



**UNIVERSITY of the  
WESTERN CAPE**

**FACULTY OF LAW**

**THE ROLE OF ANTI-CORRUPTION LAWS AND INSTITUTIONS IN CURBING ILLICIT  
FINANCIAL FLOWS FROM KENYA**

**Research paper submitted in partial fulfilment of the requirements for the Master  
of Laws (LLM) in Transnational Criminal Justice and Crime Prevention: An  
International and African Perspective**

**UNIVERSITY of the  
WESTERN CAPE**

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## DECLARATION

I, **Grace Wanjiku Mbogo**, declare that **The Role of Anti-Corruption Laws and Institutions in Curbing Illicit Financial Flows from Kenya Study** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Student: Grace Wanjiku Mbogo**

Signature:

Date:

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Date:



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To the TransCrim class of 2018, Danke schön!



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## DEDICATION

To my parents, Henry Mbogo and Lucy Njoki, I forever remain grateful.



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## ABBREVIATIONS AND ACRONYMS

ACECA	Anti-Corruption and Economics Crime Act
APNAC	African Parliamentarian Network against Corruption
APNIFFT	African Parliamentary Network on Illicit Financial Flows and Tax
ARA	Asset Recovery Agency
AU	African Union
AU Board	African Union Advisory Board on Corruption
AU Convention	African Union Convention on Preventing and Combating Corruption
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EACC	Ethics and Anti-Corruption Commission
FATF	Financial Action Task Force
FRACCK	Framework for Return of Assets from Corruption and Crime
GFI	Global Financial Integrity
HLP	High Level Panel
ICIJ	International Consortium of Investigative Journalists
IFFs	Illicit Financial Flows
IMF	International Monetary Fund
INCSR	International Narcotics Control Strategy
IOM	International Organization for Migration
KPLC	Kenya Power and Lighting Company
KWS	Kenya Wildlife Service
MAT	Multi-Agency Task Team

MNCs	Multinational corporations
ODPP	Office of the Director of Public Prosecution
OECD	Organisation for Economic Co-operation and Development
SDGs	Sustainable Development Goals
TPA	Tax Procedure Act
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNTOC	United Nations Convention on Transnational Organised Crime
UNECA	United Nations Economic Commission for Africa



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## KEY WORDS

Anti-corruption Institutions

Anti-corruption laws

Asset recovery

Corruption

Criminalisation

Global

Illicit Financial Flows

Investigation

Kenya

Prosecution



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## CHAPTER ONE

### INTRODUCING THE STUDY

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#### 1.1 Introduction

The concept of the illicit movement of money aimed at concealing illegal activities and evading taxes is not new. However, the global community first used the term “illicit financial flows” (IFFs) in the 1990s and originally associated it with capital flight.<sup>1</sup> The globalisation of financial markets and the increasing ease with which individuals and companies transact across borders have led to a substantial increase in IFFs.<sup>2</sup> Despite their growing economic and political significance, academics and international institutions are yet to formulate an agreed definition of IFFs. One of the common definitions is that of Global Financial Integrity (GFI), which describes IFFs as the illegal movement of illegal or legal money meant for an illegal purpose.<sup>3</sup>

The Report of the High Level Panel (HLP) on IFFs from Africa estimates that the continent loses more than US\$50 billion annually through IFFs.<sup>4</sup> The HLP Report notes that abusive commercial practices, transnational criminal activities and corruption are the main causes of IFFs in Africa.<sup>5</sup> It estimates that commercial activities account for 65 per cent of IFFs, criminal activities for 30 per cent and corruption for around 5 per cent.<sup>6</sup> Kenya has lost substantial amounts of money to IFFs. In the period 2002-2006, the country lost an estimated US\$686 million annually to IFFs.<sup>7</sup>

These estimates may be too low, since the study of IFFs involves complex legal and economic concepts that make it difficult to determine the precise volumes of IFFs. Nonetheless, the current estimates show that IFFs are substantial and growing at an alarming rate. IFFs reduce the ability of African countries to achieve their development goals. HE Kwesi Quartey,

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1 World Bank (2017), available at <http://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs> (visited 9 March 2018).

2 Kar & LeBlanc (2013) at iii.

3 GFI (2018), available at <http://www.gfintegrity.org/issue/illicit-financial-flows/> (visited 9 March 2018).

4 HLP (2015) at 13.

5 HLP (2015) at 24.

6 HLP (2015) at 24.

7 Kar & Cartwright-Smith (2008) at 67.

Deputy Chairperson of the African Union Commission, has stated that: “IFFs are a huge drain on Africa’s resources, including tax revenues, and hinder the level of savings required to address key development issues”.<sup>8</sup>

This research paper attempts an evaluation of the role of anti-corruption laws and institutions in curbing IFFs from Kenya. It gives a contextual background of IFFs in Kenya and their impact on development and good governance. It analyses the relationship between corruption and IFFs and discusses the role of national and international anti-corruption laws and institutions in curbing IFFs from Kenya. Finally, it recommends measures which Kenya may adopt to enhance the efficiency of its anti-corruption tools in curbing IFFs.

## **1.2 Contextual Background of IFFs in Kenya**

This section discusses the contextual background of IFFs in Kenya. It considers the three sources of IFFs as identified by the HLP, namely, commercial activities, criminal activities and corruption.

### **1.2.1 Abusive Commercial Practices in Kenya**

Abusive business practices are a major source of IFFs in Kenya. Businesses engaging in abusive commercial practices aim at dodging tax authorities and concealing their wealth. These practices include activities such as tax evasion, aggressive tax avoidance, transfer mispricing and trade misinvoicing. Multinational corporations (MNCs) are major culprits in this regard. Civil society has raised concerns about MNCs lowering their tax liabilities in the countries in which they operate.<sup>9</sup>

“Abusive tax avoidance and evasion are one of the major factors influencing creative accounting practice among private companies in Kenya.”<sup>10</sup> Tax evasion is an explicit violation of a country’s tax laws, where a taxpayer hides income or information from tax authorities to reduce his tax liability.<sup>11</sup> By contrast, tax avoidance is not an explicit violation of the law. It is a

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8 Quartey (2018), available at <https://au.int/en/speeches/20180508/statement-deputy-chairperson-high-level-meeting-consortium-stem-illicit-financial> (visited 9 June 2018).

9 United Nations Economic Commission of Africa (UNECA) (2018) at 2.

10 Kamau *et al* (2012) at 83.

11 OECD (2018), available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm> (visited 12 March 2018).

dishonest tax practice whereby taxpayers take advantage of loopholes in tax laws to reduce their tax liability.<sup>12</sup> Such practices contradict the intention of a country's tax legislation.<sup>13</sup> Kenya's Tax Procedure Act of 2015 (TPA) explicitly prohibits all tax avoidance and evasion practices.<sup>14</sup> Prior to the enactment of the TPA, Kenyan courts acknowledged the rights of a taxpayer to take advantage of loopholes in tax laws. Justice Korir, in the *Bata Shoe Company* case, said: "Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman".<sup>15</sup>

Transfer mispricing occurs when an international company takes advantage of its multiple structures to shift profits across jurisdictions.<sup>16</sup> The methods of transfer mispricing are intentional falsification of information, non-declaration of financial assets, trade mispricing, accounting fraud, bribing of tax officials and abuse of tax incentives by falsely claiming eligibility.<sup>17</sup> Kenya loses over Ksh 43 billion annually in unpaid taxes due to transfer mispricing.<sup>18</sup> In 2014, the Kenya Revenue Authority determined that Karuturi Limited, an India-based MNC, used transfer mispricing to avoid paying the government nearly Ksh 946 million in tax.<sup>19</sup>

Trade misinvoicing refers to the falsification of the price, quality and quantity values of traded goods for several reasons.<sup>20</sup> It could include the desire to evade customs duties and domestic levies with the intention of exporting foreign exchange abroad.<sup>21</sup> Kenya is one of the jurisdictions in the world in which it is easiest to incorporate an anonymous shell company.<sup>22</sup> This means that traders engaging in misinvoicing have ready avenues through which to disguise

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12 Chowla & Falcao (2016) at 12.

13 OECD (2018), available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm> (visited 12 March 2018).

14 Sections 85 & 97 of the TPA.

15 *Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited* (2014) at 11.

16 HLP (2015) at 27.

17 Waris (2017) at 7.

18 Michira (2014), available at <https://www.standardmedia.co.ke/business/article/2000107763/revealed-how-karuturi-got-away-with-denying-kenya-millions-of-shillings-in-taxes> (visited 20 May 2018).

19 International Trade Centre (2014), available at <http://www.intracen.org/itc/blog/market-insider/Tax-authorities-investigate-flower-farms-in-Kenya/> (visited 20 May 2018).

20 HLP (2015) at 27.

21 HLP (2015) at 27.

22 Baker *et al* (2014) at 23.

and utilise their illicit funds.<sup>23</sup> GFI's study shows that in the period 2002-2011, Kenya lost \$9.64 billion due to trade misinvoicing.<sup>24</sup>

The funds originating from these abusive commercial practices qualify as illegally earned funds. The transfer of these funds abroad is an example of the illicit flow of funds aimed at avoiding tax obligations. These practices lead to substantial illicit outflows from Kenya, which have affected negatively the country's development goals.

### 1.2.2 Transnational Criminal Activities in Kenya

Incidents of transnational organised crime are still prevalent in Kenya, despite the country being a signatory of the UN Convention on Transnational Organised Crime and its additional Protocols (UNTOC). Examples of such transnational crimes being committed in the country are human trafficking, drug trafficking, trafficking in wildlife products and money laundering.

It has been said that:

The Eastern Africa region is attractive to international drug trafficking syndicates as they are quick to exploit the non-existent or ineffective border controls, the limited cross-border and regional co-operation and serious deficiencies in the criminal justice systems.<sup>25</sup>

In Kenya, international drug trafficking gangs manage most of the cocaine and heroin trafficked into and through the country.<sup>26</sup> These networks involve West Africans and Kenyans with strong links to the police and the judiciary.

Kenya is a source, transit and destination country for victims of human trafficking.<sup>27</sup> It is a source of cheap labour for countries in other regions, particularly the Middle East.

Unsuspecting Kenyan victims are recruited by legal or illegal employment agencies with the promise of well-paid jobs, only for them to be exploited physically and sexually.<sup>28</sup> Kenya is a regional transit hub for both voluntary and trafficked migrants in East Africa *en route* to South

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23 Baker *et al* (2014) at 23.

24 Baker *et al* (2014) at 19.

25 UNODC (2018), available at <https://www.unodc.org/easternafrika/en/illicit-drugs/drug-trafficking-patterns.html> (visited 20 May 2018).

26 Gastrow (2011) at 3.

27 IOM (2015) at 16.

28 US Department of State (2017) at 234.

Africa.<sup>29</sup> It is a destination country for sex tourists who exploit the local population, especially children.<sup>30</sup> In the Kenyan coastal town of Mombasa, girls between the ages of 10 and 15 are sold against their will for about US\$600.<sup>31</sup> Kenya is the largest market for counterfeit goods and contraband in East Africa.<sup>32</sup> The Kenya Association of Manufacturers estimates that the counterfeit economy of the country is worth US\$1.2 billion annually.<sup>33</sup>

Tourism is one of Kenya's leading foreign exchange earners. The country is home to diverse and unique wildlife species. Unfortunately, Kenya's wildlife is under increasing threat from the activities of international criminal networks. "Reports of illegal trade of endangered wildlife trophies intercepted while in transit are common, with the Mombasa port identified as a key conduit."<sup>34</sup>

Money laundering is an important element of transnational criminal activities aimed at concealing and protecting the source and use of criminal proceeds. "It is also important because of the opportunities for survival and expansion it affords organised criminal groups."<sup>35</sup> Criminals may use the illegal proceeds to maintain expensive lifestyles, to re-investment in criminal activity or to fund terrorist activities. The 2016 report by the Bureau for International Narcotics and Law Enforcement Affairs on International Narcotics Control Strategy (INCSR) indicates that Kenya is vulnerable to money laundering.<sup>36</sup> The laundered proceeds are derived from both national and international criminal operations, such as organised crime, cybercrime, corruption and trade invoice manipulation.<sup>37</sup> Criminal networks in Kenya have established links with *Al-Shabaab* and taken advantage of the porous Kenya-Somali border to smuggle people, counterfeit goods and weapons. "Kenya's proximity to Somalia makes it also an attractive location for the laundering of certain proceeds related to piracy and a financial facilitation hub

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29 IOM (2015) at 16.

30 US Department of State (2017) at 234.

31 Gastrow (2011) at 7.

32 Gastrow (2011) at 4.

33 Lindijer (2016), available at <https://www.theguardian.com/world/2016/jan/13/kenya-is-run-by-mafia-style-cartels-says-chief-justice> (visited 24 August 2018).

34 Nduta (2018), available at <https://africasustainableconservation.com/2018/04/11/kenya-illegal-wildlufe-trade/> (visited 24 August 2018).

35 Wright (2006) at 68.

36 US Department of State (2016) at 156.

37 US Department of State (2016) at 156.

for the Somalia-based terrorist group *Al-Shabaab*.”<sup>38</sup>

Although the main purpose of these activities might not be to generate IFFs, they contribute substantially to such flows because they are intended to hide the illegal proceeds from revenue authorities and law enforcement agencies.<sup>39</sup>

### 1.2.3 Corruption in Kenya

Though criminal and illicit commercial activities cause substantial IFFs from Kenya, corruption is a major driver of these outflows. The 2017 Transparency International Corruption Perceptions Index ranked Kenya at 143 out of 180 countries, with the 180<sup>th</sup> place signifying the most corrupt country.<sup>40</sup> Corruption has permeated the country’s private and public sectors. The most affected public institutions are the police, the public procurement process, the revenue authorities, the public administration and the judiciary.<sup>41</sup>

Kenya is not short of grand corruption scandals that have caused or encouraged IFFs. The Goldenberg corruption scandal is a good illustration of this. It involved a scheme according to which Goldenberg International would “export” fictitious gold and diamonds and the Kenyan government would “compensate” it for earning foreign exchange from these fictitious exports. It is estimated that the scandal cost Kenya 10 per cent of its gross domestic product, despite the export of minimal or no gold and diamonds.<sup>42</sup> More recently, the counterfeit sugar scandal showed how corruption can fuel illicit trade in Kenya. This scandal involved smugglers colluding with corrupt officials of the Kenya Revenue Authority and Kenya Bureau of Standards to flood the Kenyan market with illegally imported sugar unfit for human consumption.<sup>43</sup> The government estimates the contraband sugar to be worth US\$17.8 million.<sup>44</sup>

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38 US Department of State (2016) at 157.

39 HLP (2015) at 32.

40 Transparency International (2017), available at [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017) (visited 8 March 2018).

41 Martini (2012) at 4.

42 Letete & Sarr (2017) at 6.

43 Okoye (2018), available at <https://www.diplomaticourier.com/kenyas-latest-scandal-reveals-the-bitter-taste-of-corruption/> (visited 24 August 2018).

44 Okoye (2018), available at <https://www.diplomaticourier.com/kenyas-latest-scandal-reveals-the-bitter-taste-of-corruption/> (visited 24 August 2018).

The prevalence of corruption notwithstanding, Kenya has a laudable legal and institutional anti-corruption framework. Kenya has enacted several laws to assist in its anti-corruption efforts. They include the Constitution of Kenya (2010), which established an independent Ethics and Anti-Corruption Commission mandated to prevent corruption and economic crimes such as money laundering.<sup>45</sup> The country has adopted also a specific anti-corruption law, dubbed the Anti-Corruption and Economic Crimes Act (2003), which provides for economic crimes. It has ratified the United National Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AU Convention). Kenya scored 100 (on a zero to 100 scale) in the 2011 Global Integrity evaluation of the strength of the country's anti-corruption laws.<sup>46</sup> This is a sign that the country has adequate anti-corruption laws. This study seeks to examine the role of these laws in curbing IFFs.

### 1.3 Problem Statement

IFFs have contributed to financial losses, undermined good governance, threatened peace and worsened income distribution in Kenya. The main hypothesis of this study is that corruption plays an overarching role in facilitating IFFs. Corruption is a source and enabler of IFFs. It weakens political, legal and financial institutional frameworks, creating an enabling environment for criminal and illicit business activities. Weak state institutions, such as banks, financial intelligence units, revenue authorities, the police force and the judicial system, hinder proper investigations into IFFs and, consequently, impede implementation of anti-IFF measures.<sup>47</sup> Efforts to curb IFFs, therefore, should start with and focus on addressing corruption in Kenya. Failure to limit corruption first will make the curtailing of IFFs an almost impossible task.<sup>48</sup> This study will analyse the extent to which domestic, regional and international legal frameworks can strengthen the country's anti-corruption efforts as the key to curbing IFFs.

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45 The Constitution of Kenya (Chapter 6: 79).

46 Global Integrity (2011), available at <https://www.globalintegrity.org/research/reports/global-integrity-report/global-integrity-report-2011/gir-scorecard-2011-kenya/> (visited 11 April 2018).

47 Goga (2015), available at <https://issafrica.org/iss-today/how-corruption-drives-illicit-financial-flows> (visited 8 March 2018).

48 Goga (2015), available at <https://issafrica.org/iss-today/how-corruption-drives-illicit-financial-flows> (visited 8 March 2018).



#### **1.4 Research Questions**

This paper will seek to answer the following questions:

- What is the link between corruption and IFFs in Kenya?
- What opportunities —and gaps — exist in Kenya's anti-corruption law for curbing IFFs?

#### **1.5 Objectives of the Study**

The overall objective of this research is to determine the role of anti-corruption laws in curbing IFFs in Kenya. The specific objectives of the paper are:

- to examine the correlation between corruption and IFFs in Kenya;
- to examine the efficiency of Kenya's anti-corruption legal framework in curbing IFFs;
- to recommend measures which Kenya may take to strengthen its anti-corruption laws and to suggest how these measures may be aligned to the country's anti-IFF mechanisms.

#### **1.6 Significance of the Study**

There is no abundance of literature on the links between corruption and IFFs, especially from a national perspective. IFFs, despite having been a problem in Africa for some while already, only gained prominence after the publication of the HLP Report. Even then, most scholars and policy-makers have studied the issue from an international and regional perspective. This study shifts the focus to a country-specific context. Researchers and policy-makers may use it to inform their studies of Kenya and as a basis for comparison with other country studies.

The benefits of curbing IFFs through various anti-corruption efforts will go beyond recovering financial losses. Kenya will be able not only to finance its development priorities but also promote the rule of law and good governance principles.

## 1.7 Outline of the Remaining Chapters

The study contains three more chapters.

Chapter Two analyses the link between corruption and IFFs. The first part will explain the concept of IFFs by analysing the different approaches to defining and distinguishing IFFs from other related concepts. The second part discusses the relationship between IFFs and corruption. It looks specifically at how corruption is a source and enabler of IFFs. The last section discusses the impact of the relationship between IFFs and corruption, focusing on development, governance and human rights. Discussions in this chapter are undertaken primarily from a Kenyan perspective.

The third chapter will consider the role of Kenyan anti-corruption laws and institutions in curbing IFFs. This chapter will investigate what type of IFFs these laws are aimed at stopping, that is, whether these laws are concerned only with IFFs related to corruption or go beyond that. It will consider also how the anti-corruption laws can complement other Kenyan laws aimed at curbing IFFs. Most importantly, the chapter will interrogate whether Kenya has an effective institutional framework to implement its anti-corruption laws.

The final chapter will include a summary of the key findings of the study and detailed recommendations on a possible way forward for Kenya. It will consider what needs to be done to ensure that the anti-corruption laws are implemented with a focus on curbing IFFs. It will consider also which institutions ought to be responsible for the implementation of the recommendations.

## CHAPTER TWO

### CORRUPTION AND ILLICIT FINANCIAL FLOWS

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#### 2.1 Introduction

Corruption is as old as human civilisation.<sup>1</sup> However, corruption is no longer a question just of ethics and integrity. It is an impediment to socio-economic and political development. It affects the cost of doing business, leads to the inefficient use of public resources, increases inequality and, ultimately, undermines the rule of law and the legitimacy of the government. Former Secretary-General of the United Nations (UN), the late Kofi Annan, in his statement on the adoption of UNCAC by the General Assembly, declared that:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish.<sup>2</sup>

Corruption has facilitated the increase of IFFs, which deprive developing countries of resources needed to foster their socio-economic development.

This chapter interrogates the link between corruption and IFFs. The first section aims at demystifying IFFs. It analyses the different approaches used to define IFFs and distinguishes IFFs from other related concepts. The next section discusses the relationship between IFFs and corruption. It specifically looks at how corruption is a source and enabler of IFFs. The concluding section discusses the impact of corruption and IFFs, focusing on development, governance and human rights.

#### 2.2 Understanding IFFs

Conceptual clarity about IFFs informs academic discourse and enables refined research on the topic. It is an important prerequisite for developing laws and institutions that will curb IFFs.<sup>3</sup>

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1 Rothstein & Varraich (2017) at 31.

2 Annan (2003), available at <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> (visited 8 May 2018).

3 Reed & Fontana (2011) at 6.

However, there is no unanimous definition of IFFs. The divergences in the definition of IFFs arise from the diverse elements that cause these flows.

The concept of IFFs is an amalgamation of different legal concepts. All these concepts differ in their relationship to IFFs and have varied explanations and understandings of the source, transfer and use of illicit funds and the approaches that should be used to curb IFFs. These disparities lead to difficulties in reaching agreement on a definition of IFFs. The approaches used to curb IFFs involve also a broad range of stakeholders who may favour one definition of IFFs over another.<sup>4</sup> For instance, a tax justice advocate will insist on including legal tax malpractices, such as tax avoidance, in the definition, while corporate actors would prefer to shield their legal activities and hence they will seek to limit the definition of IFFs to flows that contravene the law.<sup>5</sup>

### **2.2.1 Approaches to Defining IFFs**

There is no generally accepted legal definition of IFFs. However, international institutions and academics have their own non-legal definition. Miyandazi & Ronceray identify four approaches used to define IFFs, namely, the legalistic, the normative, the developmental and the “no definition” approaches.<sup>6</sup>

The legalistic approach is a narrow interpretation of IFFs which focuses on proceeds and activities that have contravened the law. Most international development organisations, such as the World Bank, the Organisation for Economic Co-operation and Development (OECD) and Global Financial Integrity (GFI), adopt the legalistic approach. The World Bank refers to IFFs as the cross-border movement of capital associated with illegal activity or, more explicitly, money that is earned, transferred or used illegally and that crosses borders.<sup>7</sup> The OECD defines IFFs as flows that are generated by methods, practices and crimes aimed at transferring financial

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4 Miyandazi & Ronceray (2018) at 3.

5 Miyandazi & Ronceray (2018) at 3.

6 Miyandazi & Ronceray (2018) at 6.

7 World Bank (2017), available at <http://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs> (visited 9 March 2018).

capital out of a country in contravention of national or international laws.<sup>8</sup> GFI defines IFFs as the illegal movement of money that has been earned, transferred and/or used illegally.<sup>9</sup>

These definitions exclude activities, such as aggressive tax avoidance, that do not infringe any law. Instead, they focus on money and activities that have a clear link to illegality. The illegality may arise from one or more of the following scenarios:

- The funds are proceeds of illegal activities such as human trafficking, tax evasion or embezzlement of public money.<sup>10</sup>
- There is an illegal transfer of funds which could occur if an individual evades custom controls and other regulatory controls.<sup>11</sup> It could occur also if an individual violates legal obligations relating to the funds, for instance, contravening tax laws by deliberately falsifying tax returns and books of account.<sup>12</sup> It does not matter whether the money being transferred is derived from legal activities, as long as the process of transferring the money has contravened the law.
- The money is used for an illegal purpose, for instance, financing drug trafficking.<sup>13</sup> Criminals often transfer money illegally to avoid any complications with the law.

By contrast, the normative approach adopts a broader interpretation of IFFs. Forstater notes that:

[A] normative definition of IFFs is not limited to financial or capital flows with a connection to illegality, but includes activities which are deemed to be undesirable, immoral, or “unacceptable to the public”, in particular focused on tax avoidance.<sup>14</sup>

The HLP defines IFFs as the illegal movement of money that has been earned, transferred and/or used illegally.<sup>15</sup> This definition is similar to the GFI definition. However, the HLP further explains that it considers the term “illicit” to include activities which may not be strictly illegal

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8 OECD (2014) at 16.

9 GFI (2018), available at <http://www.gfintegrity.org/issue/illicit-financial-flows/> (visited 8 March 2018).

10 Reed & Fontana (2011) at 6.

11 Reed & Fontana (2011) at 6.

12 UNECA (2018) at 2.

13 UNECA (2018) at 2.

14 Forstater (2018) at 5.

15 HLP (2015) at 23.

but nonetheless go against established rules and norms.<sup>16</sup> Thus, the HLP definition includes acts such as aggressive tax avoidance in its understanding of the causes of IFFs.<sup>17</sup> We can infer, therefore, that the HLP has adopted a broader definition of IFFs. The UN has not provided an official definition of IFFs. However, recent publications of UN organs show that the UN is endorsing the normative approach. The 2018 United Nations Economic Commission for Africa (UNECA) study on the global governance architecture of IFFs notes that the word “illicit” refers not only to illegal acts but also to acts that are improper and not sanctioned by a law or custom.<sup>18</sup> The African Union (AU), too, does not have a formal definition of IFFs. However, the Assembly of Heads of State and Government of the AU formally endorsed the HLP report,<sup>19</sup> implying that the AU has embraced the HLP definition of IFFs.

The key point of contention between the legalistic and normative approaches concerns the definition of “illicit” and “illegal”. The legalistic approach considers only practices that have contravened the law. The normative approach does not limit its definition to illegality but also considers practices that are morally unacceptable. This divergence links to the debate on whether commercial activities — such as aggressive tax avoidance and corruptly negotiated contracts — are to be regarded as sources of IFFs.

The number of academics and institutions adopting the broader approach to defining IFFs is growing. There are several justifications for doing so. The first justification comes from the etymology of the word “illicit”.<sup>20</sup> The Merriam-Webster Dictionary defines illicit as “something that is unlawful or illegal; involving activities that are morally unacceptable”.<sup>21</sup> Similarly, the Oxford Dictionary defines “illicit” acts as “acts not authorised or allowed; improper, irregular; [especially] not sanctioned by law, rule, or custom; unlawful, forbidden”.<sup>22</sup> The term “illicit” has a dual usage that is not limited linguistically to illegality. The second

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16 HLP (2015) at 23.

17 HLP (2015) at 24.

18 UNECA (2018) at 2.

19 Assembly of Heads of State and Government of the African Union Special Declaration on Illicit Financial Flows at Doc.Assembly/AU/17(XXIV).

20 Forstater (2018) at 6.

21 Merriam-Webster (2018), available at <https://www.merriamwebster.com/dictionary/illicit> (visited 18 August 2018).

22 Oxford English Dictionary (2018), available at <http://www.oed.com/view/Entry/91445> (visited 18 August 2018).

meaning of the term includes practices and activities that society or custom condemns or considers morally unacceptable. Therefore, from an etymological perspective, IFFs ought to address practices that go beyond what is strictly illegal.

In addition, equating illicitness to illegality means that illicit practices cannot be construed as illegal unless a court of law or a competent authority deems them illegal.<sup>23</sup> There is a presumption of innocence in most legal systems and illegality can be proved only after the completion of a formal process.<sup>24</sup> Regrettably, relying solely upon formal proof of guilt entails underestimating the volume of IFFs, in that the count would be limited to the values attached to activities that a court of law has considered illegal.<sup>25</sup> Therefore, adopting the broader definition of IFFs would help countries obtain a clearer picture of the financial losses resulting from the weakness in their legal systems.<sup>26</sup> Forstater observes that:

Considering illicit practices as sources of IFFs will enhance the enforcement capacity of revenue authorities to trace and stop these flows.<sup>27</sup>

It also places a moral obligation on governments to amend laws that facilitate tax revenue losses.<sup>28</sup>

The developmental approach agrees with the normative approach, but excludes flows that have no adverse impact on sustainable development.<sup>29</sup> Proponents of this theory argue that some IFFs, such as those linked to corruption, may contribute to political stability through a clientelist distribution of resources. They base their reasoning on the acceptance of some forms of IFFs (corruption-related IFFs in particular) as a fact of life or a lesser evil than the instability caused by them.<sup>30</sup> An inherent shortcoming of this approach is that failure to crack down upon IFFs will encourage perpetrators to continue with the illicit acts, which ultimately will foster instability.<sup>31</sup> Another shortcoming of the developmental approach is that it fails to

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23 Chowla & Falcao (2016) at 15.

24 Chowla & Falcao (2016) at 15.

25 Chowla & Falcao (2016) at 15.

26 Chowla & Falcao (2016) at 15.

27 Forstater (2018) at 7.

28 UNECA (2018) at 3.

29 Blankenburg & Khan (2012) at 25.

30 Miyandazi & Ronceray (2018) at 9.

31 Miyandazi & Ronceray (2018) at 9.

consider the impact of IFFs on human rights.<sup>32</sup> Thus far, no researcher has estimated the value of IFFs in terms of this definition.<sup>33</sup>

The “no definition” approach avoids the semantic discussion embedded in the other approaches and tackles the different IFFs individually.<sup>34</sup> The European Commission has adopted this approach. Its main shortcoming is that it excludes the possibility of an integrated policy approach and ignores the striking statistics of large volumes of “dirty money”.<sup>35</sup>

This research paper adopts the broader definition of IFFs which acknowledges that illicitness is not synonymous with illegality. It also endorses definitions that consider the adverse effects of IFFs on a broader spectrum of global issues, including development, governance and human rights.

### 2.2.2 Distinguishing IFFs from Related Concepts

In order to understand the concept of IFFs better, it is important to distinguish it from certain related concepts.

- *IFFs and Illicit Finance*

Illicit finance refers to national and cross-border financing of illicit activities and includes domestic tax evasion and corrupt activities.<sup>36</sup> The concept of IFFs emanates from the wider concept of illicit financing but focuses only on cross-border financing.<sup>37</sup> Chowla & Falcao note that “the negative impact of illicit finance on a country’s domestic resource mobilisation ability is as detrimental as that of IFFs”.<sup>38</sup> The definition of IFFs sometimes includes money that remains within national borders and is hidden from enforcement agencies or laundered domestically.<sup>39</sup> This paper considers only IFFs that cross international borders.

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32 Miyandazi & Ronceray (2018) at 9.  
33 Miyandazi & Ronceray (2018) at 9.  
34 Miyandazi & Ronceray (2018) at 9.  
35 Miyandazi & Ronceray (2018) at 9.  
36 Chowla & Falcao (2016) at 2.  
37 Chowla & Falcao (2016) at 2.  
38 Chowla & Falcao (2016) at 2.  
39 Ritter (2015) at 10.



- *IFFs and Capital Flight*

Researchers sometimes use capital flight and IFFs synonymously. It has been observed that:

Capital flight means capital flows that are not recorded in the official records of the transactions between a country and the rest of the world.<sup>40</sup>

The main record of such transactions is the Balance of Payments, which records the difference between the capital inflows and the capital outflows of a country.<sup>41</sup> Foreign direct investments are a major source of capital inflows in Africa.<sup>42</sup> The purpose of capital flight is to move capital from developing countries to safer havens and secure better returns.<sup>43</sup> Capital flight may be legal or illegal depending on the source of the capital and the method used to transfer the money. According to Reed & Fontana: "Illegal capital flight is often unrecorded and is typically proceeds of illegal activities, namely, illicit flows."<sup>44</sup> IFFs cover a broader set of transactions than capital flight, including criminal proceeds and illicit commercial activities.<sup>45</sup>

- *IFFs and Money Laundering*

Money laundering is a source of IFFs. The Financial Action Task Force (FATF) defines money laundering as the process of disguising the origin of proceeds of illegal activities to make them appear legal.<sup>46</sup> Money laundering is a well-founded legal concept supported by several international and national legal instruments. Merging money laundering and IFFs may lead to an over-reliance on anti-money laundering measures, thereby restricting the use of anti-IFF measures.<sup>47</sup> Anti-money laundering measures are limited to proceeds of illegal activities originating from a specific set of predicate criminal offences which vary across countries. Depending on the jurisdiction, these offences may exclude crimes such as corruption and tax evasion which are significant sources of IFFs.

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40 Ajayi & Ndikumana (2015) at 3.

41 Ajayi & Ndikumana (2015) at 3.

42 Ajayi & Ndikumana (2015) at 3.

43 Kant (2002) at 345.

44 Reed & Fontana (2011) at 7.

45 Ajayi & Ndikumana (2015) at 4.

46 FATF (2018), available at <http://www.fatf-gafi.org/fag/moneylaundering/> (visited 18 August 2018).

47 Reed & Fontana (2011) at 8.

- *IFFs and Informal Flows*

Informal flows are referred to also as the *hawala* money transfer system. The *hawala* system involves the transfer and receipt of funds or equivalent value settled through trade, cash and net settlement over a long period.<sup>48</sup> It often is limited to specific geographic regions or ethnic communities.<sup>49</sup>

Like capital flight, informal flows may be illicit or licit. Some countries consider informal flows to be legal. They support the use of the informal systems because of the difficulties of transmitting money, the lack of access to banking, the culture of the community, and the location of the country of source or destination.<sup>50</sup> Other countries consider such flows as illegal and refer to them only within the context of underground or criminal money transfer services.<sup>51</sup> Sometimes, these systems may be used also for an illicit purpose, such as tax evasion or evading currency controls.

### **2.3 Link between Corruption and IFFs**

Corruption and IFFs are both complex global phenomena with no precise definition. Still, academics and global institutions readily blame global underdevelopment on these two phenomena. The question, then, is what is the link between them? According to Ayogu & Gbadebo-Smith, “grand corruption lies at the core of the problem of IFFs from African countries”.<sup>52</sup> Corruption is a source of IFFs, it facilitates opportunistic crimes that lead to IFFs, it reinforces incidents of IFFs and corrodes the good governance structures useful in curtailing IFFs. This section details aspects of this relationship.

#### **2.3.1 Corruption as a Source of Criminal Proceeds**

The embezzled proceeds of state funds, grand corruption and bribes constitute some of the illicit funds that criminals transfer illegally out of a country. The *Panama Papers* reveal how

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48 FATF Report (2013) at 12.

49 FATF Report (2013) at 12.

50 FATF Report (2013) at 13

51 FATF Report (2013) at 12.

52 Ayogu & Gbadebo-Smith (2015) at 278.

African elites hide proceeds of corruption from authorities.<sup>53</sup> Criminals often launder these illicit proceeds to bank accounts in foreign jurisdictions with high levels of banking secrecy. They then use the money for illegal or legal purposes in the country of origin or elsewhere.

The HLP estimation of corruption-related IFFs has been a topic of debate. Some argue that the volumes of these IFFs is far higher than the projected five per cent. In fact, the responses to the Panel's questionnaires on the issue showed that most people felt that corruption was the main cause of IFFs in their countries.<sup>54</sup> The pervasiveness of corruption makes it difficult to estimate the volume of IFFs caused by it. For instance:

petty bribery — a phenomenon which plagues the lives of millions in many countries — is much less likely to yield detectable IFFs unless one official receives large numbers of small bribes that then need to be laundered.<sup>55</sup>

However, grand corruption yields detectable IFFs. For instance, the 2004 Kroll Report into the high level of corruption in the Kenyan government alleged that former President Daniel Arap Moi, together with his relatives and close associates, siphoned off more than £1 billion of state resources into foreign banks and acquisitions.<sup>56</sup> If true, this would place Moi on a par with other African kleptocrats, such as former President Mobutu Sese Seko of Zaire and former President General Sani Abacha of Nigeria.<sup>57</sup>

### **2.3.2 Corruption as an Enabler of Abusive Commercial Practices**

The potential for evading tax and hiding illicit funds securely in tax havens is a major incentive for abusive commercial activities such as transfer mispricing and trade misinvoicing. Corruption lowers the chances of detection and consequently increases the prospective returns.

Corruption is evident in authorities that are tasked with the collection of tax revenue. Often, such tax authorities are “weak and characterised by extensive evasion, corruption and

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53 International Consortium of Investigative Journalists (ICIJ) (2017), available at <https://www.icij.org/investigations/panama-papers/> (visited 20 August 2018).

54 HLP (2015) at 32.

55 Reed & Fontana (2011) at 20.

56 Rice (2007), available at <https://www.theguardian.com/world/2007/aug/31/kenya.topstories3> (visited 12 September 2018).

57 Rice (2007), available at <https://www.theguardian.com/world/2007/aug/31/kenya.topstories3> (visited 12 September 2018).

coercion”.<sup>58</sup> Corrupt businesses can bribe a tax official to make a “favourable” interpretation of tax regulations that lowers their tax liability or to ignore an obvious incident of tax evasion.<sup>59</sup>

Corrupt acts in tax agencies also may involve:

charging for free services, diverting cash, making false repayment claims; losing files; and receiving payments to complete tax returns or bribes to favourably settle audits.<sup>60</sup>

Kenya Revenue Authority officials are amongst the top bribe-taking officials in Kenya.<sup>61</sup> The International Monetary Fund (IMF) notes that:

corruption affects taxation by weakening the state’s capacity to tax, leading to lower revenue collections; creating disincentives for taxpayers to pay taxes; reducing the impetus for the state to collect taxes; and undermining spending programmes.<sup>62</sup>

However, corruption is prevalent not just amongst tax authorities. One can find it too amongst intermediaries (also referred to as enablers, gatekeepers or facilitators) of the global financial system. Intermediaries are a:

heterogeneous network of professionals that flout and use loopholes in both national and international laws to generate and drive the cross-border outflow of illicit finance.<sup>63</sup>

They are key vectors of corrupt practices. Corrupt lawyers, for instance, may assist MNCs to evade tax and launder the criminal proceeds.

### 2.3.3 Corruption as an Enabler of Transnational Criminal Activities

Corruption is an integral part of transnational organised crime. It gives rise to international criminal networks that rely on bought protection, information and influence to run their criminal activities. Bribery remains the most common form of corruption relating to

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58 Brautigam (2008) at 1.

59 Reed & Fontana (2011) at 19.

60 Tjen & Evans (2017) at 246.

61 *Business Today* (11 December 2015), available at <https://businesstoday.co.ke/kra-and-judiciary-staff-top-bribe-taking-list/> (visited 8 September 2018).

62 IMF (2016), available at <https://www.imf.org/external/error.htm?URL=http://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888> (visited 8 September 2018).

63 Rai (2017) at 4.

transnational crimes.<sup>64</sup> Criminal networks rely on bribes to run their criminal activities and engage in illicit business without interruption from law enforcement. Police officers accept bribes to intimidate legitimate business owners competing with the criminals. Labour or immigration officials willingly accept money to feign ignorance and allow human trafficking and smuggling. Criminals bribe judges to protect them from prosecution. They may bribe private citizens also. For instance, the owner of a transport business may receive a bribe to transport trafficked persons or goods without reporting it to the authorities.

Criminal gangs also use extortion and protection rackets to intimidate legitimate business owners. Protection rackets involve:

circumstances where a victim pays money under duress in exchange for avoiding damage to a business, construction site, or harm to employees and customers.<sup>65</sup>

Corruption is one of the underlying conditions for the existence of protection rackets, since control by law enforcement authorities is inefficient.

In some extreme situations, corruption may entail state capture. This is a form of grand corruption which has been defined as:

the corrupt efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials.<sup>66</sup>

However, state capture need not involve firms and can involve individuals or criminal networks instead. An example is the Gupta family control over South African politicians and government-owned companies.<sup>67</sup> Criminals can engage in corrupt acts, such as bribing of parliamentarians to vote on laws that favour them, bribing of government officials to enact favourable regulations and bribing of judges to influence court decisions.<sup>68</sup> These acts aim at creating a favourable environment for their criminal activities, to the detriment of the general welfare.

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64 Article 8 of UNCTOC.

65 E4J University Module Series: Organized Crime (2018), available at <https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/extortion-racketeering.html> (visited 20 August 2018).

66 Hellman & Kaufmann (2001), available at <https://www.imf.org/external/pubs/ft/fandd/2001/09/hellman.htm> (visited 20 August 2018).

67 GUPTA-leaks.com (2018), available at <http://www.gupta-leaks.com/> (visited 20 August 2018).

68 Hellman & Kaufmann (2001), available at <https://www.imf.org/external/pubs/ft/fandd/2001/09/hellman.htm> (visited 20 August 2018).

Money is the driving force behind organised crime. The globalisation of financial systems has caused an increase in international corruption and money laundering. Corruption and money laundering have a symbiotic relationship.<sup>69</sup> Corruption contributes not only to enormous profits that are laundered but also is a catalyst for money laundering.<sup>70</sup> Corruption can render anti-money laundering systems dysfunctional by preventing the adoption of effective anti-money laundering measures and overwhelming the system with a large volume of cases.<sup>71</sup>

Corruption is a key catalyst for transnational crimes in Kenya. The 2017 US State Department Trafficking in Persons Report records that corruption is rampant at all levels of the Kenyan government. This has enabled traffickers easily to obtain fraudulent identity documents from complicit government officials.<sup>72</sup> The Report states it is unclear how many corrupt law enforcement officials have been prosecuted or convicted for being complicit in human trafficking.<sup>73</sup> The reason for this lack of statistics may lie in a lack of proper record keeping. However, it is plausible also that the corrupt government officials bribed themselves out of being prosecuted or convicted.

Corruption has fuelled trafficking in wildlife products in Kenya. Dr Richard Leakey, chairman of the Kenya Wildlife Service (KWS), has said:

The corruption isn't just in wildlife management, but at the ports, at law enforcement agencies, it's with the customs, parts of the judiciary, it's certainly present at many levels in the police force, it's certainly very real and still is to a certain extent in the KWS. Government administration is in places, particularly in the countryside, compromised.<sup>74</sup>

Corrupt politicians and criminal syndicates run organised cartels in Kenya. Although there is insufficient evidence to point to the extent of the power of these cartels, it is possible that they

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69 Chaikin & Sharman (2009) at 1.

70 Goredema (2011) at 4.

71 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) (2009), available at [http://www.esaamlg.org/userfiles/Corruption\\_and\\_AML\\_Systems.pdf](http://www.esaamlg.org/userfiles/Corruption_and_AML_Systems.pdf) (visited 28 August 2018).

72 US Department of State (2017) at 233.

73 US Department of State (2017) at 233.

74 Vaughan (2016), available at <https://www.theguardian.com/environment/2016/may/30/kenya-poaching-ivory-rhino-horn-future-communities> (visited 24 August 2018).

have substantial influence in parliamentary processes.<sup>75</sup> Former Chief Justice of Kenya, Willy Mutunga, admitted that the legal system was ill-equipped to deal with the overwhelming influence of the criminal syndicates, stating that the criminals would be brought into “a corrupt investigating system, through a corrupt anti-corruption system, and a corrupt judiciary”.<sup>76</sup>

All these forms of corruption weaken the efficiency of law enforcement agencies and the judiciary. The influence and power of criminal gangs may overwhelm police in countries with weak law enforcement agencies. This reduces the chances of criminals being caught and encourages more corruption.

#### **2.3.4 Corruption as an Impediment to Good Governance and Anti-IFF Measures**

Good governance refers to political and institutional processes aimed at achieving development goals. These processes embrace respect for the rule of law, transparency and accountability, and efficiency and effectiveness of the public sector.<sup>77</sup> “Grand corruption is at the core of the nexus of governance and IFFs.”<sup>78</sup> According to Ayogu & Gbadebo-Smith, corruption and governance are embroiled in two incompatible cycles, the virtuous cycle and the vicious cycle. In the former, good governance curbs corruption. In the latter, corruption corrodes governance because poor governance enables corruption.<sup>79</sup> It is the vicious cycle that links corruption, governance and IFFs.

The presence of IFFs in an economy indicates poor governance. Poor governance enables corruption and opportunistic crimes which are sources of IFFs. Corruption is a profitable business. Business people find it easier to make money through illicit activities than through legitimate business.<sup>80</sup> Curbing corruption, therefore, means interfering with a lucrative source of income for corrupt elites. Corrupt leaders have no political will to stop corruption or the IFFs caused and facilitated by it. They, therefore, hinder the enforcement of the rule of law and frustrate anti-IFF measures.

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75 Gastrow (2011) at 9.

76 Lindijer (2016), available at <https://www.theguardian.com/world/2016/jan/13/kenya-is-run-by-mafia-style-cartels-says-chief-justice> (visited 24 August 2018).

77 HLP (2015) at 51.

78 Ayogu & Gbadebo-Smith (2015) at 278.

79 Ayogu & Gbadebo-Smith (2015) at 296.

80 HLP (2015) at 41.

## 2.4 Effects of Corruption and IFFs

IFFs have received considerable global attention because of their adverse impact on development objectives. IFFs hinder the achievement of the UN's Sustainable Development Goals (SDGs). They impede the domestic resource mobilisation efforts of developing countries, which reduces the financial resources available for socio-economic development. This obstructs the efforts of the global community to achieve SDG Target 17, which calls for domestic resource mobilisation.<sup>81</sup> The transfer of funds from developing countries to developed countries also aggravates inequalities between countries, impeding the achievement of SDG Target 10, which seeks to reduce inequalities within and among countries.<sup>82</sup>

“The costs of IFFs are not just the plundered monies lost to foreign jurisdictions, but also include negative impacts on governance.”<sup>83</sup> Poor governance increases the incidence of corruption. The discussions in this chapter have established that countries cannot reduce IFFs unless they also confront corruption. Thus, the SDGs, IFFs and corruption are inextricably linked. We cannot endeavour to achieve the SDGs without addressing IFFs and the corruption that facilitates these flows. African countries must resolve to work together significantly to promote good governance, transparency and accountability on the continent and to curtail IFFs.

Rampant corruption and powerful transnational criminal gangs in Kenya are eroding state institutions and public confidence in them. Owners of legitimate businesses are apprehensive about investing in a country that is ridden with corrupt governments and criminal gangs.

As a result, development is being hampered, governance undermined, public trust in institutions destroyed, and international confidence in Kenya's future is constantly tested.<sup>84</sup>

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81 SDG (2015), available at <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (visited 20 September 2018).

82 Muchhala (2018), available at [https://www.ohchr.org/Documents/Issues/Development/Session19/A\\_HRC\\_WG.2\\_19\\_CRP\\_3.docx](https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP_3.docx) (visited 20 September 2018).

83 Ayogu & Gbadebo-Smith (2015) at 289.

84 Gastrow (2011) at 2.



GFI estimates that in the period 2002-2006, Kenya lost approximately Ksh68.8 billion to IFFs.<sup>85</sup> Presumably, the GFI estimates have increased significantly in the past decade and the country is losing even more money to IFFs. The billions of shillings lost to IFFs could have helped to achieve the development agenda of the country. To put it into perspective, in the 2018-2019 budget, Kenya plans to spend Ksh44.6 billion on the health sector, Ksh20.25 billion on food security and Ksh6.5 billion on affordable housing.<sup>86</sup> This means the lost Ksh68.8 billion could have helped Kenya better equip its hospitals, feed its citizens and partly fund decent housing for all.

IFFs and corruption are not only a development and governance concern but are also a human rights issue. IFFs deprive countries of development resources needed to implement their human rights obligations and to establish and strengthen institutions that uphold human rights.<sup>87</sup> “The right to development makes the prevention and regulation of IFFs a human rights imperative.”<sup>88</sup> IFFs also undermine the rule of law. The existence of illicit funds in the economy encourages transnational criminal activities in the private and public sectors. The lucrateness of IFFs lowers the incentive for corrupt political leaders to strengthen revenue authorities, law enforcement agencies, the judiciary and public financial management.

## 2.5 Conclusion

Proper definition is key to understanding IFFs, their effects on development and, ultimately, the most appropriate measures for curbing them. Despite the lack of an agreed definition, IFFs are emerging as an important and valuable concept that brings together previously disconnected issues. Now, countries need to focus on developing effective anti-IFF measures. However, in order adequately to address the impediments of IFFs, countries need to appreciate the unique correlation between these flows and corruption. The discussion in this chapter has shown that corruption plays an integral role in the proliferation and persistence of IFFs from Kenya.

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85 Kar & Cartwright-Smith (2008) at 67.

86 The National Treasury (2018), available at <http://www.treasury.go.ke/budget-statement-2018-19.html> (visited 20 September 2018).

87 International Bar Association (2013) at 2.

88 Muchhala (2018), available at [https://www.ohchr.org/Documents/Issues/Development/Session19/A\\_HRC\\_WG.2\\_19\\_CRP\\_3.docx](https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP_3.docx) (visited 20 September 2018).

Corruption is not only a source of the illegal proceeds that are transferred across international borders but also an enabler of the other illicit activities that cause IFFs. What is more, it hampers good governance mechanisms that play a vital role in ensuring the efficiency and effectiveness of anti-IFF measures.



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## CHAPTER THREE

### USING ANTI-CORRUPTION LAWS AND INSTITUTIONS AGAINST ILLICIT FINANCIAL FLOWS

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#### 3.1 Introduction

Chapter Two discussed the relationship between corruption and IFFs. This chapter broadens that discussion and considers how anti-corruption laws and institutions may be used to counter IFFs. The first section of this chapter contains a discussion of the different roles which anti-corruption laws and institutions can play in curbing IFFs. The role of these laws and institutions is not limited to imposing criminal sanctions against corrupt individuals but also encompasses preventive measures which promote transparency, accountability and good governance. The first section also considers how anti-corruption laws can curb the abusive commercial practices and criminal activities that cause IFFs. The next two sections of the chapter discuss specific anti-corruption laws (and institutions) which, if effectively implemented, will reduce considerably the prevalence of IFFs in Kenya. These laws include both national and international laws that Kenya has adopted.

#### 3.2 Anti-Corruption Laws and Institutions as Key Anti-IFF Tools

“Corruption is a cross-cutting and integral part of IFFs because of its facilitating role.”<sup>1</sup> Global, regional and national anti-corruption efforts therefore can play a significant role in reducing IFFs. Anti-corruption laws and institutions legitimise anti-corruption efforts. They provide a framework for good governance, which is an important prerequisite for reducing IFFs. Good governance encourages administrative and financial accountability in the private and public sectors, enhances transparency in taxation and custom systems, creates a secure environment for filing complaints against corrupt individuals, and promotes a fair and just judiciary.

The question, however, is precisely how anti-corruption laws and bodies provide a legal basis for tackling IFFs? There is no international or national law on IFFs. Instead, governments rely on laws which seek to prevent the specific sources of IFFs. These include anti-corruption laws, tax laws and laws against transnational crimes. This paper focuses on anti-corruption

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1 HLP (2015) at 69.

laws, specifically, UNCAC, the AU Convention and Kenyan anti-corruption laws. It assesses specific provisions useful in preventing IFFs, curbing their recurrence and repatriating assets lost through IFFs.

Prevention is a crucial anti-corruption tool which offers proactive solutions and is a crucial first step in reducing IFFs. Anti-corruption laws and institutions play a role in preventing IFFs. Preventive measures ensure that the grave effects of corruption are reduced and, in some instances, eliminated. Preventive measures, such as awareness raising and educating law enforcement officers and the public on the effects of corruption, also may play a significant role in encouraging good behaviour that reduces the occurrence of corrupt activity which facilitates IFFs. Prevention also strengthens the regulatory ability of law enforcement and anti-corruption agencies to implement proactively laws that mitigate the incidence of IFFs. Unfortunately, most anti-corruption laws focus on combating corruption *ex post facto* instead of preventing it. The AU Convention has no specific provisions on prevention of corruption, despite the word “prevention” being included in its title. Similarly, the preamble to Kenya’s Anti-Corruption and Economics Crime Act (ACECA) expressly states that the Act ensures the prevention of corruption and other related offences.<sup>2</sup> However, there are no express preventive measures in the Act. UNCAC is the first anti-corruption law to dedicate an entire chapter to prevention as an anti-corruption measure.<sup>3</sup> The chapter provides fundamental steps in the achievement of the objectives of UNCAC.<sup>4</sup>

Prevention of corruption alone cannot curb the pervasiveness of IFFs. Anti-corruption laws play an important part in criminalising corruption and its role in facilitating IFFs. Criminalisation ensures that corrupt individuals are punished and it deters them and the general society from committing corruption offences. Moreover, criminal prosecution of high-level individuals on corruption charges increases the trust of ordinary people in the criminal justice system and, consequently, their support in curbing corruption.<sup>5</sup> Criminalising both the demand and supply side of corruption is of importance to anti-IFF measures. The private sector

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2 Preamble to ACECA.

3 Chapter 2 of UNCAC.

4 UNODC (2006) at 15.

5 Sandgren (2005) at 728.

is responsible primarily for the supply side of corruption. This form of corruption is responsible for the IFFs related to abusive commercial practices. The HLP Report notes that large companies engage in abusive commercial practices, such as abusive transfer pricing, trade misinvoicing and use of unequal contracts.<sup>6</sup> The private sector therefore largely is responsible for the 65 per cent of the IFFs from Africa occurring through abusive commercial practices.<sup>7</sup>

Anti-corruption laws provide a legal framework for tracing, freezing and repatriating money lost through IFFs. Asset recovery is crucial for curbing IFFs from Kenya. Firstly, it potentially can make available additional resources to the government to run its programmes, including ongoing anti-IFF measures.<sup>8</sup> Secondly, asset recovery programmes can deter future corruption by sending the message that corrupt money cannot be hidden.<sup>9</sup> This can reduce directly the scale of corruption-related IFFs.<sup>10</sup> Lastly, asset recovery provides a measure of justice for victims.<sup>11</sup> UNCAC is the first instrument to make provision for international asset recovery.<sup>12</sup>

Anti-corruption laws also supply the legal basis for establishing institutions vital to implementing laws that will help reduce IFFs. In addition, anti-corruption laws establish the standards necessary for the effective operation of these institutions, such as independence and adequate resourcing.

The scope of anti-corruption laws is not limited to corruption-related IFFs. Anti-corruption laws constitute an extensive legal framework for curbing the corruption that facilitates commercial and criminal-related IFFs. For instance, Gallagher notes that:

the provisions of UNCAC also apply to the various forms of trafficking-related corruption and are more detailed than those of the UNCTOC.<sup>13</sup>

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6 HLP (2015) at 37.

7 HLP (2015) at 24.

8 Vlastic & Cooper (2011) at 99.

9 Vlastic & Cooper (2011) at 99.

10 Federal Department of Foreign Affairs (FDFA) (2015), available at [https://www.eda.admin.ch/dam/mission-newyork/en/documents/150414\\_Swiss%20Working%20Paper%20AR\\_17%20March%202015.pdf](https://www.eda.admin.ch/dam/mission-newyork/en/documents/150414_Swiss%20Working%20Paper%20AR_17%20March%202015.pdf) (visited 10 October 2018).

11 Vlastic & Cooper (2011) at 99.

12 Chapter V of UNCAC.

13 Gallagher (2010) at 446.

In some cases, anti-corruption laws have express provisions on other sources of IFFs. Articles 14 and 21 of UNCAC, for example, are dedicated to preventing money laundering, which is a key driver of IFFs.

### **3.3 International and Regional Anti-Corruption Laws and Institutions**

#### **3.3.1 United Nations Convention against Corruption (UNCAC)**

An impressive 186 countries, including Kenya, have adopted UNCAC.<sup>14</sup> This signifies the global acceptance of the instrument and the anti-corruption principles which it promotes. UNCAC also serves as an important international instrument to deal with the corruption component of IFFs.

Chapter II of UNCAC provides an important basis for curtailing IFFs through its detailed preventive mechanisms. Prevention is a key factor in curbing IFFs. UNCAC contains prevention measures which the public and private sectors can adopt to stop corruption. Articles 7-11 of UNCAC focus on preventing public sector corruption and can have a direct impact on preventing IFFs. UNCAC imposes mandatory obligations on States Parties, like Kenya, to implement preventive provisions in the areas of public procurement, public finances, accounting practices, public administration and judicial corruption. These areas all focus on public money and may be prone to corruption-related IFFs. For instance, lack of transparency in government procurement and supply chains can lead to corruption-related IFFs.<sup>15</sup> Judicial corruption undermines efforts to curb IFFs and is one issue with which Kenya is grappling.<sup>16</sup> The measures imposed by UNCAC to prevent judicial corruption play an important role in enhancing the country's efforts to curb IFFs.

Article 12 of UNCAC is an important provision in curbing IFFs within the private sector. A significant part of the private sector in Africa comprises multinational corporations, international banks and international legal and accounting firms.<sup>17</sup> The HLP Report found that multinational corporations engage in IFFs through abusive transfer pricing, trade misinvoicing,

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14 UNODC (2019), available at <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (visited 18 January 2019).

15 HLP (2015) at 83.

16 Kiplagat (2019), available at <https://www.nation.co.ke/news/Judiciary-accused-of-derailing-anti-graft-war/1056-4917948-15jvOriz/index.html> (visited 18 January 2019).

17 HLP (2015) at 36.

misinvoicing of services and intangibles, and the use of unequal contracts.<sup>18</sup> A good example in Kenya is Karuturi Limited, which the Kenya Revenue Authority found culpable of transfer mispricing.<sup>19</sup> Article 12 details a range of preventive measures that Kenya should implement to prevent private sector corruption. These measures include enhancing accounting and auditing standards and prohibiting the tax deductibility of bribes.

Articles 15-25 of UNCAC criminalise corrupt acts. Criminalisation of corruption is an important approach that Kenya should implement to curb the corruption component of IFFs. Article 21 is a significant provision in relation to private sector corruption. It encourages States Parties to criminalise both active and passive corruption in the private sector. UNCAC is not limited to corruption-related IFFs. Article 23 criminalises money laundering, which falls under the criminal component of IFFs. Corruption and money laundering often coexist and reinforce each other.

Corruption enables money laundering through bribes paid to government agencies, such as financial intelligence units, that collect and analyse suspicious transaction reports, or to private individuals and enterprises, who must file such reports.<sup>20</sup>

Conversely, money laundering provides a means through which criminals conceal and enjoy criminal proceeds without revealing the corrupt sources of the funds.<sup>21</sup>

UNCAC is designed not only to prevent corruption and hold corrupt individuals liable but also to encourage international co-operation in the fight against corruption. Chapter IV of UNCAC has detailed provisions on international co-operation. Article 43(1) provides that:

States Parties shall co-operate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

Article 43 shows that international co-operation relates to both criminal and civil matters. However, States Parties are obligated only to co-operate in criminal matters and need to consider co-operating in civil and administrative matters. In order to curb IFFs in Kenya, there is

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18 HLP (2015) at 37.

19 International Trade Centre (2014), available at <http://www.intracen.org/itc/blog/market-insider/Tax-authorities-investigate-flower-farms-in-Kenya/> (visited 20 May 2018).

20 Chaikin (2008) at 274.

21 Chaikin (2008) at 274.

a need for international information exchange that reveals illicit Kenyan wealth held offshore, and reports on what profits multinational corporations make in Kenya for taxation by the Kenyan revenue authorities.<sup>22</sup> The UNCAC provisions on international co-operation provide a basis for States Parties to co-operate and facilitate the secure and rapid exchange of this kind of information.<sup>23</sup>

Chapter V of UNCAC provides for asset recovery. Asset recovery is key to curbing IFFs. It ensures that western powers return stolen assets to their countries of origin. Duri has noted that:

Western powers have been complicit in the fight against corruption and IFFs from Africa as their secrecy jurisdictions have allowed criminal proceeds to be laundered in their financial system with impunity.<sup>24</sup>

The HLP Report notes that asset recovery provides resources that develop African countries while also serving as a deterrent for those who stash illicit gains abroad.<sup>25</sup> However, even with the UNCAC framework, asset recovery remains a complex process. International co-operation plays an important role in facilitating this process. “Efficient international co-operation and rapid exchange of information between countries is needed for successful recovery of stolen assets.”<sup>26</sup>

The Kenya—Jersey extradition and asset recovery case study is a good example of the importance Chapters IV and V of UNCAC as legal tools which Kenya can use to curb IFFs. In this case, the former managing director of the Kenya Power and Lighting Company (KPLC), Mr Samuel Gichuru, and the former Minister of Energy, Mr Chris Okemo, faced corruption and money laundering charges in Jersey. The two allegedly had used a proxy company, Windward Trading Limited, to squander public funds worth millions of Kenya shillings.<sup>27</sup> According to Jersey Court papers, Mr Gichuru, using his position as managing director of KPLC, allegedly

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22 Fröberg & Waris (2011) at 53.

23 Article 48 of UNCAC.

24 Duri (2018) at 343.

25 HLP (2015) at 46.

26 Duri (2018) at 343.

27 *Chrysanthus Barnabus Okemo & another v Attorney General & 3 others* (2018) at para 3.



accepted bribes from foreign businesses which contracted with the company.<sup>28</sup> These bribes were paid into an account in Jersey and then into an account in the name of Windward Trading Limited.<sup>29</sup> Mr Okemo allegedly received kickbacks from Windward Trading Limited in the years between 1999 and 2001.<sup>30</sup>

In accordance with Article 44 of UNCAC, Jersey authorities issued a request to Kenya to extradite the two suspects.<sup>31</sup> However, the Court of Appeal of Kenya has halted the extradition request, although the High Court of Kenya had validated it.<sup>32</sup> The matter is now before the Supreme Court of Kenya awaiting determination.<sup>33</sup> In the meantime, the current Director of Public Prosecutions in Kenya, Mr Noordin Haji, will travel to the Island of Jersey to discuss with his counterparts how to remove the extant legal impediments to the extradition process.<sup>34</sup>

On 24 February 2016, Windward Trading Limited pleaded guilty to four counts of money laundering.<sup>35</sup> In his ruling granting the confiscation orders sought by the Attorney General of Jersey, Judge Julian Clyde-Smith said:

The defendant company received and held the proceeds of criminal conduct perpetrated by its controlling mind and beneficial owner, Samuel Gichuru. The company knowingly enabled Gichuru to obtain substantial bribes paid to him while he held public office in Kenya. The company played a vital role without which corruption on a grand scale is impossible: money laundering.<sup>36</sup>

Kenya and Jersey subsequently agreed to the return of stolen assets from Jersey to Kenya. On 11 December 2018, the governments of Kenya and Jersey signed an agreement, titled the Framework for Return of Assets from Corruption and Crime (FRACCK).<sup>37</sup> This was a significant

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28 *Barclays Wealth Directors (Jersey) Limited and Barclays Wealth Corporate Officers (Jersey) Limited Representors v Her Majesty's Attorney General* (2015) at para 5.

29 *Barclays Wealth Directors (Jersey) Limited and Barclays Wealth Corporate Officers (Jersey) Limited Representors v Her Majesty's Attorney General* (2015) at para 5.

30 *Chrysanthus Barnabus Okemo & another v Attorney General & 3 others* (2018) at para 3.  
31 UNODC (2015) at 151.

32 *Chrysanthus Barnabus Okemo & another v Attorney General & 3 others* (2018) at para 54.

33 Muraya (2019), available at <https://www.capitalfm.co.ke/news/2019/03/dpp-headed-to-jersey-in-pursuit-of-justice-in-okemo-gichuru-case/> (visited 7 April 2019).

34 Muraya (2019), available at <https://www.capitalfm.co.ke/news/2019/03/dpp-headed-to-jersey-in-pursuit-of-justice-in-okemo-gichuru-case/> (visited 7 April 2019).

35 *The Attorney General v Windward Trading Limited* (2016) at para 1.

36 *The Attorney General v Windward Trading Limited* (2016) at para 1.

37 Agutu (2018), available at <https://www.the-star.co.ke/news/2018-12-11-kenya-jersey-sign-pact-to-return-sh516m-graft-proceeds/> (visited 31 March 2019).

achievement for Kenya. It served as an example of how Kenya may use legal tools as restitution mechanisms for IFFs and proceeds of corruption.

### **3.3.2 African Union Convention on Preventing and Combating Corruption (AU Convention)**

Kenya became a State Party to the AU Convention on 17 December 2003.<sup>38</sup> The AU Convention plays an important role in curbing IFFs from Kenya. To begin with, the Convention defines corruption by giving examples of corrupt acts and practices.<sup>39</sup> This ostensive definition allows for the criminalisation of specific corrupt acts such as bribery, illicit enrichment, embezzlement of public funds and laundering of proceeds of corruption. As discussed in §3.2 above, criminalising corruption curtails the corruption component of IFFs.

The AU Convention also sets out specific measures which States Parties, like Kenya, should take to curb corruption. For instance, the Convention requires States Parties to establish and strengthen independent anti-corruption agencies.<sup>40</sup> Kenya has met this obligation by establishing the Ethics and Anti-Corruption Commission. Article 5(4) of the AU Convention requires States Parties to adopt measures to create and strengthen internal accounting, auditing and follow-up systems, particularly regarding public finances and procurement processes. The AU Convention also requires States Parties to implement measures that protect whistleblowers and witnesses of corruption.<sup>41</sup> These measures are important in curbing the corruption component of IFFs. Establishing anti-corruption agencies, for instance, sets up the institutional framework needed to curb corruption. Protecting whistleblowers and witnesses encourages citizens to report incidents of corruption.

Article 11 of the AU Convention seeks to prevent and combat acts of corruption and related offences in the private sector, and is particularly important in curbing IFFs from Kenya. Thus, Article 11(2) requires States Parties to establish mechanisms which encourage the private sector to participate in the fight against unfair competition and to respect tender procedures and property rights. And Article 11(3) requires States Parties to adopt measures which prevent

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38 African Union (2019), available at [https://au.int/sites/default/files/treaties/7786-sl\\_african\\_union\\_convention\\_on\\_preventing\\_and\\_combating\\_corruption.pdf](https://au.int/sites/default/files/treaties/7786-sl_african_union_convention_on_preventing_and_combating_corruption.pdf) (visited 12 December 2018).

39 Article 1 and Article 4 of the AU Convention.

40 Article 5(3) of the AU Convention.

41 Article 5(5)-(6) of the AU Convention.

companies from paying bribes in order to win tenders.

Article 12 highlights the importance of involving civil society and the media in the fight against corruption. This creates an enabling environment to hold governments to the highest levels of transparency and accountability in the management of public affairs. Like UNCAC, the AU Convention has specific articles on asset recovery and international co-operation.<sup>42</sup>

### **3.3.3 African Union Advisory Board on Corruption**

Article 22 of the AU Convention establishes the African Union Advisory Board on Corruption (AU Board). The AU Convention further stipulates the functions of the AU Board, which are to promote the adoption of anti-corruption measures in Africa, to advise governments on how to deal with corruption and related offences in their domestic jurisdictions, and to build partnerships with relevant stakeholders to facilitate dialogue in the fight against corruption and related offences.<sup>43</sup>

The AU Convention does not mention what role the AU Board should play in curbing IFFs. However, the AU Board can interpret the AU Convention innovatively. For instance, in interpreting Article 22(5)(b) & (c), the AU Board can collect and document information on the extent to which corruption has enabled the prevalence of IFFs in Africa and develop methodologies for curbing corruption. In fact, the HLP Report recommends that the AU should amend Article 22 of the AU Convention to allow it to: “Develop methodologies for analysing the nature and extent of illicit financial flows from Africa, and disseminate information and sensitise the public on the negative effects of illicit financial flows from Africa.”<sup>44</sup>

Article 22(5)(e) is also important to the AU Board as regards the curbing of IFFs. It provides that one function of the AU Board is to collect information and analyse the conduct and behaviour of multinational corporations operating in Africa and to disseminate such information to specified national authorities.<sup>45</sup> Multinational corporations are the main culprits when it comes to IFFs: instead of paying the taxes they owe in the countries in which they

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42 Articles 16 and 19 of the AU Convention.

43 Article 22(5) of the AU Convention.

44 HLP (2015) at 84.

45 Article 22(5)(e) of the AU Convention.

generate income, they shift every expense and cost to those countries and move the profits to their home countries. The AU Board therefore can play a crucial role in analysing the conduct of multinational corporations operating in African countries, including Kenya, and reporting any suspicious activity to the relevant national authorities.

The AU Board already has taken concrete steps to offer institutional support in curbing IFFs from African countries like Kenya. Its 2018—2022 Strategic Plan provides that under its approach of enhancing the legal framework to combat corruption, the AU Board will develop strategies to address the corruption component of IFFs.<sup>46</sup> The AU Board will implement these strategies through integrating IFFs into Article 22 (as proposed by the HLP), ensuring that the minimum number of States Parties ratify this amendment, and developing an IFF programme within the Secretariat of the Board.<sup>47</sup> The IFF programme will implement activities relating to the development of model laws around government procurement, the enhancement of public access to national budgets, and the promotion of public awareness activities aimed at detailing the economic, social and political impact of IFFs.<sup>48</sup>

### **3.4 Kenyan Anti-Corruption Laws and Institutions**

#### **3.4.1 Constitution of Kenya, 2010**

The Constitution of Kenya is the Supreme law of the country.<sup>49</sup> Any Kenyan law that contradicts the Constitution is void. It is also the source of all economic, political, social and legal policies and regulations.<sup>50</sup> The executive, the judiciary and the legislature cannot act against its provisions. The Constitution therefore forms an important basis of Kenya's anti-corruption laws and institutions.

Article 10 of the Constitution stipulates the national values and principles of governance to which state organs, state officers and public officers should adhere when interpreting national laws and implementing public policy decisions. These values are good governance,

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46 AU Board (2017) at 22.

47 AU Board (2017) at 29.

48 AU Board (2017) at 30.

49 Dragne (2013) at 40.

50 Dragne (2013) at 41.

integrity, transparency and accountability.<sup>51</sup> The national values and principles enshrined in Article 10 are prerequisites for implementing anti-corruption and anti-IFF measures in Kenya. Transparency is important to all anti-IFF efforts since the main goal of criminals is to hide wealth.<sup>52</sup> Good governance will discourage IFFs and render it difficult to make money through illicit business.<sup>53</sup>

Chapter Six of the Constitution aims at promoting good governance among state officers by prescribing the principles of leadership and integrity. Article 73 considers state officers to be bearers of the public trust who are accountable to the public.<sup>54</sup> One of the guiding principles of leadership and integrity is “objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices”.<sup>55</sup> Article 73 can be read with Article 232, which provides that the public service should operate according to high standards of professional ethics. These principles are key in reducing IFFs, since corrupt practices of state officers and the public service play a substantial role in facilitating IFFs from Kenya. The High Court of Kenya confirmed the importance of Chapter Six and, specifically, Article 73 in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others*. The Court held that:

The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations ... They desired these collective commitments to ensure good governance in the Republic will be put into practice.<sup>56</sup>

Chapter Six also prohibits state officers from receiving gifts or donations, from maintaining bank accounts outside Kenya (unless allowed by an Act of parliament), and from seeking or accepting personal loans or benefits that would compromise their integrity.<sup>57</sup> This provision is crucial in curtailing corruption, money laundering and other activities which facilitate IFFs. Maintaining a bank account outside Kenya, particularly in a tax haven, is one way in which

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51 Article 10(2)(c) of the Constitution.

52 HLP (2015) at 45.

53 HLP (2015) at 41.

54 Akech (2011) at 386.

55 Article 73(2)(b) of the Constitution.

56 *Trusted Society of Human Rights Alliance v Attorney General & 2 others* (2012) at 37.

57 Article 76 of the Constitution.

money illicitly flows out of Kenya. In 2016, the International Consortium of Investigative Journalists leaked a set of papers known as the *Panama Papers* which implicated 191 Kenyans in opening companies and bank accounts in Panama, a notorious tax haven.<sup>58</sup> Those named included the then Deputy Chief Justice, Kalpana Rawal. The *Panama Papers* alleged that during her tenure, Justice Rawal was the director of certain companies registered in Panama.<sup>59</sup> If the allegations are true, Justice Rawal would have contravened Article 76 of the Constitution.

Article 79 provides the legal basis for the establishment of the Ethics and Anti-Corruption Commission (EACC) as an independent body. It is imperative that the Constitution guarantees the independence of the EACC, since it is a prerequisite of an effective anti-corruption agency.

Article 244 of the Constitution provides that “one of the objectives of the national police service is to prevent corruption and promote and practise transparency and accountability”. We can interpret this provision in two ways. Firstly, the police are obligated to prevent corruption in the public domain. Secondly, the police are obligated to prevent corruption and promote transparency within the police force. The Kenya national police service is amongst the public institutions most affected by corruption.<sup>60</sup> This provision is important in curtailing IFFs since the police play a crucial role in prosecuting perpetrators of IFFs and recovering the lost funds. The role of the police is not limited to corruption-related IFFs. They also play an important role in arresting and prosecuting persons engaging in transnational crimes and facilitating corrupt activities.

Article 71 is an important constitutional provision on natural resource governance. The article specifies that Parliament should ratify agreements relating to the exploitation of any natural resources in Kenya. The HLP found that more than half of the IFFs from the continent (56.2 per cent) derive from the extractive industries, including mining.<sup>61</sup> Corruption plays a role in facilitating these IFFs. Grand corruption is evident in the awarding of mining rights, while

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58 ICIJ (2017), available at <https://www.icij.org/investigations/panama-papers/> (visited 20 August 2018).

59 ANCIR (2016), available at <https://panamapapers.investigativecenters.org/kenya/> (visited 15 October 2018).

60 Martini (2012) at 4.

61 HLP (2015) at 97.

petty corruption usually is observed amongst tax officials.<sup>62</sup> The HLP noted that the awarding of mining contracts is “shrouded in secrecy and fuelled by bribes to circumvent existing legal provisions for the payment of royalties and taxes”.<sup>63</sup> The constitutional requirement of parliamentary ratification of mining contracts is an important step in encouraging transparency in the awarding of mining rights and discouraging corruption and related IFFs in the extractive industry.

The Constitution identifies principles and values that will enhance anti-corruption mechanisms in Kenya. However, the Constitution alone will not promote good governance.<sup>64</sup> The necessary national laws aligned to its values and principles should support the Constitution.<sup>65</sup>

### **3.4.2 Anti-Corruption and Economic Crimes Act, 2003**

The Anti-Corruption and Economic Crimes Act (ACECA) is the main domestic law governing the prevention, investigation and punishment of corruption and other economic crimes in Kenya.<sup>66</sup> ACECA has an ostensive definition of corruption and economic crimes. The corruption offences prohibited are bribery, fraud, embezzlement of public funds, abuse of office, breach of trust, bid rigging, conflict of interest, soliciting benefits and dishonesty related to any tax levied under Kenyan law.<sup>67</sup> The economic crimes prohibited by ACECA are stipulated in Section 2 and Section 45. The limitation of the ostensive approach is that conduct not expressly prohibited is not considered corruption or an economic crime.

Despite this limitation, ACECA goes a long way in curbing corruption-related IFFs and limiting the role of corruption in enabling other IFFs. For example, Section 44, which criminalises bid rigging, and Section 45(2)(b), which criminalises wilful or careless failure to follow procurement and tender contracting, are important in reducing the use of unequal contracts. Unequal contracts are a harmful aspect of commercial IFFs, particularly in the

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62 OECD (2016a) at 9.

63 HLP (2015) at 31.

64 Akech (2011) at 394.

65 Akech (2011) at 394.

66 Preamble to ACECA.

67 Section 2 of ACECA.

extractive industry.<sup>68</sup> These contracts often result from bribes paid to public officers and involve the award of a resource concession that is substantially lower than the amount bid or, in the case of public procurement, overpaying for goods and services.<sup>69</sup> Also, Section 45(1)(d) criminalises failing to pay taxes or fraudulently obtaining an exemption to pay taxes. This provision is useful in limiting tax-related IFFs such as tax evasion.

Sections 27 and 28 of ACECA are also important in curbing IFFs from Kenya. Section 27(3) provides that:

the EACC may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.

Section 28(7) provides for production of specific records which are bank accounts, legal or business documents and correspondence that is not of a strictly personal nature. Adequate information on IFFs is key to curbing them. The HLP Report noted that it is difficult to acquire ample information about IFFs because the culprits take deliberate measures to hide them.<sup>70</sup> This section empowers the EACC to obtain information which may be vital in tracking IFFs and the culprits driving them.

ACECA also provides for the establishments of a number of institutions vital to implementing anti-corruption laws. Section 3 caters for the appointment of special magistrates to hear and determine cases of corruption and other economic crimes. Section 16 sets up the Kenya Anti-Corruption Advisory Board, the primary function of which is to advise the EACC.<sup>71</sup> Although the Board comprises representatives of key institutions relevant to reducing corruption, it lacks a representative of the Financial Reporting Centre, which plays an important role in preventing and curbing money laundering in Kenya.

Section 23(1) of ACECA provides that the secretary of the EACC, or a person appointed by the secretary, can investigate corruption and economic crimes. Specialised investigations are

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68 UNECA (2018) at 13.  
69 UNECA (2018) at 13.  
70 HLP (2015) at 3.  
71 Section 17 of ACECA.



important in the successful prosecution of corruption and related IFFs. Section 23(3) stipulates that:

the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.

This section enhances the effectiveness and efficiency of investigations into corruption and other economic crimes.

Section 65 of ACECA protects the identity of informers and shields them from disciplinary action. Informers, also called whistleblowers, expose corruption in the private and public sectors and help save billions of dollars in public funds while preventing future incidents of corruption. Protecting whistleblowers facilitates the reporting of corruption-related IFFs and assists in the successful investigation and prosecution of IFFs and related offences. Section 56 of ACECA stipulates the procedure of asset recovery. Asset recovery is important because corruption and IFFs are driven by the desire to make money.

The main shortcoming of ACECA is that it lacks the element of corporate criminal liability. Corporate criminal liability is vital in curbing IFFs. Multinational corporations are the main drivers of commercial IFFs. Kenya needs to amend ACECA and impose civil sanctions on multinational corporations which engage in corrupt activities while operating in the country.

### 3.4.3 Bribery Act, 2016

The Bribery Act is a relatively new law that came into force on 13 January 2017. The Act specifically provides for the prevention, investigation and punishment of bribery.<sup>72</sup> It focuses on bribery within private entities.<sup>73</sup> Section 2 of the Act describes a private entity as “any person or organisation, not being a public entity, and includes corporate bodies however established which carry on business, or part of business, in Kenya”. This section is important because it makes clear that the Act applies also to multinational corporations.

Section 9 is a progressive provision. It obligates directors or senior officers of public and private entities to put in place measures to prevent bribery in their organisations. The Act also imposes a duty on private and public persons holding a position of authority within their organisations to report to the EACC, within twenty four hours, any knowledge or suspicion of bribery.<sup>74</sup> The Act protects persons who report bribery, including whistleblowers and witnesses, from intimidation and harassment.<sup>75</sup>

This Act plays a crucial role in curtailing IFFs from Kenya. The HLP noted in its findings that corruption was not limited to the public sector.<sup>76</sup> The HLP Report remarked that:

there are both demand and supply sides to bribery, which is why the legislation in some developed countries against the giving of bribes by companies makes an important contribution to stemming corrupt practices in Africa.<sup>77</sup>

The Bribery Act is an example of such legislation.

### 3.4.4 Public Officer Ethics Act, 2003

The Public Officer Ethics Act aims at:

advancing the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers.<sup>78</sup>

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72 Preamble to the Bribery Act.  
73 Section 4 of the Bribery Act.  
74 Section 14(1) of the Bribery Act.  
75 Section 21 of the Bribery Act.  
76 HLP (2015) at 32.  
77 HLP (2015) at 32.  
78 Preamble to the Public Officer Ethics Act.

The Act stipulates that the public commissions responsible for the different public officers are required to establish specific Codes of Conduct and Ethics.<sup>79</sup> These public commissions include the Public Service Commission, the Judicial Service Commission, the Parliamentary Service Commission and the Committee of the National Assembly responsible for the ethics of members.<sup>80</sup>

For instance, the Judicial Service Commission has established the Judicial Service Code of Conduct and Ethics, 2003.<sup>81</sup> Rule 11(2) of the Code prohibits judicial officers from accepting any kind of benefit from corporations. It is evident, therefore, that these codes can be useful in curbing IFFs from Kenya by prohibiting corruption in the public service. They bind public officers to act ethically and can be a positive stimulus for non-corrupt conduct within the public sector. They can be used also as a basis for investigating and punishing unethical conduct.<sup>82</sup> Unfortunately, the Act only applies to public officers. However, these codes of ethics can be a useful anti-corruption tool in the private sector, particularly when adopted and applied by professionals such as accountants, auditors and lawyers who often provide technical and legal support to corrupt individuals, tax evaders and money launderers.

Section 14 of the Act prohibits public officers from furthering the interests of a foreign government, organisation or individual in a way that may be detrimental to the security interests of Kenya.<sup>83</sup> Public officers can further the interests of foreign organisations, such as multinational corporations, by allowing them to evade tax. IFFs are a threat to national security. They help organised gangs move and spend their illegal gains.<sup>84</sup> They are also integral to the financing of terrorism.<sup>85</sup> This section is therefore very important in prohibiting behaviour encouraging IFFs that may pose a threat to national security.

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79 Section 5(1) of the Public Officer Ethics Act.

80 Section 3 of the Public Officer Ethics Act.

81 Legal Notice 50 of 2003.

82 Illinois Institute of Technology (2018), available at <http://ethics.iit.edu/ecodes/codefunctions> (visited 20 October 2018).

83 Section 14(1) of the Public Officer Ethics Act.

84 Vittori (2018) at 38.

85 Vittori (2018) at 38.

Section 26 of the Act stipulates that “every public officer shall declare annually their income, assets and liabilities and that of their spouse or spouses and their dependent children under the age of 18 years”.<sup>86</sup> Assets declarations by public officials are a powerful anti-corruption tool that can deter and detect incidents of illicit enrichment.

From the above analysis, it is evident that the Public Officer Ethics Act is a crucial law in curbing IFFs facilitated by public officers.

### **3.4.5 Leadership and Integrity Act, 2012**

The Leadership and Integrity Act is an important anti-corruption law that codifies Chapter Six of the Constitution. Section 3 of the Act states that “the main purpose of the Act is to ensure that State officers respect the values, principles and requirements of the Constitution”.<sup>87</sup> An important provision of the Act is Section 37, which establishes leadership and integrity codes in the public sector in line with the Act and Chapter Six of the Constitution.

### **3.4.6 Public Procurement and Disposal Act, 2005**

The Public Procurement and Disposal Act is a law which:

establishes procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities.<sup>88</sup>

It governs procurement procedures in Kenya and ensures that there is transparency in these procedures. Public procurement is the main avenue through which the public sector and the private sector interact. According to the OECD, public procurement is one of the government activities that is most susceptible to corruption.<sup>89</sup>

Opaque government procurement and supply chains facilitate IFFs from Africa.<sup>90</sup> Part V of the Public Procurement and Disposal Act provides for open tendering which increases transparency within Kenya’s public procurement activities. Sections 40 & 41 of the Act also

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86 Section 26(1) of the Public Officer Ethics Act.

87 Section 3(1) of the Leadership and Integrity Act.

88 Preamble to the Public Procurement and Disposal Act.

89 OECD (2016b) at 6.

90 HLP (2015) at 83.

prohibit corruption and fraud within any procurement procedures. These provisions promote transparency, which help reduce IFFs.

### **3.4.7 Proceeds of Crime and Anti-Money Laundering Act, 2009**

The Proceeds of Crime and Anti-Money Laundering Act is an important tool in Kenya's effort to fight corruption as it ensures that corrupt proceeds are not beyond the reach of government authorities. Section 2 of the Act provides that a predicate offence for money laundering in Kenya is an offence against a provision of any law in Kenya. Corruption is an offence according to ACECA and therefore qualifies as predicate offence for money laundering.

## **3.5 Kenyan Anti-Corruption Institutions**

### **3.5.1 Ethics and Anti-Corruption Commission of Kenya**

The Ethics and Anti-Corruption Commission is an important regulatory body that enforces anti-corruption law and anti-IFF measures in Kenya. The Commission derives its powers from the Constitution, the Ethics and Anti-Corruption Commission Act (EACC Act) and ACECA.

An important power of the Commission is to undertake preventive measures against corrupt practices.<sup>91</sup> Efforts to curb IFFs should begin with preventive measures. One function of the Commission is to "raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption".<sup>92</sup> Members of the public have a responsibility to prevent public and private sector corruption.<sup>93</sup>

Article 252 of the Constitution empowers the Commission to conduct investigations on its own initiative or as a follow-up to a complaint made by a member of the public.<sup>94</sup> The EACC Act also provides for this power under Section 13(2)(c). In order to curb IFFs, it is important for the Commission to broaden its investigations beyond corruption cases. Investigations plays a crucial role in tracking IFFs and recovering the stolen money. However, investigating corruption is challenging task.

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91 Section 13(2)(b) of the EACC Act.

92 Section 11(1)(h) of the EACC Act.

93 Lashin (2014), available at <https://blogs.worldbank.org/arabvoices/citizens-are-key-fight-against-corruption> (visited 5 January 2018)

94 Article 252(1)(a) of the Constitution.

There is often no scene of the crime, no fingerprint, no eye-witness to follow up. It is by nature a very secretive crime and can involve just two satisfied parties, so there is no incentive to divulge the truth.<sup>95</sup>

However, the EACC Act and ACECA can mitigate this challenge. The EACC Act empowers the Commission to hire expert investigators to conduct its investigations.<sup>96</sup> The Commission should utilise this power to appoint experts who will focus on crimes related to IFFs. ACECA empowers the Commission to discontinue investigations or negotiate out-of-court settlements in criminal and civil proceedings in specific circumstances, such as when a suspect makes a full and true disclosure of all material facts relating to past corruption or economic crime and has paid or refunded any property or money obtained corruptly.<sup>97</sup> This will encourage suspects to assist in the investigation of corrupt conduct.

Section 32 of ACECA stipulates that the Commission has police powers. The section provides that:

the Secretary of the Commission and investigators shall have power to arrest any person for and charge them with an offence, and to detain them for an investigation, to the like extent as a police officer.<sup>98</sup>

The Commission provides institutional support in the recovery of assets lost through IFFs.

Section 11(1)(j) of the EACC Act empowers the Commission to:

institute and conduct proceedings in court for the recovery or protection of public property, or for the freeze[ing], or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.<sup>99</sup>

The Commission remains an important institution that the Kenyan government can use to curb IFFs. The former chairperson of the Commission, Mr Mumo Matemu, noted that the Commission already is implementing diverse strategies aimed at curbing and preventing IFFs.<sup>100</sup>

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95 Man-Wai (2009) at 140.

96 Section 13(2)(e) of the EACC Act.

97 Sections 26A and 56B of ACECA.

98 Section 32 of ACECA.

99 Section 11(1)(j) of the EACC Act.

100 Matemu (2013), available at <http://www.eacc.go.ke/PRESSRELEASES.ASP?ID=476&cat=speeches> (visited 30 January 2018).

### 3.5.2 Office of the Director of Public Prosecution

The Office of the Director of Public Prosecution (ODPP) is a constitutionally established office that is mandated primarily to exercise state powers of prosecution.<sup>101</sup> The EACC, although empowered to investigate and arrest persons suspected of corruption and other economic crimes, does not have prosecutorial powers. The EACC and the ODPP therefore need to work together to ensure that such cases are investigated and prosecuted. This co-operation is a two-way street. Section 11(1)(d) of the EACC Act provides that the EACC may recommend to the ODPP the prosecution of any acts of corruption, violations of codes of ethics and any other offences prescribed under Kenyan law. Equally, the ODPP Act (2013) stipulates, in Section 5(2), that the Director of the ODPP may direct an investigative agency (such as the EACC) to conduct investigations over a matter.<sup>102</sup>

The department of economic, international and emerging crimes within the ODPP deals specifically with corruption and other economic crimes.<sup>103</sup> This department also has divisions that deal with organised crime, extradition and international co-operation.<sup>104</sup> These divisions can play a crucial role in prosecuting IFFs resulting from transnational crimes. The ODPP has developed anti-corruption prosecution guidelines for prosecutors handling corruption cases, which enhances the efficiency of the ODPP in prosecuting corruption cases.<sup>105</sup>

The ODPP also reviews evidence of economic and financial crimes submitted by other investigative agencies, such as the Directorate of Criminal Investigations and the Banking Fraud Investigation Unit.<sup>106</sup> In 2016, the Directorate of Criminal Investigations conducted two inquiries relating to the alleged mismanagement of public funds meant for the Kenyan team that took part in the Rio Summer Olympic games.<sup>107</sup> Upon perusal, the ODPP found that one of the inquiries related to the offences of stealing and money laundering and therefore instituted

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101 Article 157(6) of the Constitution.

102 Section 5(2)(b) of the EACC Act.

103 ODPP (2016) at 10.

104 ODPP (2016) at 10.

105 ODPP (2017) at 12.

106 ODPP (2016) at 2.

107 ODPP (2016) at 2.

criminal proceedings against the suspects.<sup>108</sup>

### 3.5.3 The Judiciary

The role of the judiciary in fighting IFFs lies in deciding cases brought before it in accordance with the law. If the law is unclear, judges have the freedom to infer the original intentions of the legislators.<sup>109</sup> If the law is silent on the issue, judges refer to the general principles of law.<sup>110</sup> Deficiencies in legislative, regulatory and institutional frameworks impede the ability of African countries to curb IFFs.<sup>111</sup> Judicial precedents become an important source of law on IFFs where the law is absent or ineffective.<sup>112</sup>

The Kenyan Judiciary is committed to ensuring that all the anti-corruption and economic crimes cases brought before courts are dealt with impartially, expeditiously and in accordance with the law and the evidence presented.<sup>113</sup>

In 2015, the then Chief Justice of Kenya, Justice Willy Mutunga, established the Anti-Corruption and Economic Crimes Division of the High Court to adjudicate all disputes relating to corruption and other economic crimes.<sup>114</sup>

### 3.5.4 Parliament of Kenya

The Parliament of Kenya is a constitutionally established body that comprises the National Assembly and the Senate.<sup>115</sup> Parliaments have three broad functions: legislative, oversight and representative. Parliament uses its legislative function to ensure that there are strong laws in place to curb corruption and other economic crimes. This role involves promoting the ratification and domestication of regional and international instruments, such as UNCAC and the AU Convention.

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108 ODPP (2016) at 2.

109 Amiraghdam *et al* (2016) at 58.

110 Amiraghdam *et al* (2016) at 58.

111 HLP (2015) at 71.

112 See Amiraghdam *et al* (2016) at 64: "The role of jurisprudence cannot be ignored and, in a sense, judicial decisions are the source of life in the law."

113 Maraga (2018), available at <https://www.judiciary.go.ke/7582-2/> (visited 2 February 2019).

114 The Kenya Gazette Notice No 9123.

115 Article 93(1) of the Constitution.



The Parliament of Kenya uses its oversight role to hold the government accountable for its actions and to ensure that the government operates within an ethical, transparent and accountable legal framework.<sup>116</sup> Parliament exercises this function through holding regular parliamentary hearings, participating in budgetary processes, operating oversight committees and exposing parliamentarians guilty of corruption.<sup>117</sup> The oversight role of parliament should extend to the industries that are particularly susceptible to IFFs, such as the extractive industry. Moreover, this role should not be limited to the government. It should extend to the judiciary and the private sector.

In fulfilling their representative responsibility, members of parliament need to promote ethical standards and adhere to the highest standards of integrity. This will go a long way in restoring the faith of the citizens in an institution perceived as one of the most corrupt in many parts of the world.<sup>118</sup>

Members of the Kenyan Parliament also have a responsibility to engage parliamentarians in other regions, since IFFs are a regional problem that requires a regional approach to eliminate it. The Kenyan Parliament has representatives in the African Parliamentary Network on Illicit Financial Flows and Tax (APNIFFT) and the African Parliamentarian Network against Corruption (APNAC). These fora provide members of parliament with opportunities to discuss issues of IFFs and corruption and enhance their capacity and knowledge to make substantive laws.

### **3.5.5 Asset Recovery Agency**

The Asset Recovery Agency (ARA) is a semi-autonomous body established under the office of the Attorney-General.<sup>119</sup> Its main functions relate to the implementation of Parts VII to XII of the Proceeds of Crime and Anti-Money Laundering Act, which encompass criminal forfeiture, civil forfeiture, preservation and forfeiture of property, production orders, the criminal assets

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116 Chêne (2017) at 3.

117 Chêne (2017) at 3.

118 Transparency International (2017b) at 5.

119 Section 53 of the Proceeds of Crime and Anti-Money Laundering Act.

recovery fund and international assistance in investigations and proceedings.<sup>120</sup>

The Act provides that “the Agency shall have all the powers necessary or expedient for the performance of its functions” but does not specify what those powers are.<sup>121</sup> The ARA is an important institution in curbing IFFs from Kenya as it seeks to ensure that stolen assets are repatriated to the country.

### **3.5.6 Multi-Agency Task Team**

The Multi-Agency Task Team (MAT) was established in November 2015 and is composed of representatives of the ODPP, the Ethics and Anti-Corruption Commission, the National Intelligence Services, the Kenya Revenue Authority, the Directorate of Criminal Investigations and the ARA, amongst others.<sup>122</sup> The primary aim of MAT is to investigate and prosecute corruption and other economic crimes in Kenya through inter-agency co-operation amongst institutions in the criminal justice system, the anti-corruption commission and the tax and revenue authority. MAT focuses on corruption and other economic crimes, organised crimes and criminal syndicates.<sup>123</sup> Inter-agency co-operation is an important approach in the fight against IFFs. The HLP Report recommends that:

African States should create methods and mechanisms for information sharing and co-ordination among the various institutions and agencies of government responsible for preventing IFFs, with such co-ordination being led by the country’s financial intelligence unit.<sup>124</sup>

### **3.6 Conclusion**

Efforts to curb IFFs from Kenya must focus on establishing strong, responsive and effective laws and institutions that encourage citizens and companies to engage in legal activities. The lack of specific international and national laws on IFFs should not be an impediment to curbing IFFs. This chapter has discussed how Kenya may use a multi-pronged approach, centred on anti-corruption laws and institutions, to curb IFFs and repatriate stolen assets. Anti-corruption laws may be used to prevent corruption and criminalise corrupt acts which facilitate IFFs. Anti-

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120 Section 54(1) of the Proceeds of Crime and Anti-Money Laundering Act.

121 Section 54(2) of the Proceeds of Crime and Anti-Money Laundering Act.

122 ODPP (2016) at 4.

123 ODPP (2016) at 4

124 HLP (2015) at 82.

corruption laws may be used also to curb the commercial and criminal component of IFFs. Anti-corruption institutions ensure that anti-corruption laws are implemented. The role played by the different anti-corruption institutions in curbing IFFs include investigation, prosecution, adjudication and repatriation of stolen assets. This chapter has noted also the importance of an inter-agency approach to curbing IFFs since IFFs are a multifaceted problem.

However, without an effective implementation strategy, these laws and institutions are useless. Corruption is still the greatest threat to implementation of anti-corruption laws. It weakens law enforcement agencies and institutions charged with implementing anti-corruption efforts. As discussed by Ayogu & Gbadebo-Smith, “anti-corruption laws and institutions are entrapped in the virtuous and the vicious cycle between good governance and corruption”.<sup>125</sup> Strong laws and institutions enable anti-corruption efforts, but corruption also weakens the legal system.<sup>126</sup> According to Sandgren, “a weak legal system encourages the use of informal law which is a breeding ground for corruption”.<sup>127</sup> Thus, efforts to curb corruption in Kenya should focus also on changing public perceptions and behaviour. A shift in attitude is a long-term process which involves inculcation of public confidence in the rule of law through educational initiatives and media discussions on anti-corruption efforts.

Lastly, those seeking to curb IFFs and corruption should take care not to focus solely on the role of anti-corruption laws. Sandgren notes that there are laws such as those that provide for transparency, accountability, checks and balances, tax reforms, a merit-based system for officials, privatisation and competition law which have no direct bearing on corruption but are necessary elements for reducing the risks of corruption.<sup>128</sup>

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125 Ayogu & Gbadebo-Smith (2015) at 296.

126 Sandgren (2005) at 724.

127 Sandgren (2005) at 724.

128 Sandgren (2005) at 726.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

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#### 4.1 Conclusion

This paper has discussed the role of anti-corruption laws and institutions in curbing IFFs from Kenya. Taking direction from the HLP Report on IFFs from Africa, this study found that abusive commercial practices, criminal activities and corruption are the main sources of IFFs from Kenya. Abusive business practices such as tax avoidance, tax evasion, transfer mispricing and trade misinvoicing have led to substantial illicit outflows from Kenya, which have diverted resources away from the country's sustainable development goals. Criminal activities in Kenya contribute significantly to IFFs because criminals intend to hide their illegal profits from law enforcement agencies.

This paper has paid particular attention to the relationship between corruption and IFFs. In order to analyse this relationship, the paper began by examining the different approaches to defining IFFs and discussing the normative, legalistic, developmental and the "no definition" approaches. It was also important to distinguish IFFs from related concepts, such as illicit finance, capital flight, money laundering and informal flows. The study found that there is no agreed definition of IFFs. The lack of theoretical clarity on what comprises IFFs poses a challenge not only for understanding the concept of IFFs but also for estimating the volume of assets Kenya is losing to IFFs. Proper definition is key to understanding IFFs, their effects on development and, ultimately, the most appropriate measures for curbing them. The paper adopted the normative approach to defining IFFs which recognises that illicitness is not synonymous with illegality. The paper further endorsed definitions that have a broad outlook on the adverse effects of IFFs.

On the relationship between corruption and IFFs, this study found that there exists a causal nexus between the former and the origins, growth and consequences of the latter. This finding confirmed the main hypothesis of the paper: that corruption plays an overarching role in facilitating IFFs. Corruption is a source of IFFs. Proceeds of corrupt acts, such as

embezzlement, grand corruption and bribes, make up some of the illicit funds that criminals transfer out of a country. Corruption facilitates abusive commercial practices by lowering the chances of detection and increasing prospective returns. MNCs bribe tax authorities, lawyers, auditors and accountants to ensure that the public is not aware of the illicit commercial practices. Corruption remains a key catalyst of transnational criminal activities. Transnational crime is driven by the need to make illegal money. Corrupt acts ensure that criminal networks engage in illegal activities without interference from law enforcement agencies. Lastly, corruption impedes the implementation of anti-corruption and anti-IFF measures, which further frustrates any efforts to curb IFFs from Kenya. It is clear, therefore, that corruption and IFFs together pose a fundamental challenge to domestic resource mobilisation, weaken good governance structures, erode public trust in government institutions, and undermine international confidence in Kenya.

This paper then considered what role anti-corruption laws and institutions can play in curbing IFFs from Kenya. It found that Kenya has a laudable legal and institutional anti-corruption framework. The country has ratified UNCAC and the AU Convention. It also has enacted several laws that directly or indirectly assist in the country's anti-corruption and anti-IFF efforts. These laws play an important role in curbing IFFs since there is no specific international or national law on IFFs. The study established that anti-corruption laws help to curb IFFs by preventing corruption, criminalising corrupt acts, assisting in the recovery of stolen assets, and setting up structures that support international co-operation. It is important to note that this study does not limit the role of anti-corruption laws to the corruption component of IFFs. Anti-corruption laws have provisions that can be used directly or indirectly to curb the commercial and criminal components of IFFs. Lastly, anti-corruption laws provide the legal foundation for institutions that help implement the laws and anti-IFF strategies.

This study has shown that, despite Kenya having an extensive anti-corruption legal framework, the incidence of corruption remains high in the country. The study highlighted some key challenges to Kenya's efforts to curb IFFs using the existing legal and institutional frameworks. Firstly, IFFs remain a complex problem that is still subject to debate among experts regarding its conceptualisation. The complexity is occasioned by the fact that IFFs are caused by

a variety of factors and influenced by a mosaic of actors who have interests varying from running seemingly legal profit-making transactions to obvious illegal ventures.

Secondly, and closely related to the complexities of defining IFFs, are the difficulties in estimating the precise volumes of IFFs from Kenya. The HLP Report noted:

The difficulties in estimation arise from the very nature of IFFs, which by definition are mostly hidden and therefore difficult to track. As a result, data are not usually available nor can the accuracy of existing data be easily verified due to additional and well-known difficulties of generating good statistics on the continent.<sup>1</sup>

The challenge of estimating the volumes of IFFs from Kenya becomes even more serious when one attempts to assess the volumes lost because of corruption. For instance, one of the research limitations of this study is the lack of empirical data relating to corruption among multinational corporations, which suggests significant under-reporting of this crime. It is no wonder that most people across Africa argue that the volumes of IFFs related to corruption are far higher than the projected five per cent in the HLP Report.<sup>2</sup>

Thirdly, corruption remains the main primary impediment to implementing anti-corruption laws. The vicious cycle between decline of good governance and corruption undermines the efficiency of anti-corruption laws and institutions.<sup>3</sup>

The lack of capacity of anti-corruption institutions to implement anti-corruption laws is the fourth challenge to curbing IFFs from Kenya. IFFs are a complex problem that requires adequate financial, technological and human capacities to confront and curb. Unfortunately, Kenyan anti-corruption institutions are not equipped adequately to curb IFFs. The EACC, for instance, lacks the required human resources capacity to fulfil its mandate.<sup>4</sup> The HLP Report also highlights this challenge, noting that:

the incapacities of African countries to combat IFFs was reflected at various levels such as the lack of accurate data and up-to-date information, inadequate understanding of the various mechanisms used, and absent or ineffective legislative, regulatory and institutional frameworks.<sup>5</sup>

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1 HLP (2015) at 32.

2 HLP (2015) at 32.

3 Ayogu & Gbadebo-Smith (2015) at 296.

4 Odhiambo (2016) at 50.

5 HLP (2015) at 71.

Lastly, the absence of political commitment to curb IFFs from Kenya has affected negatively the efficiency of anti-corruption laws and institutions. This study has highlighted several corruption scandals that involve key political figures in Kenya. Sadly, investigations and prosecutions of most of these scandals remain pending. Law enforcement agencies cite political interference as one of the main reasons why these corruption cases have not been concluded.

## **4.2 Recommendations**

### **4.2.1 Strengthen Anti-Corruption Laws**

Law is one of the most effective means of curbing IFFs from Kenya. Strong laws make it difficult for criminals and rogue MNCs to move funds illicitly and hide these funds from authorities. Anti-corruption laws should focus on curbing IFFs through prevention, criminalisation and facilitating asset recovery and international co-operation. They also should form a strong foundation for the institutions tasked with implementing them.

This paper recommends that Kenya should assess its anti-corruption laws and identify any shortcomings that may limit the ability of these laws to curb IFFs. For instance, Parliament should amend ACECA to include elements of corporate criminal liability, which is important in curbing IFFs within the private sector. Parliament should engage experts when amending these laws or drafting new laws to ensure that there are no loopholes that criminals may abuse.

The government should domesticate the hortatory provisions of UNCAC, especially those that are important in curbing IFFs. For instance, Article 12 of UNCAC, which provides for preventive measures within the private sector, ought to become part of Kenyan law. Domestication ensures that the provisions of UNCAC become locally applicable and enforceable.

Further, the government should focus on developing soft laws, such as codes of ethics, for the public and private sectors. Soft laws are important in establishing consensus on issues and serve as an important first step in the codification of norms. In particular, this paper recommends that the government encourage professional bodies, such as those in charge of accountants, auditors and lawyers, to develop codes of ethics for their members. An example of

such a code is the Pan-African Lawyers Union Code of Ethics on Anti-corruption and Professional Compliance Standards for Lawyers Working in Africa.<sup>6</sup>

#### **4.2.2 Enhance the Capacity of Anti-Corruption Institutions**

This paper recommends the strengthening of anti-corruption institutions to ensure that they properly implement anti-corruption laws. This involves increasing the financial, human and technical resources available to these organisations to enable them to deal with crimes related to IFFs. Also, anti-corruption institutions should focus on enhancing the technical capacity of their staff members in the areas of financial investigation, record keeping and data analysis.

The government should broaden the mandate of some anti-corruption institutions. This will ensure that they can deal appropriately with a broad range of crimes related to IFFs. For instance, the mandate of the EACC should be expanded to include prosecutorial powers so it can prosecute IFFs related to corruption. The government also should merge anti-corruption and anti-money laundering measures to avoid duplicating the mandate of anti-corruption institutions and to ensure optimum utilisation of resources.

Institutions and individuals seeking to curb IFFs should engage the courts. This study has shown that some IFFs from Kenya already violate existing anti-corruption laws. Courts are important anti-corruption institutions which provide legal recourse for these violations. A good example in this regard is the recent decision of the High Court of Kenya to nullify Kenya's Double Tax Avoidance Agreement with Mauritius because it was unconstitutional.<sup>7</sup> Courts also could provide legal guidance on the contentious issues relating to IFFs, for instance, by guiding anti-corruption institutions on the most appropriate definition of IFFs, based on the country's laws and judicial precedents.

This study recommends also that the government should broaden the mandate of the multi-agency task team. IFFs are a multifaceted problem that requires a multi-pronged approach and inter-agency co-operation among institutions in the criminal justice system, the

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6 Pan-African Lawyers Union (2019), available at <https://lawyersofafrica.org/po/code-of-ethics/> (visited 7 April 2019).

7 *Tax Justice Network- Africa v Cabinet Secretary for National Treasury & 2 others* [2019] at para 43.



anti-corruption commission, and the tax and revenue authority. This would ensure that the government utilises the strengths of the various institutional mandates jointly to investigate and prosecute crimes related to IFFs and recover stolen assets.

#### **4.2.3 Build Structures that Promote International Co-operation**

Co-operation with foreign bodies and governments is key to curbing IFFs from Kenya. Kenya should utilise the provisions of UNCAC and other laws on international co-operation, focusing specifically on regulatory, investigative and asset recovery mechanisms. As proposed by Chowla & Falcao, Kenya should sign bilateral and multilateral agreements with different governments to enhance the level of co-ordination amongst the different institutions in the different jurisdictions.<sup>8</sup> International co-operation will mitigate the hurdles that anti-corruption institutions face when seeking information from foreign jurisdictions. Moreover, these institutions can obtain easily the technical help and logistical support they need to curb IFFs effectively.

#### **4.2.4 Enhance Public Participation**

Kenya can implement anti-corruption laws successfully if the government engages non-state actors such as civil society, the media, the private sector and the citizenry. Non-state actors can endorse or discredit reports issued by anti-corruption institutions. This would help in exposing the corruption impeding the efficiency of these institutions. More importantly, non-state actors can create political will among politicians and leaders to care about the consequences of IFFs.

As Ayogu & Gbadebo-Smith note:

Politicians do not create political will. They respond to it. It is the governed or those who consent to be governed who should align the political fortunes of the policy makers to the consequences of IFFs.<sup>9</sup>

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8 Chowla & Falcao (2016) at 3.

9 Ayogu & Gbadebo-Smith (2015) at 296.

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