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ILLICIT FINANCIAL FLOWS, THE REASON AFRICA IS DEBTOR TO THE REST OF THE WORLD.

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ABSTRACT

Multinational companies engaging in commercial transactions or activities are responsible for 60% to 65% of illicit Financial Flow that leave Africa. Although on average Africa experienced a 5% annual economic growth for the last decade, the problem is, Africa experiences huge challenges to use domestic resources for investments. GFI estimated that trade mis-invoicing makes up the largest portion of illicit financial flows. The problem is that the global legal system aimed at tackling illicit financial flows is based on the idea that the issue should be addressed by the domestic courts. This idea is not practical since illicit financial flows consist of the acquisition and the cross-border transfer of funds. The objective of this study is to explore the magnitude and manner in which trade mis-invoicing contributes to illicit financial flows and provide a solution to such problem. The study objectives will be achieved by researching the most recent data from domestic and international sources. The findings of this study indicates that the Malabo Protocol, which is a regional instrument offers the most practical solution for the illicit financial flows from Africa.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The citizens of many African countries live below the bread line.[1] Poverty has eaten into the African continent for decades, which has caused serious concern on the continent and globally.[2] The effects of poverty are multiple: it limits access to basic services such as to sanitation and water, housing, healthcare and education.[3] International poverty lines is defined by citizens who live on less than1.25 US Dollars a day.[4] Estimates indicate there has been a substantial increase in the number of African citizens living on less than $1.25 a day, from 290 million in 1990 to 414 million in 2010.[5]

Over the past 30 years, illicit financial flows (IFF) amounting to approximately $1.4 trillion left Africa.[6] IFF consist of the acquisition and the cross-border transfer of funds from developing countries like Africa to developed countries in the West.[7] The HLP defines IFF as "money illegally earned, transferred or used".[8] In contrast to the perception that 'the West', despite constantly providing financial support to the African continent in the form of foreign aids and assistance by the private sector, has not received any significant return, the amount of IFF from Africa is equal to approximately all the official development assistance provided to the Continent for the same time period.[9]

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[1] 'Poverty in Africa- The Indicators' available at *https://www.sos-usa.org/about-us/where-we-work/africa/poverty-in-africa*, accessed on 1 July 2020.
[2] United Nations Economic Commission for Africa *Track It! Stop It! Get it! - Illicit Financial Flows* (2015) 13.
[3] Ibid.
[4] 'Poverty in Africa- The Indicators' available at *https://www.sos-usa.org/about-us/where-we-work/africa/poverty-in-africa*, accessed on 1 July 2020.
[5] United Nations Economic Commission for Africa (note 2 above;13).
[6] M Tafirenyika 'Illicit Financial Flows from Africa: track it, stop it, get it' available at https://www.un.org/africarenewal/magazine/december-2013/illicit-financial-flows-africa-track-it-stop-it-get-it, accessed on 1 July 2020. Others estimate similar amounts over a fifty-year period. United Nations Economic Commission for Africa (note 2 above; 13).
[7] United Nations Economic Commission for Africa (note 2 above; 15).
[8] Ibid
[9] M Tafirenyika (note 6 above).

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol') was adopted on 27 June 2014.[10] The Malabo Protocol endeavours to create the first African court that is vested with the authority to preside over human rights, international criminal law and general international legal disputes.[11] It is also designed to improve continental, sub-regional and national bodies, and institutions in ending grave and immense human rights violations in Africa through, inter alia, the prosecutions of transgressors for the offences that are contained in the statute annexed to the agreement.[12] From the 55 African Union (AU) member states only 11 have currently signed the Malabo Protocol.[13] In terms of the provisions in Article 11 of the Malabo Protocol and AU treaty, fifteen such ratifications are essential for the treaty to enter into force.[14]

Domestic legislation is not adequate or sufficient to deal with the prosecution of such matters.[15] However, the Malabo Protocol criminalises money laundering and corruption under Article 28A.[16] This paper aims to show that, even though IFF is not explicitly recognised as a crime in the Malabo Protocol, Article 28A can be used by the African court to prosecute IFF. As such, the Malabo Protocol offers a unique Continental solution that might be used to combat IFF.

1.2 ILLICIT FINANCIAL FLOWS OUT OF AFRICA

According to the president of Global Financial Integrity[17] (GFI), Raymond Baker, and contrary to popular belief, Africa has proved to be a net creditor to the outside world for decades.[18] Professor Mthuli Ncube, vice-president and chief economist maintains that Africa is rich in resources, therefore with good management and conservation of these resources, Africa can build a strong economic platform to fund its own

[10] See CC Jalloh, KM Clarke & VO Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context* (2019) xix.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] United Nations Economic Commission for Africa (note 2 above; 51).
[16] Article 28A Malabo Protocol.
[17] Global Financial Integrity is a non-profit organisation which is based in Washington, DC, producing high-calibre analyses of illicit financial flows, advising developing country governments on effective policy solutions, and promoting pragmatic transparency measures in the international financial system as a means to global development.
[18] M Tafirenyika (note 6 above).

development.[19] Although on average Africa experienced a 5% annual economic growth for the last decade, Africa is currently experiencing huge challenges to use domestic resources for investments.[20] It is evident that deep rooted and highly complex practices have caused devasting impact, which are intentionally excluded from news headlines.[21] The African Development Bank (AfDB) and GFI reported that the illicit removal or exportation of resources from Africa amounts to approximately 4 times the current debt Africa owes externally. [22]

The work and contribution of GFI strongly influenced the United Nations Economic Commission for Africa (UNECA) and the AU to establish a High-Level Panel (HLP), which focused specifically on matters relating to IFF out of the Continent of Africa.[23] The HLP, chaired by the former President of South Africa Thabo Mbeki, estimated that this practice contributed to approximately $50 billion of IFF from the African Continent.[24] These figures were fundamental and influential factors in the discussions that encouraged IFF to be included the Sustainable Development Goals (SDG).[25]

According to Forstater, the problem of IFF were "incorporated in the SDGs in 2015, under target 16.4, to primarily focus on substantially reducing IFF".[26] Notwithstanding this, on a global level there is no agreement on the definition of illicit financial flows, and there is substantially less consensus in respect of measuring IFF.[27] The aspect of IFF which the HLP is concerned with is that of hidden flows, intentionally hiding or masking the prohibited source of capital and/or such unlawful type of transactions carried out.[28]

Criminals engaging in activities of a cross border nature, perpetrators engaging in money laundering, persons that pay bribes, individuals that take bribes, and those

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] M Forstater *Illicit Financial Flows, Trade Mis invoicing, and Multinational Tax Avoidance: The Same or Different?* (2018) 11.
[24] M Tafirenyika (note 6 above).
[25] Ibid.
[26] M Forstater (note 24 above; 2).
[27] M Forstater (note 24 above; abstract page i).
[28] United Nations Economic Commission for Africa (note 2 above; 106).

involved in tax evasion tend to hide illicit operations between real business operations.[29] Commodities like jewellery, diamonds, gemstones and gold and are simple to bring in or take out of a country, whereas commodities such as oil can be misreported or easily stolen.[30] The perception that such IFF of this nature can be consistently identified with simple calculations by making use of data that is available to the public seems unjustifiably optimistic.[31] By its very nature, hidden flows cannot be accurately measured.[32] Nevertheless, the risks that is associated with the flow of funds that comprises of a hidden component, is likely to be examined more accurately.[33]

The working definition that is most commonly used for IFF lean towards the central idea of "financial transfers across borders that are in some way related to illegal activity".[34] The definition basically means "the flows of money are in violation of laws in their origin, or during their movement or use, and are therefore considered illicit".[35] IFF has been categorised into the three components by the HLP, namely, corruption, criminal activities and commercial activities.[36] The commercial component of IFFs occurs within the context of business-related activities.[37] IFF related to the commercial component has serious implications because it is anticipated that this sector should participate in activities of a productive nature, job creation, and convey technological and managerial skills.[38]

GFI estimated that criminal actions such as embezzlement and bribery contribute to approximately more than 2% of IFF, whilst unlawful practices involving the smuggling and trafficking of drugs make up 30% - 35% and multinational companies engaging in commercial transactions or activities contribute to majority of the illicit financial flows- 60% to 65%.[39] The HLP and other experts in the field have gathered evidence which

[29] M Forstater (note 23 above; 25).
[30] Ibid.
[31] Ibid.
[32] United Nations Economic Commission for Africa (note 2 above; 106).
[33] Ibid.
[34] M Forstater (note 23 above; 4).
[35] United Nations Economic Commission for Africa (note 2 above; 23).
[36] United Nations Economic Commission for Africa (note 2 above; 24).
[37] Ibid.
[38] Ibid.
[39] M Tafirenyika (note 6 above).

indicates that multinational corporations/companies (MNC) are responsible for the bulk of the illicit financial flows from Africa.[40] Customs agencies stated that medium and small business enterprises are similarly involved in IFF, which is frequently achieved by mis-invoicing of importations and exportations.[41] To reduce customs duties, these enterprises occasionally under-invoice imports and over-invoice exports in order to receive a benefit that is presented by export incentives.[42] "However, the HLP consider that such enterprises belong to the informal sector and are the primary victims of aggressive tax avoidance and tax evasion by large corporations, since they carry the consequence of the tax burden".[43]

Even though it was assessed by the World Trade Organization (WTO) that the value of merchandise trade at a global level was approximately US$18 trillion in 2017, on a yearly basis under 2% of the total shipping containers are examined to confirm the accuracy of invoices for customs purposes, offering a readily available channel for illicit activity.[44] This additionally signifies that the opportunities for trade mis-invoicing have also expanded since the extent of global trade has increased in recent decades.[45] GFI estimated that trade mis-invoicing makes up the largest portion of illicit financial flows.[46]

According to Nitsch, the growing attention on the mis-invoicing of international trade transactions are due to the following three reasons:

1) On average international commerce makes up a substantial portion of the nation's Gross Domestic Product (GDP),
2) In principle, mis invoicing of global trade transactions appears easier to detect due to the fact that mirror statistics exist,
3) Trade mis-invoicing is a significant tool to shift unrecorded wealth or money from a particular country".[47]

[40] M Forstater (note 23 above; 3).
[41] United Nations Economic Commission for Africa (note 2 above; 37).
[42] Ibid.
[43] Ibid.
[44] Global Financial Integrity *Trade-Related Illicit Financial Flows in 135 Developing Countries: 2008-2017* (2020) 6.
[45] Ibid.
[46] M Forstater (note 23 above; 10).
[47] V Nitsch *Trade Mis invoicing in Developing Countries* (2017) 1.

The main purpose of mis-invoicing is to divert financial resources.[48] Trade mis-invoicing remains to be the primary reason that developing countries experience a substantial drain on domestic tax bases, restricting countries from utilising domestic resources in order to achieve the SDG targeted for 2030 and additional inexhaustible growth initiatives at a national level.[49] Trade mis-invoicing exists as a type of fraud within the customs and/or tax environment, that involves export and import traders who intentionally misrepresent the amount, number, or type of goods or services in a business deal.[50]

Evaluated by means of their influence on the general trade statistics on a state, four categories of trade mis-invoicing can be distinguished: (1) over-invoicing as a result of exportations, (2) under-invoicing as a result of exportations, (3) under-invoicing as a result of importations, and (4) over-invoicing as a result of importations.[51] Individual categories of mis-invoicing are noted in practical situations and recorded by both unconfirmed data and empirical findings.[52] The over-invoicing of exports was identified as a common practice in economies that intend to encourage exportations by providing them with fiscal incentives.[53] Under invoicing of exportations allows fraudulent traders to avoid restriction that are imposed on exports.[54] Although it is risky, traders regard it as beneficial to under declare the value of the commodity and to provide false information on official trade documentation at a significantly larger extent.[55] Import over-invoicing is mostly detected in commodity categories with low or zero import tariffs.[56] Importers increase import expenditures, overpay foreign exporters and request for the excess funds to be diverted to a tax haven or a bank in developed country.[57] Reducing outflows will result in strengthening of domestic resource mobilisation and enhance economic activity, which will increase economic growth and draw more investment.[58]

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[48] African Monitor *State of illicit financial flows in South Africa* (2017) 4
[49] Global Financial Integrity (note 44 above;45).
[50] M Forstater (note 23 above;10).
[51] V Nitsch (note 47 above; 2).
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] African Monitor (note 51 above; 4).
[58] African Monitor (note 51 above; 12).

GFI used a method that is built on the computation of gaps and disparities found in trade data, to determine that mis-invoicing cause approximately $800 billion loss to developing countries annually.[59] GFI's "gross excluding reversals" methodology was reviewed by Volker Nitsch and he concluded that the quantifiable results which GFI presented lacks practical meaning, therefore, the remarks that illegal movement of currency from emerging nations totalled $1 trillion in 2012 cannot be substantiated by evidence and remains unconfirmed.[60] The UN and International Monetary Fund (IMF), whose information these findings depend on, caution against the steadfast use of these figures in such manner.[61] The IMF advise not to attempt measuring illicit flows with placing reliance on inconsistencies that are present in the economics of aggregates dataset.[62] Also, it will not be possible to establish the conclusive estimations of trade mis-invoicing by converting trade figures that appear in the UN COMTRADE and/or IMF Trade Statistics, either in total or by individual country.[63] According to the World Customs Organisation, mirror trade analysis can be utilised as an instrument to calculate risk that detect possible occurrences relating to mis-invoicing, however such detections of mirror analysis require varication through studies in the natural environment or comprehensive review of document before they lead to assumptions of fraud.[64]

Owing to the magnitude, IFF will at some time move through the formal banking and financial system.[65] From a number of asset recovery cases it has become apparent that banks which are located internationally, occasionally facilitate IFFs subsequent to acquiring knowledge that such funds are the proceeds of crime.[66] Even though there is an obligation on banking institutions to submit suspicious transactions reports, such obligation has been frequently neglected in certain jurisdictions, where the transactions originate from small, rural branches. In fact, banks at times intentionally create structures to enable IFF to shift to territories that support financial secrecy.[67]

[59] M Forstater (note 23 above; 11).
[60] V Nitsch *Trillion dollar estimate: Illicit financial flows from developing countries* (2016) 15.
[61] M Forstater (note 23 above;18).
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] United Nations Economic Commission for Africa (note 2 above; 37).
[66] Ibid.
[67] Ibid.

Secrecy jurisdictions are specific global locations that are protected in terms of national law to keep banking or financial information private in most circumstances.[68] A legal structure is created especially for the benefit of non-residents in these jurisdictions.[69] Individuals or entities involved in IFF may focus their efforts in preventing authorities in the country of origin from identifying them and therefore direct the flow to a secrecy jurisdiction.[70]

According to GFI, all currency that departs from a territory inevitably find its way to a different jurisdiction.[71] Frequently, such movement or transfer signifies IFF that leave from emerging economies eventually arrive at banking institutions in first world nations, including countries like the British Virgin Islands, Singapore and Switzerland, which are regarded as tax havens.[72] An occurrence of this nature cannot be attributed to chance.[73] Several jurisdiction and their organizations enable and obtain significant returns from the investment of enormous sums of currency from emerging economies.[74] The extensive incidence of IFF in Africa is a clear indication that a governance problem exists, which is the result of weak institutions and inadequate regulatory environments.[75]

[68] United Nations Economic Commission for Africa (note 2 above; 9).
[69] Ibid.
[70] United Nations Economic Commission for Africa (note 2 above; 10).
[71] Global Financial Integrity (note 44 above; 12).
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] United Nations Economic Commission for Africa (note 2 above; 51).

1.3 TRADE MIS-INVOICING AND MONEY LAUNDERING

Trade-Based Money Laundering (TBML) is defined as "the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their origins."[76] Money laundering consist of camouflaging the profits from criminal activity and incorporating such earnings into the legal banking facilities.[77] While trade mis-invoicing "is not specifically related to TBML",[78] it can be connected to it as an instrument that could be used to participate in TBML.[79]

Typically, prior to laundering the ill-gotten gains that are acquired from criminal activity, criminal element experience huge challenges in using the illegal earning, since they cannot account for the source of the income and with relative ease the money can be traced to the criminal activity.[80] Subsequent to cleaning/laundering the money, it is difficult to differentiate illegal earnings from lawful economic resources, and as such it is possible for criminal element to use these resources without being detected or identified as illegal money.[81] The following stages have been identified in the process of laundering money: first is the placement stage, second is the layering stage and the final stage is the integration.[82] During the course of the placement stage, for the first time cash deposits enter into the financial system.[83] The Layering stage consists of a long list of transactions that cut across many jurisdictions and involves numerous front companies, manufacturing difficult layers of financial contrivance.[84] Integration is known as the final stage, after moving through various transactions in the banking system, the funds eventually appear to be legitimate in portfolios relating to investments.[85]

The global legal system aimed at tackling the laundering of money has proven to be based on the idea that money laundering contraventions falls within the domestic

[76] Ibid.
[77] Ibid.
[78] Trade Misinvoicing-Global Financial Integrity at https://gfintegrity.org/issue/trade-misinvoicing/, accessed on 18 October 2020.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] JWE Sheptycki, *Issues in transnational policing* (2000) 138.
[83] Ibid.
[84] JWE Sheptycki, (note 82 above; 139).
[85] JWE Sheptycki, (note 82 above; 141).

courts authority.[86] Several international treaties necessitate or appeal for states to criminalise the offence of money laundering under domestic legal framework, and collaborate with other countries to prosecute criminals by means of extradition and mutual legal assistance.[87] Even though various international instruments necessitate countries to criminalise the offence of money laundering, such international instruments essentially do not establish any international criminal liability for this particular offence.[88]

When, or perhaps if, the Malabo Protocol comes into effect and the African Court has the opportunity to exercise its authority regarding the money laundering contravention, the African Court will not be the first international court to look into the financial aspects of international crimes.[89] The International Criminal Court (ICC) has indirectly considered the laundering of money by criminal organizations, allegedly responsible for exploiting mineral resources in the Democratic Republic of the Congo (DRC).[90] It was considered that the misuse and manipulation of natural resources within the DRC, was in part, responsible for the purported atrocities, and the global financial structures were party to cleaning of dirty money.[91] However, the ICC lacks the capacity to indict people specifically for money laundering, despite the fact that the Prosecutor considered that investigations of a financial nature perform a vital function in the prosecution and prevention of crimes that fall under the jurisdiction of the court.[92]

As such, adding the transgression of money laundering in the Malabo Protocol would enable prosecuting authorities to utilise financial investigations in a considerably broader way than the ICC.[93] By conducting investigations into money laundering, the court will be empowered to provide support in the prosecution of other transgressions, in addition, the court will have the opportunity to prosecute accused persons for contravening the money laundering provision.[94]

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[86] *The African Court of Justice and Human and Peoples' Rights in Context (*2019) 507.
[87] Ibid.
[88] Ibid.
[89] *The African Court of Justice and Human and Peoples' Rights in Context (*2019) 505.
[90] L M Ocampo *Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC* (2003) 3–4.
[91] ICC Press Release, 'Communications Received by the Office of the Prosecutor of the ICC' (No.: pids.009.2003-EN), 16 July 2003, 3–4.
[92] Ibid.
[93] *The African Court of Justice and Human and Peoples' Rights in Context (*2019) ; 506.
[94] Ibid.

CHAPTER 2: TRADE MIS-INVOICING

2.1 INTRODUCTION

Even though it was assessed by the World Trade Organization (WTO) that the value of merchandise trade at a global level was approximately US$18 trillion in 2017, on a yearly basis under two percent of total shipping containers are examined to confirm the accuracy of invoices for customs purposes, offering a readily available conduit for illicit activity.[95] This signifies that the opportunities for trade mis-invoicing have also expanded, since the extent of global trade has increased in recent decades.[96] Trade mis-invoicing is a prevalent technique of concealing IFF inside the global commerce trade structure, along with circumventing and/or manipulating customs procedures.[97] Trade mis-invoicing is among the main avenues that enable IFF from emerging economies.[98] GFI estimated that trade mis-invoicing is responsible for the largest portion of IFF.[99] This chapter will explore the different aspects of trade mis-invoicing. The chapter begins with the background and definition of mis-invoicing, followed by the different categories and motives for mis-invoicing. The chapter will conclude with the estimates and how mis-invoicing is measured.

2.2 DEFINITION OF TRADE MIS-INVOICING

Mary Forstater defines trade mis-invoicing as a type of fraud within the customs and/or tax environment, that involves export and import traders who intentionally misrepresent the amount, number, or type of goods or services in a commercial transaction.[100] A very interesting illustration of the growing consumption of services for purpose of IFF was found in the telecommunications industry in several countries in Africa.[101] It was estimated that on a yearly basis one country was suffering significant loss of approximately 90 million dollars, this was due to telecommunications minutes

[95] Global Financial Integrity (note 44 above; 6).
[96] Ibid.
[97] Ibid.
[98] Global Financial Integrity (note 44 above; 8).
[99] M Forstater (note 23 above; 10).
[100] Ibid.
[101] United Nations Economic Commission for Africa (note 2 above; 28).

being stolen from this industry.[102] Such scheme related to channelling calls from international locations and converting these to appear as calls that were made domestically.[103] Industry operators subsequently presented false submission in respect of call minutes from international locations, the purpose of the false submission was to cut taxes that was owed to the revenue authority.[104] Additional instances for the over-invoicing of services can be traced to payments relating to education at an overseas destination, tours of a medical nature and insurance at a foreign location.[105]

The HLP uses a more concise definition and describes trade mis-invoicing as "the act of misrepresenting the price or quantity of imports or exports in order to hide or accumulate money in other jurisdictions".[106] According to GFI trade mis-invoicing is conduct that relates to the intentional falsification with regards to the value of a business deal by fabricating, inter alia, the number of items, the grade of items, the price of items, which can also include the place of import/export for the commodity or service by a minimum of one transacting partner.[107]

It may be beneficial for entities and individuals engaging in trade to falsify prescribed government documentation in a multitude of ways, owing to diverse motives.[108] Although specific reasons to falsify and fabricate invoices are in all probability very broad, they frequently rely on conditions.[109] Common motivations to misrepresent business transactions are precisely linked to a jurisdiction's commercial and economic rules.[110] Limitations that are placed on trade influence transacting parties to conceal commercial transactions; whereas subsidies for trade on the other hand, indicate an incentive to increase trade values.[111]

There are various reasons for participating in trade mis-invoicing, inter alia, this consist of circumventing taxes and duties that are due for customs purposes, cleaning the

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] United Nations Economic Commission for Africa (note 2 above;10).
[107] Global Financial Integrity (note 44 above; 6).
[108] V Nitsch (note 47 above; 2).
[109] Ibid.
[110] Ibid.
[111] Ibid.

earning that were generated from unlawful dealings, avoiding restrictions that are placed on currency, in addition, concealing earnings in a foreign country.[112] Funds can be illegally transferred from a jurisdiction by the over-invoicing of importations, or under-invoicing of exportations. On the contrary, funds can be illegally transferred into countries as a result of over-invoicing the exportations, or under-invoicing the importations.[113]

2.3 TYPES OF TRADE MIS-INVOICING

The table provides an analysis of the four main categories of trade mis-invoicing activities, two categories relate to illicit financial *outflows* from jurisdictions and the other two categories bring about illicit financial *inflows* in jurisdictions.[114]

IFF Outflows	***Import Over-Invoicing***	• transfer currency to a foreign location (elude capital regulations, move assets to an economy with stable currency, etc.) • exaggerating the value of imported expenses for purpose of lowering the liability for income tax •circumvent duties specific to anti-dumping
	Export Under-Invoicing	• transfer currency to a foreign location (elude capital regulations, move assets to an economy with stable currency, etc.) • elude income taxes (cutting level of income that are taxable) •avoid paying taxes for exportations
IFF Inflows	***Import Under-Invoicing***	• avoiding paying value added taxes and duties for customs purposes • dodge monitoring mechanisms designed for importation that are above a specific amount

[112] Global Financial Integrity (note 44 above; 6).
[113] Ibid.
[114] Ibid.

	Export Over-Invoicing	• take advantage of subsidies that are created for exportations • benefit from rebates on exportations.

2.3.1 IMPORT OVER-INVOICING

Import over-invoicing is mostly detected in commodity categories with low or zero import tariffs.[115] There are at least two explanations offered for fake imports that appear in international trade statistics during business,[116] Firstly, a huge importation cost present producers with the opportunity for decreasing their local revenues and as a result is subject to lower taxation.[117] Because this approach is at the expense of overstating the value tariffs, such method appears to be practical for only products that are mainly exempt from taxes.[118] Secondly, the reporting of importations with disproportionately great frequency (over-reporting) is an immediate consequence of incorrect classification.[119] If during importation, false commodity codes are used to declare merchandise, with the intention of avoiding commercial levies by categorizing goods that have high tax rates as commodities with zero-tax rates, importations are essentially over-reported for this specific category of products that is incorrectly declared on the official documentation.[120] In Madagascar it was noticed that the importation of books, fertilizers plus substantial portions of cereals are not subject to VAT and tariff, and it was established that the import value for these commodities substantially exceeded the matching export value.[121] In 2014 it was estimated that customs fraud was responsible for reducing customs income for non-oil products (VAT and duties) in this country by approximately US$96 million or at least 30 percent. Also, in the same year (2014), it was estimated that the under valuing of commodity

[115] V Nitsch (note 47 above; 2).
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] C Chalendard *The Use of Detailed Statistical Data in Customs Reform The Case of Madagascar* (2016) 9.

and incorrect tariff classifications were responsible for loss of income totalling 53.7 million US dollars and 42.4 million US dollars, respectively.[122]

Import over-invoicing is also a commonly used technique to unlawfully transfer currency from emerging economies and this causes illegal outflows of resources from a nation.[123] For instance, instead of paying an amount of 100 US dollars for each unit of the commodity, a trading partner can fabricate the documents to display an amount of 120 US dollars for each unit.[124] When the remittance is paid, the trading partner receiving the payment transfers the additional 20 US dollars for each unit to an offshore account to benefit the other trading partner .[125] Even though the trading partner pays an amount of 100 US dollars for each unit, the fabricated document allows the importer to move 20 US dollars to a foreign bank account.[126]

There are various explanations wherefor individuals endeavour to shift currency from an emerging economy, these comprise of transferring wealth from countries that have weak currencies to countries with more stable currencies like the dollar in the United states, pounds in Britain and euros in the European Union.[127] The evasion of taxes, which consist of the unlawful transfer of taxable revenue is also a common incentive for the over-invoicing of importations.[128] In this instance money is moved to a territory that is likely to have low to no tax rates.[129]

2.3.2 EXPORT UNDER-INVOICING

Under invoicing of exportations allows fraudulent traders to avoid restrictions that are imposed on exports.[130] Although it is risky, traders regard it as beneficial to under declare the value of the commodity and to provide false information on official trade documentation at a significantly larger extent.[131] Prohibitions that are imposed by countries, can be avoided by mis-declaring the final destination of a consignment and

[122] C Chalendard (note 121 above; 8).
[123] Global Financial Integrity (note 44 above; 7).
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] V Nitsch (note 47 above; 2).
[131] Ibid.

as a result adding more inconsistencies to the trade figures of a country's by successfully over-invoicing its exportations to different locations.[132] Prohibitions on exportations with regards to specific commodities can be avoided by mis declaring the category of the commodity.[133] This kind of misreporting was evident while conducting trade examinations in respect of a particular commodity group, relating to, items of a cultural nature.[134] The exportation of such items is frequently banned with no permission.[135] With regards to this particular objects it was argued that there is a "stark difference in legality of shipments between importing and exporting countries."[136] Upon analysing the mirror trade statistics, it was found that the detected gap in reported trade figures has a strong association with levels of corruption from territories of exportation, with especially serious impact on countries that are wealthy in artifacts.[137]

Export under-invoicing can similarly be utilised to transfer money globally.[138] In this technique, an invoice will be fabricated which reflects that the amount of the shipped commodity is lesser than the real price that is paid by an importer from the partner country.[139] This category of trade mis-invoicing is widely used by export traders that endeavour to reduce their tax liability on exportations and this category is also utilised by businesses as a book-keeping strategy to legitimately reduce noticeable revenues and as a result, pay a reduced commercial income tax amount.[140] Such conduct is frequently problematic with regard to the exportation of valuable raw materials from countries located in Africa.[141] The HLP dealing with IFF from Africa discovered that such flows are clearly visible in countries from the African Continent which export resources.[142] Furthermore, such conduct of export under-invoicing causes unlawful *outflows* of currency, which additionally deprives governments of taxes in respect of exportation and income.[143]

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[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] R Fisman and SJ Wei *"The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques,"* American Economic Journal: Applied Economics (2009) 83
[137] Ibid.
[138] Global Financial Integrity (note 44 above; 7).
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Global Financial Integrity (note 44 above; 8).

2.3.3 IMPORT UNDER-INVOICING

Trade mis-invoicing also allows parties to move illegal capital into territories. The main technique of unlawful *inflows* involves the under-invoicing of imports.[144] Largely due to the direct advantages, the reverse approach of exploiting the declarations on customs documents during the moment of arrival, which is under-invoicing of importations, is possibly the uttermost frequently used method of misreporting trade.[145] This category of trade mis-invoicing is regularly used for circumventing the remittance of VAT and duties for customs, which are due for importations.[146] Since customs duties are calculated according to value the item is declared, which in practical situations can remain challenging to validate, under declaring the value of the item decreases the remittance of tax.[147] For instance, rather than making payment for taxes and duties on a commodity with the value of 100 US dollars for each unit, an import trader could fabricate the invoice so that it shows 50 US dollars for each unit and reduce the VAT and duties that would ordinarily be due, when using unit prices that are higher .[148] After settling the invoice amount of 50 US dollars, the balance remains unpaid to the business partner in a foreign country, consequently with the aim of finalizing these business dealings, the importer must depend on another way to shift the money globally.[149] In other words, under-invoicing of importations is occasionally performed by using supplementary devices for moving currency from a jurisdiction that eluded revenue authorities, in order to reimburse the remain amount that is owing.[150]

Once enforcement was increased by Philippine customs as a result of hiring private firms to facilitate pre-shipment inspection on importations from specific territories, importation from such territories changed to a different technique to avoid duties: importing by making use of processing zones that are exempt from duties.[151]

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[144] Ibid.
[145] V Nitsch (note 47 above; 3).
[146] Global Financial Integrity (note 44 above; 8).
[147] V Nitsch (note 47 above; 3).
[148] Global Financial Integrity (note 44 above; 8).
[149] Ibid.
[150] Ibid.
[151] D Yang Can Enforcement Backfire? Crime Displacement In The Context of Customs Reform In The Philippines (2008) 1

2.3.4 EXPORT OVER-INVOICING

Export over-invoicing is one of the ways to channel illegal monies to a country. In this category of trade mis-invoicing, the amount that is displayed on the exportation invoices are fabricated to indicate that exportations are valued at greater concentrations compared to what import traders from the partner country has invoiced.[152] Export over-invoicing is a common practice in countries that intend to promote exports by offering tax incentives.[153] These methods are used by businesses that intend to misuse a variety of incentive packages that are intended for export, which are made available by the authorities, like VAT tax rebates and duties for customs.[154] With a vast number nations, specific government programs are created to promote exportations by presenting discounts on the VAT and duty in respect of the expenses on items that are imported, and which are utilized in the domestic manufacture of commodities prior to exportation.[155] Even though such government programs are aimed at promoting exportations, this can be construed as an incentive for businesses to fabricate amounts relating to their exportation in order to obtain maximum benefits that are offered by rebates or exploit subsidies that are intended for exportation.[156] As a result, businesses can generate more income by obtaining subsidies and rebates that are made available by authorities, compared to the payments that are required for additional income taxes.[157] While this brings extra funds into a country's economy than it should, the over-invoicing of exportations correspondingly causes unlawful inflows of monies into a State territory .[158]

During the early 1980s in Turkey, a wide-ranging package of policy measures were offered that was clearly leaning towards promoting manufacturing for exportation purposes.[159] These policies consisted of rebates for export taxes, credits for exports that are subsidised, special allowance of forex and imports that are duty-free.[160] With

[152] Global Financial Integrity (note 44 above; 8).
[153] V Nitsch (note 47 above; 2).
[154] Global Financial Integrity (note 44 above; 8).
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] C Merih & D Rodrik *"Turkish Experience with Debt: Macroeconomic Policy and Performance"* in Jeffrey D. Sachs (ed.) Developing Country Debt and the World Economy (1989) 723.

the aim of obtaining maximum benefit from these subsidies, "Turkish businesspersons, were not hesitant to take advantage of arbitrage opportunities", these individuals transformed their invoicing practices to the extent that exporters significantly over-invoiced shipments or merely declared exports that did not occur.[161] It was concluded that a significant portion of the increasing number in exportations subsequent to 1980, proved to be the consequence of a numerical fabrication.[162]

2.4 ESTIMATES OF TRADE MIS-INVOICING

The theory concerning the analysis of trade mis-invoicing is regarded as simple.[163] When a consignment of goods cross the border of a country, the importer or exporter declares the commodity in the container.[164] If customs declarations correspond to what is imported or exported in the vessel, this indicates no prohibited flow.[165] The accurate tariff[166] as well as VAT[167] will be imposed, relevant credits for exports are appropriately granted, then ultimately such entity will make payment of the correct value concerning its liability for income tax purposes.[168] Such circumstances change when the export or import trading partners have intentions that lean towards avoiding taxes and tariffs, or conceal a remittance to a business partner by the mis-declaration or falsely declaring the commodity's actual price (in both ways— either lower or higher).[169] Consequently, if there are differences in the declarations that were made to the customs authority and the true number, nature or price of the commodity, this can indicate that funds are being diverted and there is fraud relating to customs.[170]

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[161] Ibid.
[162] C Merih & D Rodrik *"Debt, Adjustment, and Growth: Turkey"* in Jeffrey D. Sachs and Susan M. Collins (eds.) Developing Country Debt and Economic Performance: Country Studies (1989) 207.
[163] M Forstater (note 20 above; 12).
[164] Ibid
[165] Ibid.
[166] A tariff is a tax imposed by a government on goods and services imported from other countries that serves to increase the price and make imports less desirable, or at least less competitive, versus domestic goods and services. Tariffs are generally introduced as a means of restricting trade from particular countries or reducing the importation of specific types of goods and services.
[167] A **value-added tax** (**VAT**) is a consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale. The amount of **VAT** that the user pays is on the cost of the product, less any of the costs of materials used in the product that have already been taxed.
[168] M Forstater (note 23 above; 12).
[169] Ibid.
[170] Ibid.

It is believed that merchants stand to benefit much from misreporting in only one jurisdiction of a trade deal, whilst information at the corresponding end of the trade deal is correctly declared. The discrepancies that are established between the defective and the true declaration of a transaction are construed as mis-invoicing.[171] In distinct circumstances the calculation specifies that, when there is an import or export transaction of trade between a country that is developed and a country that is developing, the price as well as the volume will be declared correctly to the authorities on the side of the developed country, which are compiled into trade statistics.[172]

According to Nitsch the best method for detecting trade mis-invoicing is to conduct a comparison between the declared values of a business deal in one territory (country of origin) against a matching declaration, that make up the mirror statistics, from the corresponding territory (country of destination).[173] The "mirror data" method of matching what territory X declares to be exportations to Y and what territory Y declares to be importations from X (alternatively, the other way round) remains the foundation of this extensively mentioned trade mis invoicing research, which is similar to the research that is conducted on a frequent basis by GFI as well as the High Level Panel.[174]

In assessing approximate volumes of commercial transactions among two territories which could have possibly been mis-invoiced, GFI performs a "value gap analysis" of numerous sets of mutual information that is relevant to trade. This method which is used by GFI is built on "adding up gaps and mismatches" in commercial statistics, to determine that mis-invoicing cause approximately $800 billion loss to developing countries annually.[175]GFI makes use of the United Nations Comtrade database (UN Comtrade[176]), which on an annual basis accumulates information from most territories in respect of their yearly importations and exportations.[177]

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[171] V Nitsch (note 47 above; 4).
[172] M Forstater (note 23 above; 13).
[173] V Nitsch (note 47 above; 4).
[174] M Forstater (note 23 above; 13).
[175] M Forstater (note 23 above; 11).
[176] UN COMTRADE is the pseudonym for United Nations International Trade Statistics Database. Over 170 reporter countries/areas provide the United Nations Statistics Division (UNSD) with their annual international trade statistics data detailed by commodities/service categories and partner countries. These data are subsequently transformed into the United Nations Statistics Division standard format with consistent coding and valuation using the processing system.
[177] Global Financial Integrity (note 44 above; 11).

UN Comtrade comprises of commodity and partner-specific trade statistics that is made available by the national statistical authorities of each reporting country.[178] UN Comtrade consist of annual trade data from 1962 onwards.[179] It is recommended by UN Comtrade that imports should be "recorded as Cost, Insurance and Freight' (CIF) and exports as 'Free on Board' (FOB)", it was found that majority of the participating countries comply with this recommendation when submitting their information.[180]

UN Comtrade provides clear information with regards to the limitations of the database.[181] Due to reasons relating to confidentiality, countries' trade reports may only consist of data at an aggregate commodity code.[182] The dataset also consist of missing values because states are not automatically reporting relevant data in respect of that year.[183] Information cannot be accurately converted into earlier classifications as a result of, inter alia, the inclusion of new commodities over time.[184] Likewise, commodity classifications can also vary between countries and over time.[185] This makes comparison challenging over the considered period.[186] Lastly, UN Comtrade does not report trade flows that are below USD 1000, essentially limiting the estimates in an upward direction.

The comparison of trade statistics are diminished because no uniform procedure or practice exists in recording import origins and export destinations.[187] The term 'partner country' does not require any direct trading relationship, because exports and imports are documented according to the "country of first consignment or the country of last consignment", and the term 'partner country' can mean either of these.[188] To demonstrate this, the cocoa that Ghana exports to a trader in the Netherlands, who subsequently retails the cocoa to an importer in Germany- there are two ways in which this trade can be recorded.[189] In the first way, every country document their

[178] S Marur *Curbing Illicit Financial Flows from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance the SDGs* (2019) 10.
[179] Ibid.
[180] S Marur (note 178 above; 11).
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.

exportations “by country of first consignment, and their imports by country of last consignment”.[190] Therefore, Ghana documents an exportation to the Netherlands, Netherlands documents an importation from Ghana and a matching exportation to Austria, then Austria records an import from the Netherlands. In the second way, every country records their exportations by country of last consignment, and their importations by country of first consignment. In such instance, Ghana documents an exportation to Austria, and Austria documents an importation from Ghana, with Netherlands not being mentioned in Ghana or Austria’s trade statistics.[191] Therefore, depending on the recording system that is used, trade statistics can portray a very different image of trade between two countries.[192]

GFI use this formal information to embark on a “partner-country” assessment, signifying juxtaposition of trade information that is reported between two partner countries, and analyses “value gaps, or mismatches between reports”.[193] If Egypt for instance, in 2016 recorded a payment of five million US dollars in respect of alarm clocks that were shipped from China, but for the same period China only recorded a value three million US dollars for the same commodity that was shipped to Egypt, such reporting will signify a “value gap” in 2016 for two million US dollars among these two countries engaging in mutual trade, in respect of this specific product.[194]

If examining the “value gap” from the perspective of Egypt, there is clear indication of a situation relating to over-invoicing of importations by the country.[195] If scrutinising the “value gap” from the perspective of China, there is clear indication of a situation relating to under-invoicing of exportations by the country.[196] Because there are common challenges to determine the extent of the trade mis-invoicing by a specific trading party in the value gaps that are identified, the focus is mainly “on the extent of the value gaps that can be empirically identified in the UN Comtrade data”.[197]

[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Global Financial Integrity (note 44 above; 11).
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid.

Since there are multiple challenges and difficulties present when working with global trade information, the program by GFI makes use of several steps to improve the UN Comtrade data.[198] When examining the mutual trade information in respect of every state, GFI excludes approximately one 3rd of all the information that is collected by UN Comtrade, that falls into 1 of the 3 categories of groupings.[199] Firstly, GFI excludes every transaction that is categorised as "orphaned", referring to the information in the records for which territory X reported a price for the importation of a commodity from territory Y, whilst territory Y did not report exportations of such commodity to territory X in the same period.[200] By making use of this example, GFI would exclude the recorded information pertaining to Egypt if a value was presented for the importation of clock radios from China in 2016, and if China did not report exportations to Egypt of the same commodity during this time frame.[201]

In addition GFI excludes every transaction that is categorised under "lost", referring to the recorded information which match consignments that are recorded as exportations by territory X to territory Y in the same time frame, however the transactions were not documented as importations by territory Y in the same time frame.[202] In such instance, GFI will exclude the recorded information from China that reports a value for the exportation of "clock radios to Egypt in 2016, if Egypt did not report a value for any importation from China of the same commodity within this time frame.[203]

In addition, GFI excludes all recorded information that are categorised under "others", referring to a situation where trading partners to transactions report values and volumes that are zero, or expressed the quantities in the different form of measurement.[204] Drawing from the above example, the recorded information will be excluded by GFI in the event Egypt or China declared nil in respect of the value, volume or quantity.[205] when these three processes are employed the remaining groups

[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Global Financial Integrity (note 44 above; 12).
[203] Ibid.
[204] Ibid.
[205] Ibid.

of recorded information are referred to matched values, which make up the source of the information and as a result " value gaps" are subsequently detected.[206]

Although all cases that are recorded as "orphaned", "lost" and "others" are eliminated, there are various reasons that "value gaps" still continue to exist in the UN Comtrade data.[207] Such reasons include: mistake by humans; territories reporting on commodities that are the same , however they utilise unique six-figure harmonized system commodity codes[208] in respect of identical commodity in the UN Comtrade system; and the challenge with regards to re-exportations and trade that are in transit, in which transnational consignment are briefly discharged from a shipping vessel and loaded again on another shipping vessel in one or multiple territories during the voyage.[209] Such commodity can be erroneously recorded as importations to, or exportations from, wrong places.[210] Such aspects are capable of causing mistakes in measurement and "partner misattribution" which has the ability to weaken the trustworthiness of "value gaps" as a substitute for mis-invoicing.[211]

A weighted method is utilised by GFI to decrease the distortionary consequences of numerical anomalies in the information.[212] Utilisation of weighted measures in the estimations that are founded on UN Comtrade information is designed for increasing the credibility of the estimates regarding trade mis-invoicing.[213] "The weighting scheme is described in formal terms as follows: Let QD and QA denote, respectively, the reported volume of trade (of a particular good in a particular year) between a developing country reporter (D) and its advanced-country trade partner (A)."[214]

It should be highlighted that there are significant restrictions on the methodology that is used by GFI for detecting value gaps in respect of mutual trade.[215] Firstly, estimates

[206] Ibid.
[207] Ibid.
[208] At the international level, the Harmonized System (HS) for classifying goods is a six-digit code system. The HS comprises approximately **5,300** article/product descriptions that appear as headings and subheadings, arranged in 99 chapters, grouped in 21 sections. The six digits can be broken down into three parts.
[209] Global Financial Integrity (note 44 above; 12).
[210] Ibid.
[211] Ibid.
[212] Global Financial Integrity (note 44 above; 14).
[213] Ibid.
[214] Ibid.
[215] Ibid.

that are used by GFI focus specifically on mis-invoicing relating to the trade in goods, the estimates exclude mis-invoicing relating to the trade in services. This is largely because there is insufficient mutual UN Comtrade information regarding services, which is a developing portion of global trade.[216]

However it has been determined that an extensively used method to cause illicit funds to flow out of the African Continent is the mis-invoicing of intangibles and services, for instance loans within an institution, management fees and intellectual property.[217] These methods are causing a significant increase in IFF.[218] To some extent this is because of the cumulative share of services within international trade.[219] The additional influential reasons are technological changes and a deficiency of relative cost data.[220] The transfer of large volumes of money with relative ease was made possible by the expansion in information and communications technologies, at the same time allowing advanced forms of mis-invoicing.[221]

Even though trade in services has increased in overall global trade, the identification of trade in services cannot be achieved during the value gap analysis.[222] Trade mis-invoicing with regards to services consist of fake invoicing in respect of remittance for interest, management fees, permits, patents and copyrights , and additional intellectual property rights.[223] These payments are used regularly as channels for overpricing, which is method to move currency from one territory and into another.[224] Another reason is the value of services is significantly more independent in relation to the value of goods, that usually consist of apparent input expenses.[225]

IFF from various categories can escape detection when utilising the existing financial information and techniques.[226] For instance, cash and *hawala* transactions[227] plus

[216] Ibid.
[217] United Nations Economic Commission for Africa (note 2 above;28).
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Global Financial Integrity (note 44 above; 14).
[223] Global Financial Integrity (note 44 above; 15).
[224] Ibid.
[225] bid.
[226] bid.
[227] Hawala is an informal method of transferring money without any physical money actually moving. Interpol's definition of hawala is "money transfer without money movement." Another definition is

"same-invoice faking" basically remain unrecorded in existing financial information.[228] With regards to cash transactions, that are occasionally utilised in business and frequently utilised in transactions of a criminal nature and smuggling cash in bulk, such transactions do not appear in official trade information so it cannot be encapsulated in the value gap assessments.[229] The methodology used by GFI additionally fail to spot transactions which use systems like *hawala* and "flying money"[230] transactions.[231] Such practices are used more frequently with the expanding size of trade, since the cost implication are lower than the formal value transfer services.[232] These systems are readily available in underprivileged communities and/or communities that do not rely on formal banking structures.[233]

Regarding "same-invoice faking," the value gap analysis that is used by GFI fail to detect and encapsulate occurrences where the import and the export traders conspired beforehand to decide about the values they will individually state on their separate fabricated importation and exportation documents.[234] In situations like these, gaps are not displayed between the exportation and importation values and consequently, escape detection in the analysis.[235] Such method is challenging to identify and is extensively used by MNC and long-standing business associates.[236] "Nevertheless, GFI was responsible for developing GFTrade, which is a global trade risk-assessment database tool, that can identify "same invoice faking" by matching declared values on invoices against recent average trading values for the identical commodities that are reported by 43 of the globe's leading trading countries".[237]

Amongst the informal proof which is responsible for influencing GFI to deem that the occurrence of trade mis-invoicing in emerging states is relatively great, are the open

simply "trust." Hawala is used today as an alternative remittance channel that exists outside of traditional banking systems.

[228] Global Financial Integrity (note 44 above; 15).

[229] Ibid.

[230] Flying cash is a type of paper negotiable instrument used during China's Tang dynasty invented by merchants but adopted by the state. Its name came from their ability to transfer cash across vast distances without physically transporting it.

[231] Global Financial Integrity (note 44 above; 15).

[232] Ibid.

[233] Ibid.

[234] Ibid.

[235] Ibid.

[236] Ibid.

[237] Ibid.

remarks voiced to GFI by 4 Commissioner's General (CG) from customs authorities representing four different emerging states.[238] Each of the CGs asserted separately they anticipate that approximately 80 percent of the total importation invoices presented by import traders in their states are mis-invoiced.[239] If accurate, the extent of mis-invoicing is higher than GFI estimates.[240] Recently, GFI has acquired real-world data from governments of developing states, which utilised the GFTrade risk assessment tool in their customs divisions that exhibit the frequency of mis-invoicing in emerging states.[241]

According to the World Customs Organisation, mirror trade analysis can be utilised as an instrument for risk assessment to show possible instances of mis-invoicing, however such detections of mirror analysis must be confirmed through inquiries with the source or detailed document evaluations before they lead to assumptions of fraud.[242] GFI emphasizes that its estimations are meant to demonstrate the extent of the trade mis-invoicing challenge and not to offer exactness.[243] "GFI's estimates of the magnitude of the value of trade mis-invoicing underscore it is a major global challenge that must inform policy responses at the national and international levels."[244] IFFs are naturally aimed to be concealed, indicating also those categories of illicit flows that are capable of being quantified must be quantified in an indirect manner and as a result, are an inaccurate estimation of such activity.[245] At a global level law enforcement agencies and financial crime units encounter this frequent problem.[246] "However, GFI's estimations fill a vital gap in the trade data and the degree to which such estimates largely serves to only show the extent of the trade-related IFF problem".[247]

According to GFI, all currency that departs from a territory inevitably find its way to a different jurisdiction.[248] Frequently, such movement or transfer signifies that IFF that

[238] Global Financial Integrity (note 44 above; 34).
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] M Forstater (note 23 above;18).
[243] Global Financial Integrity (note 44 above; 15).
[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Global Financial Integrity (note 44 above; 12).

leave from emerging economies eventually arrive at banking institutions in first world nations, including countries like the British Virgin Islands, Singapore and Switzerland, which are regarded as tax havens.[249] An occurrence of this nature cannot be attributed to chance.[250] Several jurisdictions and their organizations enable and obtain significant returns from the investment of enormous sums of currency from emerging economies.[251] The extensive incidence of IFF in Africa is a clear indication that a governance problem exists, which is the result of weak institutions and inadequate regulatory environments.[252]

GFI's Policy Recommendations to curtail revenue losses associated with trade mis-invoicing includes the following:[253]

1. Pass legislative and regulatory measures to reduce trade mis-invoicing;
2. Take administrative steps to better detect trade mis-invoicing (such as using tools like GFI's GFTrade, which tracks recent trade prices across major trading countries in real time); and
3. Take corrective steps to claw back lost revenue via subsequent audits and reviews.

2.5 TRADE MIS-INOVICING AS MONEY LAUNDERING

As noted above, trade mis-invoicing does not specifically correspond to trade-based money laundering but can be connected to it as a mechanism that can be used to participate in TBML.[254] Advanced criminal networks frequently use trade-based money laundering, that may also include trade mis-invoicing, to transfer huge amounts of unlawful currency among territories.[255] By merging the ill-gotten gains with the earnings from lawful trade, launderers can camouflage the original supply of the illegal

[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] United Nations Economic Commission for Africa (note 2 above; 51).
[253] South Africa, Revisited: Trade Misinvoicing and Lost Revenue in 2016 at https://gfintegrity.org/south-africa-revisited-trade-misinvoicing-and-lost-revenue-in-2016/, accessed on 28 November 2020.
[254] Trade Misinvoicing (note 78 above).
[255] Money Laundering -Global Financial Integrity at https://gfintegrity.org/issue/money-laundering/, accessed on 18 October 2020.

currency.[256] "For example, in the Lebanese-Canadian Bank case, a global money laundering drug business with connections to Hezbollah mixed the proceeds that were generated from the sales of used cars in Europe with the sales of cocaine in Africa".[257] The Money laundering process essentially consist off the following three stages: placement, layering; and integration.[258]The stages usually follow one another consecutively.[259] Nevertheless, depending on which methods of laundering are applied, these stages may apply at the same time or separate from each other.[260] Moreover, not all of the stages are required in every money laundering scheme.[261] However, the three stages are the only stages that provide a perfect or often an extremely complicated money laundering process.[262] These three stages show that money laundering is mostly achieved via financial systems.[263] Therefore, the majority of efforts to prevent money laundering restrict any potential entry of money into the financial system.[264]

Globally IFF are a huge challenge, especially for emerging states that are grappling to collect tax revenue at a domestic level in order to fund national development goals.[265] Even though various international instruments necessitate countries to criminalise the offence of money laundering, such international instruments essentially do not establish any international criminal liability for this particular offence.[266]

According to Tuba, "while the Financial Action Task Force[267] (FATF) is known at a global level for its proactive measures enforcing anti-money laundering on financial institutions, one of its primary focus is to compel countries to implement domestic legal enforcement mechanisms to prosecute money laundering offences".[268] The FATF policy measures recognise legislative tools that must be merged into domestic

[256] Ibid.
[257] Ibid.
[258] D Tuba *Acta Criminologica: Southern African Journal of Criminology CRIMSA 2011 Conference* 2 (2012) Tuba 105.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] D Tuba (note 258 above;106)
[263] Ibid.
[264] Ibid.
[265] Global Financial Integrity (note 44 above; 8).
[266] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 507).
[267] The Financial Action Task Force is the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society.
[268] D Tuba (note 258 above;108).

legislation, whilst considering domestic criminal justice systems.[269] To merge the FATF policy measures, domestic criminal systems must frequently counteract challenges that hinder effective prosecution of money laundering.[270] Even though domestic legislation to combat money laundering consist of numerous similarities, it remains inconsistent with regards to organisation of the respective legal systems, their processes, and their substantive laws, as well as definitions of what amounts to money laundering.[271]

Several international bodies have combined their efforts in the fight against money laundering.[272] They have implemented a broad spectrum of measures to handle the adverse impacts of money laundering.[273] Specific methods to fight money laundering may be categorised by those that are established by the UN and FATF, respectively.[274]

According to Tuba:[275]

> The UN-based measures concentrate specifically on the criminalisation of specified money laundering related conducts. However, many of them are not directly focusing the prosecution of all money laundering related conducts. It is evident that attempts to prevent money laundering in terms of the existing criminal justice and regulatory systems is a discouraging if not an impossible assignment.

The following chapter argues that, with the inclusion of corporate criminal liability and its criminalisation of transnational crime of money laundering, the Malabo Protocol represents a novel avenue for the prosecution of money laundering generally, and IFF in particular.

[269] D Tuba (note 258 above;103).
[270] D Tuba (note 258 above;104).
[271] D Tuba (note 258 above;105).
[272] D Tuba (note 258 above;107).
[273] Ibid.
[274] Ibid.
[275] D Tuba (note 258 above;103-107).

CHAPTER 3: THE MALABO PROTOCOL

3.1 INTRODUCTION

In Africa, regionalising international criminal law was greatly influenced by the distrust that arose between AU member states and Western states, due to the manner in which Western states applied the principle of universal jurisdiction against state officials from the African continent, and the perceived biased targeting of these Heads of State by the ICC.[276]

In recent years, the AU has maintained that the application of universal jurisdiction against states officials from the African continent by the states in Europe is a manipulation of this principle, it ignores the immunity that the officials are at liberty to enjoy at international law, and it is an insult to the sovereignty of the African states in question.[277] With regards to the indictment of current serving Heads of State from Africa by the ICC, the AU has maintained that the ICC is unjustly targeting African leaders, the indictments contravene the customary international law on the immunities of Heads of State; and an insult to the sovereignty of the African states in question.[278] According to Mushoriwa:[279]

> The relationship between the AU and the ICC substantially declined in 2009, after the indictment of the previous Sudanese President Omar Al Bashir, and in 2012 the confirmation of charges and subsequent trials against the Kenyan President Uhuru Kenyatta and his deputy William Ruto.

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) was adopted by the Assembly of Heads of State and Government of the AU on 27 June 2014. The Malabo Protocol seeks to regionalise international criminal law through the determined efforts of states in Africa, under the support of the AU.[280] As Jalloh explains:[281]

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[276] L Mushoriwa *The African Court's Jurisdiction Over The 'International' Ecocrime of Trafficking In Hazardous Wastes: Challenges and Opportunities* (2018) 6.
[277] AU-EU Expert Report on Universal Jurisdiction (Brussels, 2009) at para 37.
[278] AU Assembly Decision on Africa's relationship with the International Criminal Court (ICC) Ext/ Assembly/AU/Dec.1 Oct 2013 at para 9.
[279] L Mushoriwa (note 276 above; 6)
[280] L Mushoriwa (note 276 above; 2).
[281] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; xix).

> The Malabo Protocol which pursues to create the first African court that possess a tripartite jurisdiction in respect of human rights, criminal and general matters, is designed to empower national, sub-regional and continental bodies and institutions in stopping grave and immense violations of human rights in the African region by, among other things, prosecuting the perpetrators of crimes that are detailed in the statute annexed to the treaty.

So far, only 11 out of 55 AU member states signed the Malabo Protocol, however none of the signatory states have approved it.[282] In terms of the AU treatymaking practice and Article 11, fifteen such ratifications are necessary for the agreement to come into force.[283] No certainty exist that the Malabo Protocol will attain the necessary number of ratifications in the near future.[284] However, 33 States from Africa are currently signatories to the Rome Statute of the ICC and due to the existing unfavourable association between the ICC and the AU, it is likely that states from Africa may have reason to accelerate their signatures and approvals of the Malabo Protocol in the future.[285] If the Malabo Protocol is ratified, the African court will be the first tribunal to indict offences that are of concern specifically to the region of Africa, such as unconstitutional government changes or unlawful manipulation of natural minerals, together with environmental and other connected offences.[286] Jurisdiction will vested in the African Court to prosecute for crimes that are committed by natural persons and corporations.[287]

The jurisdiction of the African Court of Justice and Human and Peoples' Rights (African Court) was extended by the Malabo Protocol by creating of a criminal chamber with jurisdiction to prosecute international and transnational offences.[288] In terms of Article 16 (1) of the Malabo Protocol, "The Court shall have three (3) Sections: a General Affairs Section, a Human and People's Rights section and an International Criminal

[282] Ibid.
[283] Ibid.
[284] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; xx).
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] L Mushoriwa (note 276 above; 2).

Law Section."[289] The section relating to International Criminal Law is described as "competent to hear all cases relating to the crimes specified in this Statute".[290]

Article 28 A1 (1-3) deals specifically with the power of the court to prosecute individuals for the core international "crimes of genocide, war crimes and crimes against humanity".[291] Article 28 A1 (14) relates to the jurisdiction with regards to the crime of aggression and article 28 A1 (4-13) deals specifically with the power of the court to try persons for ten transnational crimes which are of particular significance to the African continent, including the crime of money laundering.[292] Creating jurisdiction over transnational crimes is perhaps the most innovative element of the Malabo Protocol.[293] Article 28 A1 (4-13) presents an opportunity for the regional prosecution of transnational crimes, which the AU has not previously been able achieve because of inadequacies in international and domestic legal frameworks.[294] Including the money laundering offence within the jurisdiction of the African Court is particularly new and innovative.[295]

3.2 CORPORATE CRIMINAL LIABILITY

Jalloh argues that "one of the most revolutionary features of the Malabo Protocol is the insertion of corporate criminal liability under Article 46C".[296] Article 46C provides the following:[297]

> 1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of states;
>
> 2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence;
>
> 3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation;

[289] Article 16 (1) *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (hereinafter Malabo Protocol) 27 June 2014.
[290] Article 17 Malabo Protocol.
[291] Article 28 A 1 (1-3) Malabo Protocol.
[292] Article 28 A 1 (4-14) Malabo Protocol.
[293] L Mushoriwa (note 276 above; 2).
[294] L Mushoriwa (note 276 above; 3).
[295] African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7 (May 2012), art. 28Ibis.
[296] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 26)
[297] Article 46C Malabo Protocol.

4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation;

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel;

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

The primary objective of Article 46C is to explain "how a combination of tangible activities and subjective mental states for instance intent, recklessness or knowledge can be ascribed to legal persons; otherwise stated as the principles of attribution".[298] Placing criminal accountability on corporations/commercial entities in respect of core international and other crimes can be viewed "as part of Africa's approach to bringing an end to 'business as usual', for which corporates that are involved in gross violations of human rights and the commission of horrific crimes are prosecuted".[299]

The concept of incorporating corporate criminal responsibility in respect of international offences were given due consideration when the ICC Statute was being negotiated.[300] The proposal from France for incorporating corporate liability within the jurisdiction of the ICC was rejected. The reason for the rejection was threefold.[301] Firstly, incorporating corporate liability would shift attention away from individual criminal responsibility, which was regarded as the primary reason for establishing the ICC.[302] Secondly, the Court would be compelled to decide on several evidentiary and other procedural challenges when it deals with corporate liability.[303] Most significantly, given that corporations are considered entities, without consciousness, it would not be possible to show criminal intent or knowledge, or to impose the conventional punishment under international criminal law (i.e. imprisonment).[304] Finally, several states that were present during the negotiations did not recognize corporate liability in their own domestic systems.[305] This had an adverse effect on support for the proposal

[298] *The African Court of Justice and Human and Peoples' Rights in Context (*2019) 806.
[299] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 27).
[300] Ibid.
[301] AS. Knottnerus & E de Volder International *Criminal Justice and the Early Formation of an African Criminal Court* (2019) 391.
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] Ibid.

and questions were raised about the complementarity principle with regards to these cases.[306]

According to the International Commission of Jurists, during the past sixty years multinational businesses have become increasing involved in international crimes.[307] The Commission established that many of these activities are connected to multinational corporations in Africa.[308] The enormous extractive industry is due to the wealth of natural resources in the continent.[309] These corporations frequently conduct operations in war-torn zones, in which the presence of natural resources like oil, gold or diamonds has steered to conflict over their control.[310] There has been extensive debate regarding the concept of corporations being held criminally responsible , in addition legal systems at domestic levels they frequently exercise their jurisdiction in the prosecutions of companies as legal entities.[311] However, there is no international court or tribunal that can prosecute corporations under international law.[312] As such the provision for corporate criminal liability in the Malabo Protocol could assist in clarifying the international law position on corporate criminal liability and furthering the progress of international criminal law.[313]

Beside adding other crimes to the African Court's jurisdiction, the Amendment Protocol is unique and distinct from the Rome Statute because of its opposed view on which parties should be held responsible in terms of international criminal law.[314] The Amendment Protocol is not limited to individual criminal responsibility but also includes corporate liability, this feature is distinct from the ICC's conception of criminal liability.[315] This inclusion is of specific relevance for Africa, where various multinational corporations have been allegedly involved in the contravention of offences that will fall under the jurisdiction of the African Court's Criminal Chamber.[316]

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306 Ibid.
307 AS. Knottnerus and E de Volder (note 301 above; 390).
308 Ibid.
309 Ibid.
310 Ibid.
311 Ibid.
312 Ibid.
313 CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 27).
314 AS. Knottnerus and E de Volder (note 301 above; 390).
315 Ibid.
316 Ibid.

The focus on commercial entities for international criminal law transgressions started with the trials in Nuremberg, when bills were passed by Allied Control Council that were intended to punish the businesses that were associated with the Nazi administration.[317] It was argued by Joanna Kyriakakis that "the regional criminal tribunal's provision for corporate criminal liability exert pressure on the prevailing legal landscape both within and outside of Africa, and that this regional innovation might help to clarify the status of corporate criminal liability in international criminal law"[318]. "She speculates that the developments could consist of things like better coordination on the control of corporate activity; better accountability for corporations than the one that exists at the domestic or international level; and the means of international criminal trials to establish an exact historical record of conflicts".[319]

In terms of long-established practice, civil law and common law jurisdictions were divided over recognising corporate criminal responsibility.[320] It was observed that prior to the 1990s, the idea of corporate criminal culpability was rejected by many states under the civil law legal system.[321] However, in Europe since 2013, there was no form of corporate criminal liability only in Greece, Germany and Latvia.[322] "This practice is also apparent in the Council of Europe and the European Union member states, both of which have adopted several regional treaties that consist of corporate criminal responsibility for several transnational crimes, for instance corruption".[323]

The critical difficulties in applying Article 46C relate to complementarity with domestic systems and enforcement challenges.[324] Also companies that are involved in the offences may be " incorporated in one jurisdiction, but act through connected entities in other jurisdictions, and the fact that corporations cannot be extradited to appear before the court.[325] It seems clear that the leadership of a corporate body could be held liable for the conduct of a corporation that is imputed to it".[326]

[317] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 27).
[318] Ibid.
[319] Ibid.
[320] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 794).
[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 29).
[325] Ibid.
[326] Ibid.

As Jalloh points out, "since Article 46C stipulates that the Court is vested with jurisdiction over legal persons, there is apparently no justification to exclude foreign company from being prosecuted for bribery".[327] In reality, most influential companies are persuaded by the "menace of prosecution and likely banning, to settle with prosecutors to pay a fine in exchange for a conviction for a non–corruption related offence or an agreement not to prosecute".[328]

By including corporate criminal liability in the Malabo Protocol, states from Africa have fulfilled their commitment to resolve the issue with impunity on the continent.[329] It has also been maintained that this provision will guarantee justice for victims, because multinational corporations can be compelled to compensate victims in instances where the natural persons who committed the crime do not have the means to compensate but the corporation which was involved in the crime has the financial resources to do so.[330]

3.3 PROSECUTING MONEY LAUNDERING UNDER THE *MALABO PROTOCOL*

3.3.1 THE ORIGINS OF MONEY LAUNDERING

The practice of 'money laundering' can be traced back 2000 BC, at the time merchants concealed personal wealth or business transactions from the Chinese organisational leaders who proscribed several commercial trades.[331] The traders relocated personal wealth and invested such profit in enterprises that were located at distant regions or even beyond China.[332] In the event authorities were successful in tracing these benefits to the original source, the merchant was liable for prosecution for concealing their illegal source from these business transactions.[333] It was also noticed that, loan agreements were regarded as crimes and mortal sins under the medieval Catholic

[327] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 483).
[328] Ibid.
[329] F Tiba, "Regional International Criminal Courts: An Idea whose Time has Come?" (2016) 17 *Cardozo J of Conflict Resolution* at 521.
[330] Ibid.
[331] D Tuba Prosecuting Money Laundering The FAFT Way: An Analysis of Gaps and Challenges In South African Legislation From a Comparative Perspective- CRIMSA 2011 Conference 2 ed (2012) 104.
[332] Ibid.
[333] Ibid.

rules.[334] Creditors would camouflage loan interests as payments to hide potential risks for default on repayments. Consequently, they would be chastised in terms of religious laws for accumulating or generating interests on these loans and for utilizing them for their own benefits.[335]

Contemporary money laundering was first introduced during the 1920s in America, when sales, conveyance and manufacturing of intoxicating beverages that exceeded specified liquor percentages were proscribed by the federal constitution.[336] This created a vast illegal alcohol market by several mob groups, who concealed their illegal gains by using cash-based clothes-laundries and car-wash businesses.[337] Their primary aim was to blend illegally obtained money with legally acquired money and to declare the sum as the revenues from such cover entities.[338] "In 1982 the expression of Money Launder was first presented in a judicial context in the matter of *United States v $4,255,625.39."*[339] A forfeiture of money deposited by Colombian citizens into a USA bank account opened in the name of a false institution was upheld by the court.[340] Following an evaluation of facts, the court found this act is more likely, a money laundering process.[341]

Following the September 2001 terror attacks in the USA, international efforts to combat money laundering flared up.[342] These occurrences displayed to the world the significance of tracing the flow of money within their financial systems.[343] Reports revealed that terrorists disbursed between $400 000 000 and $500 000 000 to plan and carry out their attacks.[344] It was observed that various methods were utilised to transfer, store, and use monies which were capable of circumventing the exposure to law enforcement agencies.[345] Subsequently the efforts were focused on preventing

[334] Ibid.
[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Ibid.

terrorists from receiving funding‟ through what later became known as “anti-money laundering and countering the financing of terrorism regime”.[346]

Even though money laundering does not consist of any threat of violence, it carries several economic, political, and social threats.[347] These comprise of taking over established financial structures for the circulation of money into the real economy, as well as granting criminals use of their profits that are linked to their illegal investments to further other criminal interests.[348]

According to Rose:[349]

> Economic crimes like corruption and money laundering can be among the structural causes of violence, nevertheless prosecutors at international criminal courts and tribunals lack jurisdiction over these types of prejudices. The same applies in the wider sphere of transitional justice, which has also managed to ignore economic crimes. Truth and reconciliation commissions, for instance, have usually focused on violence by the police, military and paramilitary that violates civil and political rights instead of non-violent economic crimes.

Similarly, Tuba notes:[350]

> Furthermore, money laundering causes harm to the financial stability of the state by driving away long-term investors from investing in the economy powered by unlawfully obtained money. Even though these threats while not invisible cause substantial financial losses on international and domestic economies especially when financial institutions are used to channel these illegal acquisitions. The Financial Action Task Force (FATF) apply direct international pressure on countries to criminalise and prosecute money laundering by imposing possible sanctions for non-compliance with its AML/CFT standards.

[346] Ibid.
[347] D Tuba (note 331 above; 106).
[348] Ibid.
[349] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 510).
[350] D Tuba (note 331 above; 106)

A vast number of international bodies have come together in the fight against money laundering.[351] They have adopted extensive measures to address the negative impact of this crime.[352]

Tuba further notes:[353]

> Precise measures to tackle money laundering were either developed by the UN or the FATF. The UN-based measures concentrate specifically on the criminalisation of certain money laundering related conducts. Nevertheless, many of them are not exactly focusing on the prosecution of all money laundering related conducts.

According to Rose:[354]

> Including the offence of money laundering in the Malabo Protocol enables the prosecutors in the African Court to extend beyond the ICC's use of financial investigations in a supporting capacity. The African Court will be empowered to provide support in the prosecution of other crimes through money laundering investigations and be able to charge accused person (natural or legal) for the very act of money laundering.

3.3.2 MONEY LAUNDERING UNDER THE MALABO PROTOCOL

In terms of Article 28A, the African Court will be authorised to prosecute persons for the crime of money laundering. According to Article 28i Bis, the definition of money laundering is:[355]

> i) Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is

[351] D Tuba (note 331 above; 107)
[352] Ibid.
[353] Ibid.
[354] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 506).
[355] Article 28I Bis Malabo Protocol.

involved in the commission of the offence to evade the legal consequences of his or her action.

ii) Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;

iii) Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences

iv) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Not every conceivable requirement with regards to the application of jurisdiction by the African Court would be applicable or possible with regards to the prosecution of money laundering, this additionally limits the courts capacity to prosecute such conduct.[356] In theory the Court could apply its jurisdiction on the basis of the victims nationality and the impact of the extraterritorial acts, however, in reality the requirements relating to jurisdiction will not be practical in the context of money laundering.[357]

Due to the fact that the "African Court" will be the first criminal tribunal at an international level to preside on money laundering matters, there is anticipation that defence counsel will contest the legality surrounding the Court's authority, based on the principle of nullum crimen sine lege.[358] It is anticipated that defence counsel could claim, for instance, that the African Court is not vested with the power to preside over money laundering matters, for the reason that money laundering was not made a criminal offence in terms of international legal rules, customary or conventional.[359] However, based on the principle of legality, prosecutors can resolve the jurisdictional issues by claiming that Article 28i Bis consist of the applicable law and clearly stipulates the jurisdiction of the Court regarding the money laundering offence.[360] This essentially means that Article 28i Bis is both substantive and jurisdictional.[361] This

[356] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 506).
[357] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 507).
[358] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 512).
[359] Ibid.
[360] Ibid.
[361] Ibid.

legal claim will not be new in the international legal landscape.[362] In actual fact, the same claims were previously made by academics with regards to Articles 6, 7, 8, and 8bis of the Rome Statute of the ICC, which relates separately to war crimes, genocide aggression and crimes against humanity. [363]

From an evidentiary standpoint, complicated financial investigations may strain or surpass the resources of the prosecution.[364] Furthermore, prosecutors conducting such investigations are more likely to rely on both state parties and non-state parties for cooperation , whilst there is no legal responsibility to obey requests for assistance in obtaining evidence, freezing asset and so forth.[365] Since several major banking institutions are located beyond Africa in non-state parties, the inability of the Court to compel collaboration may adversely affect the court's ability to collect proof.[366] Additionally, several non-states parties might also be hesitant to assist with investigations that could breach their enforcement efforts at a domestic level.[367]

There is a matter of concern with regards to the absence of clearly defined rules governing the procedure for acquiring such assistance.[368] It is of vital importance that investigators possess the power to swiftly acquire applicable evidence that are in other states or stop the destruction of such evidence and pursue to freeze the earnings from crime before they are shifted to other jurisdictions.[369]

While the Prosecution might pursue further evidence from Countries and others, in terms of Article 46L the authority to make a formal mutual legal assistance request rest with the Court.[370] It is significant for the Office the prosecution to pursue mutual legal assistance when the investigation commences.[371] Currently considerable efforts are required to address the aspect of mutual legal assistance particularly with regards to offences of money laundering and corruption.[372] The highly comprehensive

[362] Ibid.
[363] Ibid.
[364] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 507).
[365] Ibid.
[366] Ibid.
[367] Ibid.
[368] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 490).
[369] Ibid.
[370] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 491).
[371] Ibid.
[372] Ibid.

provisions listed in the UNCAC on mutual legal assistance can be a useful guide in this respect.[373]

With the African Court prosecuting the offences of corruption and money laundering , it will be in a position to display the harmful effect of economic crimes , which can take a physical role in powering the commission of atrocities such as crimes against humanity and war crimes, which was evident in the DRC.[374] The African Court functions on the basis of the principle of complementarity, therefore the Court's jurisdiction with regards to money laundering could further influence domestic law enforcement measures.[375] "Guilty Verdicts for money laundering at the African Court could possibly facilitate the identification, freezing, and seizure of assets that may be retrieved or utilized for the compensation for victims".[376]

3.3.3 CORRUPTION UNDER THE MALABO PROTOCOL

In several ways, corruption is the most important crime over which the Court has jurisdiction.[377] The gravity of corruption suggest that it is a continental occurrence, which has adverse effects on a large portion of the population.[378] On a daily basis, average citizens encounter minor corruption, which consist of bribe payments to public officials in respect of services they are eligible to obtain for free.[379] The citizens are additionally the causalities of 'grand corruption' where high-ranking state representatives unlawfully secure substantial private wealth.[380] Grand corruption essentially consist of two central activities: (i) receiving bribe payments directly or indirectly via third parties; and (ii) misusing and stealing resources that belong to the government.[381] Consequently, African leaders appropriated billions of dollars and laundered the proceeds across the globe, which caused devastating economic consequences to the affected states and citizens.[382] Through research, it has been

[373] Ibid.
[374] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 506).
[375] Ibid.
[376] Ibid.
[377] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 477).
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Ibid.
[382] Ibid.

established that the people from Africa are primarily concerned about corruption in the continent.[383]

In terms of Section 28i, the "following shall be deemed to be acts of corruption if they are of a serious nature affecting the stability of a state, region or the Union":[384]

> a) The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
>
> b) The offering or granting, directly or indirectly, to a public official, his/family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
>
> c) Any act or omission in the discharge of his or her duties by a public official. his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
>
> d) The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, or any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
>
> e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
>
> f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making

[383] Ibid.
[384] Malabo Protocol Article 28i

of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

g) Illicit enrichment;[385]

h) The use or concealment of proceeds derived from any of the acts referred to in this Article.

Even though money laundering is listed as an individual offence in the Malabo Protocol, its application is restricted specifically to the predicate offence of 'corruption.[386] Tackling the link between money laundering and corruption is now viewed as a global priority.[387] At a global level, consensus to eradicate corruption is not novel.[388] Resolution 3514 was adopted by the General Assembly of the UN (UNGA) in 1975 , this resolution disapproved of all corrupt actions, as well as acts of bribery.[389] This approach was adopted in other conventions, in which signatories were mandated to proscribe a vast number of offences that are related to corruption and enact domestic legislation to recover assets.[390] A vast number of states in Africa implemented domestic legislation that proscribe a variety of offences related to money laundering and corruption ,combined with provisions for the retrieval of assets.[391]

The African Court will be vested with the power to try natural and legal persons in respect of the offence of 'Corruption, in terms of Article 28A (1) of the Malabo Protocol.[392] Currently, the definition from Transparency International is most

[385] The section adds: "For the purposes of this Statute 'Illicit enrichment' means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income".
[386] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 488).
[387] Ibid.
[388] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 478).
[389] Ibid.
[390] Ibid.
[391] Ibid.
[392] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 480).

recognised i.e. “the misuse of entrusted power for private gain”.[393] The SADC Protocol Against Corruption highlights the multi-dimensional nature of the offence, the protocol essentially states that ‘corruption’ comprises of ‘bribery or some further conduct concerning individuals that hold office within the private and public sectors, and which use their position in office to acquire unjustified benefits.[394]

Article 28i of the Malabo Protocol has a similar approach, it does not provide a definition for ‘corruption’ but makes reference to a string of individual ‘acts of corruption.[395] This can be beneficial to the prosecution, since its presents the opportunity for a variety of alternative charges.[396] For instance, it is frequently difficult to prove bribery due to the element of secrecy that is involved in the case and in protecting the identity of the offenders.[397] Conversely, it may be less of a burden to prove the offence of illicit enrichment in circumstances where a senior public official or family members cannot provide a reasonable explanation for the substantial growth in their assets.[398]

3.3.4 LINKING IFF WITH ILLICIT ENRICHMENT

‘Illicit enrichment’ is listed as an act of corruption under Article 28I(1)(g) of the Malabo Protocol.[399] In terms of the Malabo Protocol, ‘Illicit enrichment’ means that, in relation to a person’s income, officials holding a public office or any other individual cannot provide a reasonable explanation for a substantial growth in their assets.[400] This advocates that only after the prosecution has produced clear evidence that the accused has substantially increased his/her assets, the legal burden shifts to the accused to deliver a rational description to the court regarding the manner in which the assets were attained or else encounter conviction.[401] Since it is known that there are difficulties in prosecuting corruption successfully, an approach of this nature has significant value.[402]

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[393] Ibid.
[394] Ibid.
[395] Ibid.
[396] Ibid.
[397] Ibid.
[398] Ibid.
[399] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 487).
[400] Ibid.
[401] Ibid.
[402] Ibid.

As Hatchard points out, “The African Court’s jurisdiction is limited to offences that are ‘deemed to be acts of corruption’ only if they are of ‘a serious nature that affects the stability of a Union, state, or region”.[403]

According to Rose, “This essentially means that only acts of money laundering with serious, high-level corruption will be prosecuted by the African Court, however corruption in connection with other crimes will be prosecuted at the national level”.[404] IFF strips developing countries of essential resources that can be utilised to fund desperately required public services, ranging from justice and security to fundamental social services for instance education and health, which in turn weakens the countries fiscal structures and economic capacity.[405]

Article 28I(1)(g) is extremely significant because it is not limited to the prosecution of illicit enrichment regarding public official, it also provides for the prosecution of illicit enrichment of any other person.[406] “Any other person” is not restricted to natural persons but includes legal persons. In term of Article 46C criminal accountability is placed on corporations/commercial entities in respect of core international and other crimes. This inclusion is of specific relevance for Africa, where various multinational corporations have been allegedly involved in the contravention of offences over which the Criminal Chamber of the African Court has jurisdiction.[407]

The definition of IFF by the HLP is very closely linked to the definition of illicit enrichment in the Malabo Protocol. The money that is illegally earned from IFF is directly connected to illicit enrichment. This definition presents an opportunity for the prosecutors in the African Court to use evidence of IFF to prosecute in matters relating to illicit enrichment. If the African court adopts this approach, the Malabo Protocol can be used as very significant instrument to combat IFF. In addition there are several provisions in the Malabo protocol that can empower the prosecutor to successfully prosecute illicit enrichment, which in turn will have a significant impact in combatting IFF.

[403] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 481).
[404] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 506).
[405] Illicit Financial Flows from Developing Countries: *Measuring OECD Responses* (2014) 15.
[406] Article 28I(1) (g) Malabo Protocol.
[407] AS. Knottnerus and E de Volder ((note 301 above; 390).

CHAPTER 4: CONCLUSION

The Malabo Protocol, which seeks to establish the first African regional Criminal court, may be the only hope for the African continent to successfully combat IFF. Even though IFF is not listed as an offence under the Malabo Protocol, the legal instrument consists of fundamental provisions that can be adapted to prosecute IFF from Africa. These provisions are namely, Article 46C-Corporate Criminal Liability, Article 46L Co-operation and Judicial Assistance, Article 28I-Corruption and Article 28I Bis-Money Laundering.

Over the past 30 years, IFF amounting to approximately $1.4 trillion left Africa.[408] Even though the African Continent is rich in natural resources, the African Continent has been struggling with Poverty and economic instability for decades.[409] Although on average Africa experienced a 5% annual economic growth for the last decade, Africa is currently experiencing huge challenges to use domestic resources for investments.[410]

IFF from Africa have devasting consequences and adversely effects the growth and development of the continent.[411] IFF consist of the acquisition and the cross-border transfer of funds from developing countries like Africa to developed countries in the west.[412] Trade mis-invoicing is a prevalent technique of concealing IFF within the global commercial trade system, along with circumventing and/or manipulating customs procedures.[413] Trade mis-invoicing is one of the main avenues for enabling IFF out of emerging nations.[414]

Considering that MNC are responsible for majority of the IFF from Africa, the significance of Article 46C in prosecuting IFF will be explained. In comparison to the international crimes that fall within the jurisdiction of the International Criminal Court in the Hague, the African Court will have the authority to try and convict corporations/legal entities for a more comprehensive list of unlawful conduct if it comes

[408] M Tafirenyika (note 6 above).
[409] United Nations Economic Commission for Africa (note 2 above; 13).
[410] M Tafirenyika (note 6 above).
[411] United Nations Economic Commission for Africa (note 2 above; 13).
[412] United Nations Economic Commission for Africa (note 2 above; 15).
[413] Ibid.
[414] Global Financial Integrity (note 44 above; 8).

into operation.[415] International crimes like illicit exploitation of natural resources, trafficking in hazardous waste, corruption and money laundering , often involve corporations.[416]

International Commission of Jurists confirmed that over the past 6 decades there has been a substantial increase in the participation of multinational industries in international (and other) crimes.[417] A vast number of such activities that were studied are related to MNC within the African continent.[418] It will not be possible to impose the traditional punishment of imprisonment to corporations, however such legal entities can still be issued with tough sanctions.[419] These tough sanctions may understandably include economic or financial sanctions that consist of benefits that present substantial cash to affected parties, such prospect may not be possible with prosecuting personnel from corporates.[420]

Arguably there are various problems that presently exist in relation to prosecuting corporation, which have not been remedied in the Malabo Protocol.[421] As a result there is much uncertainty, with regards to utilising corporate liability when the Criminal "Chamber of the African Court" commences.[422] In the event the "Malabo Protocol" does enter into force, the provision (Article 46C) relating to corporate liability nevertheless clearly express a powerful message that the prosecution of legal person (corporations) must form a vital part of international legal framework and against the battle that strongly opposes impunity in African continent.

John Ongeso argued, "for true international criminal justice [both natural and legal] entities causing harm by taking advantage of the lack of regulatory mechanisms and weak rule of law in Africa must be held responsible".[423] "Extending criminal responsibility for core international and other crimes to corporate entities could thus be seen as part of Africa's way of putting an end to 'business as usual', whereby

[415] AS. Knottnerus and E de Volder (note 301 above; 392).
[416] Ibid.
[417] Ibid.
[418] Ibid.
[419] Ibid.
[420] Ibid.
[421] Ibid.
[422] Ibid.
[423] Ibid.

corporate players that aid and abet, or that are complicit in gross violations of human rights and the commission of, egregious crimes are made accountable".[424]

Taking into account that money laundering and IFF consist of the movement of funds (illicit) from one jurisdiction to another, Article 46L of the Malabo Protocol, relating to Co-operation and Judicial Assistance will be explored. The legal inquiries regarding the cleaning of dirty money that are linked to criminal activities and regaining their control will certainly need support from the other jurisdictions and states that were victims , from inside and beyond Africa.[425] "Article 46L(1) therefore requires States Parties to 'co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute".[426]

The concealed nature of information relating to these crimes combined with the authority/influence of senior state representatives who 'control the controls', implies that obtaining proof inside the victim state can be substantially difficult.[427] Significant reliance will be placed on the co-operation of national anti-corruption commissions and intelligence and financial forensics units.[428] It is extremely significant for the prosecution to be vested with the authority to obtain mutual legal assistance at the commencement of an investigation.[429]

Corruption and Money laundering are preserved and protected by the secrecy surrounding the nature of these activities.[430] It is vital for investigators to possess the capacity to swiftly acquire the required proof that are found in other jurisdictions, in order to stop the destruction of assets or to pursue immobilising the profits from criminal activities prior to being relocated to another state.[431] Documentary evidence and records containing bank, financial, government, business and corporate records of this nature are crucial for a positive investigation and prosecution.[432]

The Malabo Protocol strictly requires corruption to be the predicate offence for prosecuting Money Laundering in the African Court. On this basis it is significant to

[424] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 27).
[425] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 489).
[426] Article 46L (1) Malabo Protocol.
[427] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 489).
[428] Ibid.
[429] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 491).
[430] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 490).
[431] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 491).
[432] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 490).

note that the prosecution for the offence of money laundering, have the potential to limit prosecutors to a large extent.[433] Only charges relating to "corruption of a serious nature affecting the stability of a state, region or the Union", can be brought against accused persons (natural or legal).[434] Even though numerous other offences that are under the authority and control of the African Court produce and launder illicit profit, the money laundering contravention in the Malabo Protocol is restricted to profits that are acquired "from serious forms of corruption".[435] This essentially indicates that the conduct of laundering money, which is associated with offences not deemed as serious, high-level corruption, will rely on national efforts for such prosecution.[436]

From the preceding paragraphs the Malabo Protocol may be regarded as limiting or restrictive ; however it is sufficient for the purposes of prosecuting IFF. According to Article 28i Bis, 'money laundering' is defined as:[437]

> i) Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.

Firstly, money laundering defined under Article 28i Bis (1) comprise of the elements "transfer and disposal of property". These elements are very close linked to the definition of IFF from African Union's High-Level Panel. The HLP defines illicit financial flow as "money illegally earned, transferred or used".[438] The money laundering definition under Article 28i Bis and the definition of IFF consist of the transfers of money or property. On this basis the African Court can adapt the meaning of money Laundering to include IFF.

Secondly, "money illegally earned" from the HLP's definition of illicit financial flows can be adapted by the African Court to mean "the proceeds of corruption" in Article 28i Bis. In terms of Article 28i of the Malabo Protocol only corruption of a 'serious nature affecting the stability of a state, region or the Union' will be prosecuted by the African

[433] CC Jalloh, KM Clarke & VO Nmehielle (note 10 above; 506).
[434] Ibid.
[435] Ibid.
[436] Ibid.
[437] Article 28I Bis Malabo Protocol.
[438] United Nations Economic Commission for Africa (note 2 above; 15).

Court.[439] On face value , Article 28i may seem restricting and limiting, however if one considers the effect that IFF has on the African Continent, it can be argued that the definition of corruption in Section 28i of the Malabo Protocol will be sufficient and useful for prosecuting IFF. Experts have established that that IFF consist of deep rooted and highly complex practices have caused devasting impact on the African continent.[440] This can be interpreted to mean that IFF "are of a serious nature that affect the stability of a state, region or the Union".

Thirdly, Article 28I of the Malabo Protocol does not provide a definition for 'corruption', however there is reference to a string of specific 'acts of corruption'.[441] This is beneficial because it presents the prosecution with a variety of alternate charges.[442] Article 28I (1) (g) will be beneficial for prosecuting IFF. "According to Article 28I (2) 'Illicit enrichment' means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income".[443] Article 28I (2) is very versatile for the reason that illicit enrichment, which is an act of corruption is not limited or restricted to public officials. It is also interesting to observe the words 'any other person' in Article 28I (2) is not limited to natural persons. Article 46C completes the chain for prosecuting IFF at the African Court since it provides for corporate criminal liability.[444] Corporate criminal liability is extremely relevant for the prosecution of IFF due to the fact the HLP and other experts in the field have gathered evidence which indicates that MNC are responsible for the bulk of the illicit financial flows from Africa.[445]

The prosecution of money laundering and corruption (should include IFF) at a regional level will enable the African Court to exhibit the harmful effect of economic crimes.[446] Such crimes essentially contribute to the commission of atrocious deeds, like those experienced in the DRC.[447] Convictions for the offence of money laundering that are confirmed by the African Court can probably result in the freezing, seizure

[439] Article 28i Malabo Protocol.
[440] M Tafirenyika (note 6 above).
[441] Ibid.
[442] Ibid.
[443] Article 28I Malabo Protocol.
[444] Article 46C Malabo Protocol.
[445] M Forstater (note 23 above; 3).
[446] Ibid.
[447] Ibid.

and identification of resources that may be recovered by victim states or be utilised to compensate victims.

The Malabo Protocol should be amended if it is determined that the Court cannot prosecute IFF under the Money Laundering and Corruption provisions. The amendment should consist of criminalising IFF under Article 28A. The amendment will be beneficial to the African Continent since the African Court will have jurisdiction to deal with this offence at a regional level. Criminalising IFF under the Malabo Protocol will be innovative and unique. This reform can set the standard for future international instruments and influence the amendment of the Rome Statute. The Malabo protocol currently has not come into effect; therefore such reform will not be difficult to achieve.

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Mr Devandran Govender (218079618)
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Pietermaritzburg

Dear Mr Devandran Govender,

Protocol reference number: 00007920
Project title: Illicit Financial flows from Africa: The reason Africa is debtor to the rest of the World

Exemption from Ethics Review

In response to your application received on 01/04/2021 , your school has indicated that the protocol has been granted **'EXEMPTION FROM ETHICS REVIEW'.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law