) 12.

competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.⁹³ These measures include timely and public call for tenders; establishment of clear conditions for participation, selection criteria and procurement rules; objective and predetermined criteria for public procurement decisions; establishment of effective domestic review and appeal processes; and measures to regulate conduct of responsible personnel such as declaration of personal interests, screening procedures and training requirements.⁹⁴ The United Nations Office on Drugs and Crime (UNODC) has published guidelines on good practices to meet measures provided in the article.⁹⁵

Political interferences constrain compliance with transparency measures in procurement processes. Politicians in many African countries involve themselves in government contract award processes despite clear measures aimed at increasing transparency in procurement. For example, the influence of former President Jacob Zuma of South Africa was used to award government tenders to Gupta family-connected businesses was in clear violation of transparency measures in public procurement.⁹⁶ The problem of political interference is aggravated by a lack of political will by the government to commit and back anti-corruption initiatives, particularly when involving corruption by powerful persons. African countries should ensure that there is no political interference in the procurement processes and must be ready to offer political backing to ensure such non-interference.

4.2 Combating private sector corruption

Over the years, '[c]entralised public sector corruption has transformed into decentralised private sector corruption' in Africa.⁹⁷ Private entities are increasingly playing significant roles in public service delivery. As a result, they have become more susceptible to corruption in a bid to secure business from the government and to maximise profits. However, there has been little focus on corruption in the private sector. Corruption in the private sector is two-fold: private-to-public corruption and private-to-private corruption. The former is the most common type of corruption which involves corruption between a

93 See also art 5(4) AUCPCC, art 4(1)(b) SADC Protocol; art 5(b) ECOWAS Protocol; art 6(2)(b) draft EAC Protocol.

94 Arts 8(1)(a)-(e) UNCAC.

95 UN Office on Drugs and Crime *Guidebook on anti-corruption in public procurement and the management of public finances Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption* (2013) 7-36.

96 D Pilling & J Cotterill 'Jacob Zuma, the Guptas and the selling of South Africa' *Financial Times* 30 November 2017.

97 S Gossel 'Africa needs to develop new ways of stemming illicit financial flows' 10 May 2016 *The Conversation* <http://theconversation.com/africa-needs-to-develop-new-ways-of-stemming-illicit-financial-flows-58892> (accessed 15 July 2018).

private entity and a public official. The latter involves the ‘abuse of entrusted power within and/or between the economic zones under the ownership of private entities’.⁹⁸ Private-to-public corruption has received more attention than private-to-private corruption.⁹⁹ It has been contended that the former is a small component of corruption by companies as corruption within the private sector is common.¹⁰⁰ According to Argandona:

The privatisation of many publicly owned companies has shifted onto the private sector problems that previously were seen as belonging exclusively to the area of private-to-public corruption. In fact, the distinction between private-to-public and private-to-private corruption is increasingly coming to be seen as irrelevant.¹⁰¹

Private sector corruption may be in the form of bribery, extortion or solicitation, dubious commissions and gifts, facilitation payments, favouritism, illegitimate use or trading of information, and undue influence for private gain, among other forms.¹⁰² In South Africa, a leading private firm Steinhoff was involved in ‘accounting irregularities’, a form of private sector corruption, which was aimed at recording losses in the company and thereby making it easier to externalise funds.¹⁰³ Article 12 of UNCAC provides for state parties to implement preventive measures in the private sector, including measures for transparent accounting and auditing practices.¹⁰⁴ Accounting which shows financial activities of an entity, and auditing which checks or monitors the accuracy of accounting, provide great potential to establish accountability and to detect of corrupt activities.¹⁰⁵ Preventing abuse of power by private entities for unethical accounting and auditing will reduce ‘cooking of books’ and illicit flows associated with the practice. Therefore, there is need for an increased focus on combating private sector corruption to reduce any abuse of power, accounting irregularities or ‘cooking of books’ by corporations leading to IFFs.

4.3 Protection of whistle-blowers and reporting persons

Exposing, reporting and adducing evidence of corruption pose a serious risk to one’s life or wellbeing. Journalists, whistle-blowers, anti-

98 MT Tessema & R Koen ‘The problem of private-to-private corruption’ (2017) 1 *Journal of Anti-Corruption Law* 155.

99 See IM Carr ‘Fighting corruption through regional and international conventions: A satisfactory solution?’ (2007) 15 *European Journal of Crime, Criminal Law & Criminal Justice* 131; A Argandona ‘Private-to-private corruption’ (2003) 47 *Journal of Business Ethics* 253.

100 D Hess ‘Corruption in the value chain: Private-to-private and private-to-public corruption’ in D Zinnbauer *et al Global Corruption Report: Corruption and Private Sector* (2009) 19.

101 Argandona (n 99) 254.

102 Argandona (n 99) 255-257.

103 A Lungisa ‘The Steinhoff debacle – the biggest fraud in SA history’ *Daily Mavericks* 13 December 2017.

104 See also arts 5(4) & 11 AUCPC, arts 4(1)(c) & (h) SADC Protocol; art 5(f) ECOWAS Protocol.

105 See J Everett ‘Accounting and the global fight against corruption’ (2007) 32 *Accounting, Organisations and Society* 513–542.

corruption campaigners, human rights defenders and law enforcement officials involved in fighting corruption are frequent victims of death threats, draconian arrests and enforced disappearances. For example, a whistle-blower in the Democratic Republic of the Congo reported suspicious transactions between the president's family owned bank and other close organisations, and was forced to flee the country after the president's brother threatened to end his life.¹⁰⁶ Paragraph 93 of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression noted that journalists covering corruption and organised crimes are in particular danger of violence.¹⁰⁷ According to the Committee to Protect Journalists, between 1992 and 2018, 270 journalists covering corruption cases have been murdered worldwide.¹⁰⁸ A report by Reporters Without Borders indicated that for the period from 2000 to 2010, at least 141 journalists were killed covering organised crime, which is another major source for illicit financial flows.¹⁰⁹

Hence, effective legal measures to protect *bona fide* whistle-blowers and reporting persons play a crucial role in combating corruption and related IFFs. Employees in the public sector, banks, financial institutions, tax and revenue authorities, and private entities should be protected by law for exposing corruption and any illegal movement of money. All major international anti-corruption instruments require states parties to establish measures to protect whistle-blowers against any disadvantages suffered as a result of reporting the misdeed.¹¹⁰ The mechanism should provide protection from retaliation and against any criminal or civil liability which may be instituted against the whistle-blower, ensure the confidentiality of information, allow for anonymous reporting, and provide sanctions for false or malicious reporting.

African countries have been reluctant to establish legal frameworks to protect whistle-blowers. Where laws have been established, protection mechanisms have fallen short of international standards or best practices. For example, South Africa established laws on protection of whistle-blowers and reporting persons in 2000.¹¹¹ However, it was not backed by political commitments to protect

106 Platform to Protect Whistle-blowers in Africa 'Bank revelations that weaken DRC's President's hold on power', <https://pplaaf.org/whistleblowers/jean-jacques-lumumba.html> (accessed 5 August 2018).

107 Frank La Rue 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (4 June 2012), UN Doc A/HRC/20/17.

108 Committee to Protect Journalists '1313 journalists killed between 1992 and 2018 / motive confirmed' https://cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start_year=1992&end_year=2018&group_by=year (accessed 5 August 2018).

109 Reporters Without Borders "Muscling in on the media" – a Reporters Without Borders look at organised crime' (24 February 2011), <https://rsf.org/en/reports/muscling-media-reporters-without-borders-look-organized-crime> (accessed 5 August 2018).

110 Art 13 UNCAC; arts 4(1)(e)&(f) SADC Protocol; art 5(c) ECOWAS Protocol; art 6(2)(f) Draft EAC Protocol.

111 Protected Disclosures Act 26 of 2000.

whistle-blowers of grand corruption. For example, Mosilo Mothepu faced malicious criminal and civil lawsuits for reporting the corrupt relationship between former President Jacob Zuma and the Gupta family, and was unemployed for a long time as organisations regarded her as a ‘political risk’.¹¹² The Protected Disclosures Act was amended in 2017 and it introduces immunity to a whistle-blower from civil or criminal liability arising from any protected disclosure regardless of any prohibition by law, oath, contract, practice or agreement requiring him or her to maintain confidentiality.¹¹³

4.4 Assets declarations

To reduce corruption and to increase transparency, the wealth of African politicians and senior public officials should be subject to immense scrutiny. Asset declaration by senior public officials is an important anti-corruption tool. A declaration regime serves to prevent any conflict of interests, and most importantly, it monitors unexplained wealth by declarants. In countries like Zimbabwe, lifestyles of many politically-exposed persons cannot be sustained by their income, and the problem has been aggravated by lack of an asset declaration regime.¹¹⁴ The declaration allows civil society, media, law enforcements agents and financial institutions to monitor and detect any movement of assets or an increase in the estate of the declarants which cannot be reasonably explained by his or her lawful income.

According to the High Level Panel, African governments can help financial institutions to monitor activities of politically-exposed persons (PEPs) by providing lists of PEPs, asset declarations filed by PEPs and the legal position on the prohibition or restriction of PEPs ability to hold financial accounts abroad.¹¹⁵ Asset declarations as an anti-corruption tool is recognised and provided by several anti-corruption instruments.¹¹⁶ An effective assets declaration regime should ensure that declarations are made public, verifiable by the public, with effective sanctions for non-compliance. To combat IFFs, asset declarations requirements should be extended to tax and customs officials susceptible to corruption and IFFs.

The main challenges to asset declaration regimes in many African states are the lack of public access to declarations,¹¹⁷ unverified

112 M Merten ‘State Capture: In Parliament, Mosilo Mothepu lifts the lid on the machinations of State Capture at Eskom’ *Daily Maverick* 1 November 2017.

113 Sec 9A Protected Disclosures Amendment Act 5 of 2017.

114 J Duri ‘Assets declarations by public officers in Zimbabwe as an anti-corruption tool’ unpublished LLM thesis, University of the Western Cape, 2016 at 2 (on file with the author).

115 High Level Panel (n 11) 84.

116 Art 8(5) UNCAC; art 7(1) AUCPCC; art 5(g) ECOWAS Protocol; art 6(2)(i) Draft EAC Protocol.

117 See D Kotlyar *et al* ‘Asset declarations: A threat to privacy or a powerful anti-corruption tool?’ (2016) <http://www.worldbank.org/en/news/opinion/2016/09/26/asset-declarations-a-threat-to-privacy-or-a-powerful-anti-corruption-tool> (accessed 4 August 2018).

declarations and the lack of sanctions for violation of the declaration regime.¹¹⁸ For example, in Malawi, assets declarations are submitted with the declaration office and are available to the public upon request.¹¹⁹ This hinders effectiveness of public monitoring as requests can be denied or can be subject to unnecessary delays. According to an academic research, public disclosures are usually associated with lower levels of corruption as there is more transparency and close monitoring by the public.¹²⁰ The lack of verification of declarations affects the effectiveness of the anti-corruption tool as declarants may deliberately make false declarations. This is particularly true when there are no effective sanctions for non-compliance with the declaration requirements. Therefore, African states should establish asset declaration regimes which require public declarations, subject to verification and with effective sanctions for non-compliance.

4.5 Regulation of beneficial ownership

Due to enhanced measures to combat money laundering and terrorist financing by financial institutions, criminals have turned to corporations as vehicles to conceal their proceeds. They abuse the legal personality of corporations to hide the proceeds of crime and not to reveal themselves as beneficial owners. A beneficial owner is the natural person who 'ultimately owns, controls or benefits from a company or trust fund and the income it generates'.¹²¹ The Panama Papers is a typical example of how companies may be abused by corrupt persons to operationalise corrupt agreements or to launder stolen funds.¹²² A study by the World Bank revealed that in 213 grand corruption investigations it reviewed, 150 cases involved the misuse of corporate vehicles that concealed, at least in part, beneficial owners in order to disguise the origins of stolen funds.¹²³ The absence of information on beneficial owners helps corrupt persons to escape liability for misusing corporations as conduit for their illegal activities.

Transparency on beneficial ownership of corporate vehicles is key to the fight against corruption and IFFs. Criminals should find it difficult to hide behind corporate vehicles to engage in corruption or to conceal proceeds of corruption. The Financial Action Task Force has been leading the fight against money laundering through corporate

118 M Chene 'African experience of asset declarations' (2008) 3 <https://www.u4.no/publications/african-experience-of-asset-declarations/> (accessed 4 August 2018).

119 Secs 14-17 of the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act 22 of 2013.

120 S Djankov 'Disclosure by politicians' (2016) *National Bureau of Economic Research Paper* 24, <http://www.nber.org/papers/w14703> (accessed 4 August 2018).

121 Transparency International 'Beneficial ownership secrecy' https://www.transparency.org/glossary/term/beneficial_ownership (accessed 6 August 2018).

122 The Panama Papers are 11.5 million secret files which revealed how political leaders and prominent figures around the world misuses corporate vehicles to hide their ill-gotten assets and to avoid taxes <https://www.icij.org/investigations/panama-papers/> (accessed 6 August 2018).

123 Van der Does de Willebois (n 39) 117.

vehicles. The 40 Recommendations, which countries should adhere to, provide important guidelines on transparency and the beneficial ownership of legal persons. Recommendations 24 and 25 provide that countries should establish measures requiring adequate, accurate and timely information on the beneficial ownership and control of legal persons and arrangements which is obtainable and accessible in timely fashion by competent authorities. Articles 12(2) and 14(1)(a) of UNCAC require state parties to establish comprehensive domestic regulatory and supervisory regimes for banks and other financial institutions, and designate individuals to identify natural persons who are the ultimate beneficiaries of legal persons to prevent laundering of proceeds of corruption. Article 52 provides hortatory obligations on state parties to require financial institutions to verify the identity of beneficial owners of high-value accounts, to enhance scrutiny of accounts held by or on behalf of politically-exposed persons, and to share such information with authorities of other countries when necessary to investigate, claim and recover proceeds of corruption.

To combat corruption-related IFFs, African countries should establish mandatory public registers containing names of beneficial owners of companies and trusts. Corrupt persons would find it difficult to misuse these corporate vehicles where their names are registered as ultimate beneficiaries. What is more, it would make it easier to trace proceeds of corruption by law enforcement officials. The easy identification of beneficial owners would increase financial transparency and lessen corruption and related-IFFs. Also, beneficial ownership information must be required in all assets declarations by public officials in order to ascertain all natural persons with a financial interest in assets declared by the official.

The main challenge has been the reluctance by African countries to establish laws regulating beneficial ownership measures. It is only recently that countries are starting to pay attention to importance of beneficial ownership regime, with Kenya¹²⁴ South Africa¹²⁵ Zambia¹²⁶ all introducing beneficial ownership measures only last year. Some countries like Zimbabwe do not have comprehensive laws regulating beneficial ownership regardless of having amended its anti-money laundering laws recently.¹²⁷ Therefore, there is need for African countries to establish beneficial ownership transparency measures which will prohibit the use of shell companies and compel all legal persons and arrangements to reveal the identity of beneficial owners.

4.6 Asset recovery

Asset recovery forms an integral part of the international fight against corruption and IFFs. It is one of the fundamental pillars of UNCAC, and

124 Sec 8 Companies (Amendment) Act 28 of 2017.

125 Secs 21, 21A & 21B Financial Intelligence Centre Amendment Act 1 of 2017.

126 Sec 21 of the Companies Act 10 of 2017.

127 See J Duri & MA Matasane 'Regulation of beneficial ownership in South Africa and Zimbabwe' (2017) 1 *Journal of Anti-Corruption Law* 179-188.

States Parties have an obligation to ‘afford one another the widest measure of cooperation and assistance’ in recovering ill-gotten assets.¹²⁸ It is a common trait for corrupt elite in Africa to stash their stolen assets in the developed world. Western powers have been complicit in the fight against corruption and IFFs from Africa as their secrecy jurisdictions have allowed proceeds of crime to be laundered in their financial system with impunity. The aims of asset recovery are to deprive offenders of the opportunity to enjoy the fruits of corruption and to return stolen assets to the victim country. It can supplement resources in victim country to be used for development and provide a powerful deterrent as well justice to the affected society.¹²⁹

The entire Chapter V of UNCAC contains comprehensive provisions on asset recovery. Essentially, there are two forms of asset recovery: conviction-based asset recovery and non-conviction based asset recovery. The former follows after the prosecution and conviction of a person engaged in corruption. Whereas the latter does not require a criminal conviction, and it usually becomes applicable when the conviction based proceeding is not possible or not desirable.¹³⁰ This may be the result of death, flight of the perpetrator, immunity enjoyed by the offender or any other reasonable grounds. Non-conviction based asset recovery processes are more effective than conviction based asset recovery as civil proceedings require a lower standard of proof compared to a criminal prosecution. According to the High Level Panel,

Countries that have been the most successful in tracing, freezing and repatriating stolen assets have legal frameworks that allow asset forfeiture and civil prosecutions without requiring criminal prosecution of the offender.¹³¹

Asset recovery is usually transnational, and involves requesting of assistance between governments, different legal systems, police forces and political processes. Efficient international cooperation and rapid exchange of information between countries is needed for successful recovery of stolen assets. The importance of mutual legal assistance (MLA) has been stressed out in article 55 of UNCAC which requires States Parties to provide one another legal assistance ‘to greatest extent possible.’

Despite comprehensive provisions on asset recovery, little progress has been made to return stolen assets back to Africa. A report by the World Bank indicated that between 2006 and 2012, OECD countries managed to return only US \$ 423 million? out of the US \$ 2.623 billion frozen assets, with an estimated amount of US \$ 130 billion of corruption-related IFFS stashed in the countries.¹³² In Nigeria, authorities have been trying to recover funds stolen by former President Sani Abacha during his time in office. At one point, the frustrations in legal processes led to the authorities agreeing to give US

128 Art 51 UNCAC. See also art 16 AUCPCC.

129 High Level Panel (n 11 above) 36.

130 Art 54(1)(c) UNCAC.

131 High Level Panel (n 11) 47.

132 L Gray *et al* *Few and far: The hard facts on stolen asset recovery* (2014) 21.

\$ 105 million of stolen money back to the Abacha family as part of a deal to repatriate stolen assets.¹³³ Last year, the Swiss government agreed to return US \$ 321 million of stolen money acquired by the Abacha family.¹³⁴

Large amounts of stolen assets are yet to be returned to the requesting states in Africa as a result of several barriers including secrecy jurisdictions, reluctance by requested states and lack of expertise in asset recovery processes. Banking secrecy laws in certain jurisdictions that allow banks to refuse to divulge information about their customers hinder the recovery of stolen assets.¹³⁵ Law enforcement officials may only access the information by obtaining a judicial order. As a result of secrecy laws, officials are barred from effectively investigating and collecting evidence useful for asset recovery processes. Requested states may refuse a request citing reasons of insufficient information or evidence to justify search for and communication of documents.¹³⁶ Additional to secrecy laws, anonymous identity of the beneficial owner of some accounts in these jurisdictions makes it difficult to recover the assets. Assistance is denied on grounds such as lack of trust between two countries, difference in legal traditions, lack of a non-conviction based asset recovery legal framework and the inability to enter into plea agreements and immunity enjoyed by perpetrators.¹³⁷ The Human Rights Council has urged cooperation between requesting and requested States in the recovery of proceeds of corruption and 'to demonstrate strong commitment to ensuring the return or disposal of such assets' to the countries of origin, to their prior legitimate owners or to the victims of the crime.¹³⁸

Asset recovery processes are usually expensive and developing countries have scarce resources. As a result, there are inadequate and poorly trained personnel, under resourced asset recovery institutions and lack of knowledge and experience by prosecutors and judges to facilitate and expedite the return of stolen assets. Incompetent asset recovery team will lack effective coordination and effective channels for transmission of MLA requests and follow-up communication.¹³⁹

To counter problems faced in the asset recovery processes, African countries should pursue bilateral and multilateral mutual legal

133 DU Enweremadu 'Nigeria's quest to recover looted assets: The Abacha affair' (2013) 48 *Africa Spectrum* 63.

134 World Bank 'World Bank monitoring of repatriated Abacha funds' (4 December 2017), <https://www.worldbank.org/en/news/factsheet/2017/12/04/world-bank-monitoring-of-repatriated-abacha-funds> (accessed 7 August 2018).

135 KM Stephenson *Barriers to asset recovery: An analysis of the key barriers and recommendations for action* (2011) 58.

136 Stephenson (n 134) 58.

137 Stephenson (n 134) 19, 47, 66, 69 & 71.

138 Resolution 34/11: Resolution on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation, Adopted by the UN Human Rights Council at its 34th Session held in Geneva, Switzerland, from 27 February - 24 March 2017 UN Doc A/HRC/RES/34/11.

139 Stephenson (n 134) 37.

assistance arrangements. These should be legally-binding between the contracting countries and place an obligation on state parties to provide mutual legal assistance when requested and outline the procedures to follow. Article 59 of UNCAC places an obligation for state parties to consider concluding bilateral or multilateral agreements or arrangements for asset recovery purposes. Such agreements make it easier for cooperation as there will be mutual understanding between states and clear guidelines on the procedure to be followed. They lessen grounds for refusal to cooperate by requested states.

4.7 Interagency cooperation

The High Level Panel recommended that African countries ‘create methods and mechanisms for information sharing and coordination among the various institutions and agencies of government responsible for preventing IFFs’.¹⁴⁰ Usually, different agencies have overlapping mandates and pulling resources and information together help to combat corruption and IFFs. For instance, anti-corruption agencies, financial intelligence centres and police departments may pursue a suspicious transaction linked to corruption, and sharing information may speed up investigations or prosecution. Dealing effectively with the problem of corruption and IFFs requires authorities within a country to work better and to become more co-operative. Strong and effective interagency co-operation between anti-corruption commissions, tax and revenue authorities, anti-money laundering agencies, and law enforcement agencies is key to combating the creation and flow of illicit funds, particularly with regards to sharing of information related to corruption and IFFs. Article 38 of UNCAC provides for state parties to establish measures to encourage cooperation between state authorities and with public officials, including information about a suspected act of corruption and to provide necessary information when requested. Hence, African countries should establish legal frameworks requiring cooperation between various state institutions for effective combating of corruption and IFFs

Interagency cooperation is usually limited due to financial, technological and human resources challenges faced by these agencies. According to UNECA, institutions face ‘significant challenges stemming from lack of knowledge, poor data, corrupt practices, capacity constraints and limitations in enforcement capabilities’.¹⁴¹ These challenges weaken institutions and their cooperation is futile. Strong institutions threaten opportunities for politicians and senior officials to engage in criminal activities and to move their assets abroad successfully. There may be lack of genuine political will to provide the necessary resources to build strong and independent institutions. To combat corruption and IFFs, there is need for strong, independent and well-resourced institutions that can share information and cooperate

140 High Level Panel (n 11) 82.

141 UNECA (n 29) 10.

without any political interference when investigating or sharing information on senior public officials or politicians.

5 CONCLUSION

The declaration of 2018 as anti-corruption year in Africa is apt. It comes at a time when the continent is plagued with economic crime costing it billions of dollars every year. Corruption plays a crucial role in IFFs from Africa. It contributes directly to IFFs with huge amounts of proceeds of corruption stashed outside Africa, and it facilitates or enables all other sources of IFFs. Drainage of resources has resulted in stagnant development, limiting the government's ability to fulfil social, economic and cultural rights of citizens. Corruption and IFFs do not spare civil and political rights, and may undermine state institutions and the rule of law making fertile ground for political instability.

African states commitment to fight corruption should include combating IFFs as a priority. Effective anti-corruption measures can play a crucial role in reducing IFFs. The paper has highlighted key anti-corruption measures in a bid to illuminate how anti-corruption measures may play a pivotal role in combating IFFs. These measures include transparency in procurement, regulation of beneficial ownership, assets declarations, protection of whistle-blowers, increased focus on private sector corruption, effective asset recovery regime and enhancing inter-agency cooperation. However, combating corruption and IFFs requires political will on the part of African governments to ensure effectiveness of anti-corruption measures. There is need for genuine political commitment and backing of anti-corruption tools to add muscle to the fight against corruption and IFFs. Without demonstrated political will at national and regional level, anti-corruption measures become empty gestures, or camouflage for continued abuses.¹⁴² Therefore, the declaration of the anti-corruption year in Africa should be followed by genuine political backing of transparency and accountability measures. Countries should be encouraged to ratify legal instruments such as the AUCPCC and sub-regional instruments, and they should ratify the Malabo Protocol, so as to expedite the operation of the African Chamber, which will prosecute corruption and money laundering. Maximising domestic resource mobilisation required for sustainable development and the fulfilment and protection of human rights in Africa is only possible if African countries add much-needed muscles to the fight against corruption.

142 M Johnston & SJ Kpundeh 'Building a clean machine: anti-corruption coalitions and sustainable reform' (2004) *World Bank Policy Research Working Paper* 3466 4.