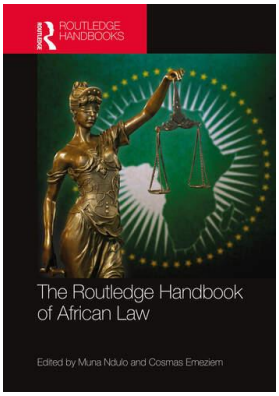

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Developing effective money-laundering laws in AfricaDealing with corrupt, politically exposed persons

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DEVELOPING EFFECTIVE MONEY-LAUNDERING LAWS IN AFRICA

Dealing with corrupt, politically exposed persons

John Hatchard

Introduction

The purpose of this chapter is to explore the effectiveness of anti-money laundering (AML) laws in Africa, with particular reference to dealing with corrupt, politically exposed persons (PEPs). In doing so, it critically considers the work and impact of the Financial Action Task Force (FATF) and the four FATF-style African regional bodies and their influence in "persuading" African states to introduce effective AML laws and institutions.

The chapter is divided into the following parts: section 1 explores the problem of money laundering by PEPs, while section 2 discusses the role of the Financial Action Task Force and the African FATF-style regional bodies. Section 3 considers the FATF recommendations and the development of AML laws in African states. Section 4 reviews the FATF mutual evaluation process, and section 5 then examines how the FATF recommendations are being implemented in African states. section 6 provides a conclusion.

The problem of money laundering by politically exposed persons

The laundering of the proceeds of crime by corrupt, African PEPs in order to disguise their illegal source of money is well documented.[1] PEPs can be defined as "individuals who are or have been entrusted with prominent public functions, for example, Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials" (FATF 2019). The term also includes "family members or close associates of such PEPs" (FATF 2012–2019, 14).

Addressing this problem raises two key challenges for African states. First, PEPs are the most powerful and influential individuals in any society and are in a position to "control the controls," that is, to undermine the development and/or effectiveness of anti-corruption or anti-money laundering laws and institutions.[2] It follows that there is a need for the international community to have the power to "persuade" states to introduce the necessary AML laws and

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other measures, whether they want to or not. Of course, given the diversity of legal systems in Africa, it is not necessary or possible to impose a uniformity of laws or change the fundamental principles of national legal systems. Rather the aim must be to ensure there is *functional equivalence* in the AML measures enacted at the national level. Thus, while the laws and legal systems in African states make it difficult to define what is exactly meant by "African law," in the case of AML measures, it is entirely appropriate to refer to the development of "AML laws in Africa."

Second, many powerful individuals and institutions are willing to assist such criminality, in particular, international and local banks and other financial institutions through which the proceeds of crime are laundered. The disclosures by the Panama Papers highlight that much of this criminality is facilitated by professional money launderers, including lawyers and accountants who make use of shell and shelf companies, registered in off-shore jurisdictions to purchase assets on behalf of PEPs in "haven" or "beneficiary countries," and thus, to effectively conceal the beneficial ownership of such assets.[3]

Combating the laundering of proceeds of corruption by PEPs represents a major challenge for African states and requires effective action both at the national and transnational levels. Africa is not short of international and regional anti-AML and anti-corruption instruments to which most African states are parties. There are three United Nations (UN) conventions, which contain AML provisions: the UN Convention Against Corruption (UNCAC): the UN Transnational Crime Convention (the Palermo Convention): and the UN Convention against Illicit Traffic in Narcotic Drugs (the Vienna Convention). Virtually all African states are parties to these conventions.[4] There are also several relevant regional conventions, including the African Union Convention on Preventing and Combating Corruption (AU Convention).

The challenge is to ensure that: (1) all African states have in place the necessary AML laws and institutions, whether or not there is political support for them; (2) these laws are effective in practice; (3) there is a mechanism to monitor the implementation of the laws; and (4) there is the ability to impose "sanctions" on individual states for noncompliance with their AML obligations. This is the role of the Financial Action Task Force and the FATF-style African regional bodies.

The role of the Financial Action Task Force and the FATF-style African regional bodies

The Financial Action Task Force (FATF) was established in 1989, and is an independent intergovernmental body. Membership originally was comprised of the governments of the seven major industrialized countries (the G7),[5] the Commission of the European Communities, together with eight other invited states.[6] Today, FATF membership has expanded to 35 states and two regional organizations, which represent most of the major global financial centers.[7] South Africa is the only African member of FATF but, as discussed in this chapter, the four FATF-style African regional bodies (African RBs) ensure that all African states are part of the FATF family.

The FATF is a policymaking body that works to generate the necessary political will to bring about global national legislative and regulatory reforms in combating money laundering. It continues to operate only if its members agree that this is necessary (FATF 2012–2019, 1). In 2012, its mandate was extended to 2020.

In recognition of the fact that combating money laundering requires a global response and outreach, the FATF has developed a series of FATF-style regional bodies that perform similar tasks to the main body. In essence, this ensures that states worldwide are required to become

members of FATF and/or of a FATF-style regional body. Indeed, over 190 jurisdictions have committed to implementing the FATF Recommendations.[8]

In the African context, there are currently four FATF-style regional bodies (African RBs). The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) was launched at a meeting of ministers and high-level representatives in Arusha, Tanzania, in August 1999, and consists of 18 members.[9] All have signed the ESAAMLG Memorandum of Understanding, in which they agree, among other things to: (1) adopt and implement the FATF Recommendations; (2) apply anti-money laundering measures to all serious crimes; (3) "implement any other measures contained in multilateral agreements and initiatives to which they subscribe for the prevention and control of the laundering of the proceeds of all predicate crimes …" (ESAAMLG 2018, 3); and (4) participate in an ongoing Programme of Mutual Evaluation (ESAAMLG 2018, 16).

The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) is comprised of 16 state members.[10] It was established in 2000 by the Economic Community of West African States (ECOWAS) Authority of Heads of State and Government to provide "a focus for co-operative anti-money laundering and anti-terrorism financing efforts" in the West African region (GIABA 2006, art. 2(c)(II)). Its link with FATF is highlighted in art. 2(c)(I) of the Revised Statutes of the GIABA Statutes (2006), which states: "The Group shall do everything possible to ensure that Member States recognize, adopt and implement: a. The FATF norms including Recommendations," especially [the 2012 Recommendations] adopted by the FATF members (GIABA 2013).

Article 2 sets out the objectives of the Group, which include: (1) combating the laundering of proceeds from crime and the financing of terrorism; (2) ensuring harmonized and concerted adoption of appropriate measures to combat money laundering and the financing of terrorism; and (3) evaluating, through self-evaluation and mutual evaluation, according to the FATF procedure, progress and the efficacy of measures (GIABA 2006).[11]

At a ministerial meeting in 2004, the governments of 14 states, including Algeria, Egypt, Mauritania, Morocco, Sudan, and Tunisia, agreed to establish the Middle East and North Africa FATF (MENAFATF), which is "voluntary and co-operative in nature" and does not derive from any international treaty.[12] As with the other African FATF-style regional bodies, its objectives include adopting and implementing the FATF Recommendations; ensuring compliance with these standards and measures within the MENA Region; and working with other international organizations to raise compliance worldwide. A Memorandum of Understanding requires that MENAFATF organizes a continuous mutual evaluation program.

The most recent regional body is the Task Force on Money Laundering in Central Africa (GABAC), which is a body of the Economic and Monetary Community of Central Africa. Its members are Cameroon, Central African Republic, Chad, Republic of the Congo, Democratic Republic of the Congo (DRC), Equatorial Guinea, and Gabon.

As noted later in this chapter, any state which does not cooperate with FATF or the African RBs is liable to face serious financial-related "countermeasures" (FATF 2012–2019, 17).[13]

Standard-setting: The FATF recommendations and the development of anti-money laundering laws in African states

Since its inception, a major goal of FATF has been to establish global AML standards in the form of Recommendations that are to be implemented in a consistent manner at the national level and reinforced by an effective mutual evaluation program of state compliance. The

Recommendations were first published in 1990 and have been regularly updated to reflect new challenges and the need to strengthen AML laws and institutions.

The most recent version is the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, which was published in 2012 and last updated June 2019 (the Recommendations).[14] These stamdards are described by the FATF as a "comprehensive and consistent framework of measures which countries should implement in order to combat money laundering …" (FATF 2012–2019, 6).[15] For example, each member country of the ESAAMLG has affirmed their commitment to the FATF Recommendations (ESAAMLG 2018, 2).

The Recommendations themselves are wide ranging and impose obligations on governments, financial institutions, and other key gatekeepers (which are referred to as "designated non-financial businesses and professions' [DNFBPs]) (FATF 2012–2019, 116).[16] The pressure on states to comply with the Recommendations is exerted in several ways: first, through the economic and political power and influence of the FATF members themselves and their ability to demand economic countermeasures against any state failing to adhere to the Recommendations.

Second, each of the Recommendations states that a specific action should be taken: thus suggesting that this is an optional provision. In reality, the 2012 Glossary for the Recommendations, regarding the word "Should," makes it clear that "[f]or the purposes of assessing compliance with the FATF Recommendations, the word *should* has the same meaning as *must*" (FATF 2019). In other words, these are global standards to which all states must adhere. This is an extraordinary situation in that states effectively have no option but to comply with the Recommendations or face "countermeasures," as discussed later in this chapter (FATF 2012–2019, 17).

Third, an integral part of the work of the FATF and African RBs is the mutual evaluation exercise. This gives the Recommendations real teeth. In essence, it is not enough for a state merely to commit to introducing the necessary legislative and regulatory requirements of the Recommendations: rather, a critical part of the FATF's strategy is also to ensure that all states worldwide actually implement all the Recommendations by holding them to account via a mutual evaluation process.

This is reinforced by the FATF International Co-operation Review Group (ICRG), which performs a "name and shame" exercise by identifying those countries with "strategic AML deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies" and recommending specific action to be taken by the individual country in order to address their money laundering risks.[17] A continued failure to do so may lead to the calling on other FATF members to apply countermeasures. Thus, FATF Recommendation 19 provides that "countries should [i.e. *must*] be able to apply appropriate countermeasures when called upon to do so by the FATF" (FATF 2012–2019, 17). These are designed to have a significant negative economic impact on the targeted country and include requiring financial institutions to apply specific elements of enhanced due diligence; limiting business relationships or financial transactions with the identified country or persons in that country; and prohibiting financial institutions from establishing branches in the country concerned.[18] Several African states have been publicly criticized for failing to comply with their AML obligations and have been threatened with countermeasures. This has resulted in drastic remedial action being taken in some cases.[19]

The effect is an extraordinary example of persuasive threats being used against states, despite their enjoying state sovereignty, in order to ensure the necessary political will to take effective

AML action. Thus all African states (whether they like it or not): (1) are obliged to become members of the FATF or a FATF-style regional body; (2) are under an obligation to introduce a series of AML laws and institutions; (3) are subject to a compulsory mutual evaluation process; (4) face significant economic countermeasures if they fail to do so or fail to apply them effectively; and (5) must apply countermeasures against other states when required to do so by the FATF.

African states and the mutual evaluation process

All member states of the African RBs are subject to a periodic mutual evaluation process that includes on-site visits by experts from other states and organizations with the aim of assessing compliance with the FATF Recommendations.[20] A comprehensive country report is then produced, which highlights any AML deficiencies and makes recommendations for action, with each state being categorized as either "compliant," "largely compliant," "partially compliant," or "non-compliant" (FATF 2013–2019, 12). Once approved by the plenary body, the report is published. Where the evaluation reveals strategic deficiencies, there is provision for the drawing up of an Implementation Action Plan setting out a timeframe to address them, as well as follow-up visits to review progress.[21]

The mutual evaluation process also helps provide a picture of state compliance and where additional work is needed. This is crucial in that the reports on mutual evaluations from the African RBs reveal that there is an overall low level of compliance with the FATF Recommendations. For example, in the West African region, a GIABA report states that:

> … regulation, supervision, and monitoring of the operations of DNFBPs remain poor in West Africa. Legal, institutional, and operational frameworks for regulating, supervising and monitoring DNFBPs are either weak or poorly defined. In some countries, specific legislations that govern particular types of DNFBPs (notaries, real estate agents, dealers in precious stones, and dealers in precious metals) contain obsolete provisions.
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> *GIABA 2015b, 6*

The report also highlights that, even with the necessary political support for AML measures, economic constraints limited the ability of many states to comply fully with their obligations. Alarmingly, another key finding of the GIABA report was that "[e]ven in countries where legal, regulatory and supervisory frameworks exist, regulatory and supervisory authorities either do not fully understand them or are unaware of [the FATF Recommendations] … [and] the majority of DNFBPs are unaware of, do not understand, or poorly comply with their AML/CFT obligations" (GIABA 2015b, 6). In essence, "an overwhelming majority of target-respondents were unaware of the existence of the … [FATF Recommendations] even though most of them are high-echelon functionaries of agencies and bodies responsible for the prevention and control of money-laundering" (GIABA 2010a, 38).

As noted earlier, the matter does not stop there, as the mutual evaluation process publicly highlights the failings of individual states to comply with the Recommendations, with the FATF ICRG performing its "name and shame" exercise and recommending specific action to address their money laundering risks.[22] The effectiveness of such is illustrated by the fact that in 2013, Ethiopia, Kenya, Nigeria, São Tomé and Príncipe, and Tanzania, among others, were on the "name and shame list," with FATF calling on its members to "consider the risks arising from the deficiencies associated with each jurisdiction …" (FATF 2013,

1). In response, each state, with the exception of Ethiopia, has now addressed their AML weaknesses and have been removed from the list. For example, the enactment of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2017 satisfied FATF that Kenya had addressed deficiencies in the criminalization of money laundering and asset recovery provisions satisfactorily.

In the case of Ethiopia, FATF/ESAAMLG identified strategic weaknesses in its AML laws. Discussions with government continued, and in June 2018, the ICRG noted: "Since February 2017, when Ethiopia made a high-level political commitment to work with the FATF and ESAAMLG to strengthen its effectiveness and address any related technical deficiencies, Ethiopia has taken steps towards improving its AML/CFT regime, including by developing a risk-based supervision manual for the designated non-financial businesses and professions (DNFBPs) and commencing risk-based supervision for higher-risk DNFBPs and non-profit organizations (NPOs)" (FATF 2018). This work is continuing, and as of June 2018, Ethiopia remained on the "name and shame" list.[23]

An outstanding example of the persuasive power of the Mutual Evaluation Report (MER) system comes from Ghana. As a member of GIABA, in 2009, Ghana was subject to a mutual evaluation exercise. The subsequent report identified "strategic deficiencies" in 16 key FATF Recommendations, including a failure to: (1) adequately criminalize money laundering; (2) establish and implement adequate measures for the confiscation of funds related to money laundering; (3) establish effective customer due diligence (CDD) measures; and (4) establish a fully operational and effectively functioning Financial Intelligence Unit (FATF 2010). It was thus subjected to the FATF ICRG review process. An action plan to address the deficiencies was produced and in October 2010, Ghana publicly made a political commitment to implement this within one year. However, in October 2011, FATF announced that Ghana had not made sufficient progress in addressing its deficiencies and later issued a public statement calling on its members "to consider the risks arising from the deficiencies" in Ghana's AML/CT regime (FATF 2011, 2012). This pressure produced some action. The Anti-Money Laundering Regulations 2011 were introduced, which comprehensively addressed the CDD issue while the Economic and Organized Crime Office Act 2011 provided for the confiscation of proceeds of crime.[24] In addition, the Ghana Financial Intelligence Unit, known as the Financial Intelligence Centre, became fully operational. GIABA then issued a second follow-up progress report, which highlighted those areas where further action was still necessary (GIABA 2011a). Finally, in January 2013, following an on-site visit to Ghana, the ICRG Regional Review Group announced that it was satisfied that the main action plan items had been substantially completed, and that there was political commitment and institutional capacity to implement AML Reforms in Ghana. They concluded that Ghana was therefore no longer subject to FATF's monitoring process, but the Ghanaian authorities would work with the GIABA, so as to address the full range of AML issues identified in its mutual evaluation report.[25] In 2013, Ghana was removed from the list following a review that found it had demonstrated the necessary political will to make sufficient progress in addressing its deficiencies.

Implementing the FATF recommendations in African states: Preventive measures and criminalization

In this section, some of the key Recommendations are explored with the focus on the manner in which several African states have been "persuaded" to comply (willingly or unwillingly) with the Recommendations.

Politically exposed persons and the anti-money laundering preventive measures

Part D of the FATF Recommendations contains a series of AML preventive measures. Countries are required to "ensure that financial institution secrecy laws do not inhibit implementation" of the Recommendations (FATF 2012–2019, 12). There are also a series of customer due diligence and record keeping requirements, which apply to both financial institutions and designated non-financial businesses and professions. Where there is a suspicion or "reasonable grounds to suspect that funds are the proceeds of a criminal activity," a law must require that a report is made to the national financial intelligence unit (FATF 2012–2019, 17).[26]

States are required to ensure that "financial institution secrecy laws do not inhibit implementation of the FATF Recommendations" and that financial institutions keep and retain the records of financial "transactions, both domestic and international," for at least five years (FATF 2012–2019, 12, 13).[27] Further, each state must have in place a legislative/regulatory framework requiring financial institutions and DNFBPs to implement CDD and "know your customer" (KNC) measures when either establishing business relations, carrying out occasional large financial transactions where there is a suspicion of money laundering, or where the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.[28] In developing their strategies, states must adopt a risk-based approach, so that when higher risks are identified, the AML regime must adequately address them. PEPs represent a higher money laundering risk, and thus, enhanced due diligence measures must be put into place.[29]

Ensuring that the necessary legislative and regulatory AML framework is in place to facilitate this enhanced scrutiny is essential. Certainly, some states have proved willing to incorporate this obligation into legislation. For example, art. 9 of the Anti-Money Laundering Act in Guinea specifically provides that, apart from ordinary identification measures, reporting entities "shall: (i) develop risk management systems for determining if a client is a PEP; (ii) adopt reasonable measures for determining the origin of funds; (iii) institute enhanced and continuous monitoring over the business relationship with this type of client."[30]

However, both the ESAAMLG and GIABA have reported that the mutual evaluation program has highlighted the fact that several states still have no, or inadequate, legal provisions specifically requiring financial institutions to "profile" or otherwise identify PEPs and have called on states to take the appropriate action.[31] For example, the GIABA Mutual Evaluation Report on Mali highlighted this deficiency and required that it was addressed. This was followed by three follow-up reports, the final one of which noted with satisfaction that legislation had remedied the deficiency.[32]

That satisfactory progress can take time to achieve and the determination of the FATF and African RBs to achieve its goals is well illustrated by the case of South Africa. In 2009, a joint FATF/ESAAMLG Mutual Evaluation Report on South Africa highlighted a number of key deficiencies in the preventive mechanisms required by Part D of the Recommendations in the existing domestic legislation. In particular it was noted that, "… there is no specific requirement in law or regulation requiring accountable institutions to identify or verify the identity of beneficial owners (*i.e.* the natural persons who ultimately own and control the customer)" (FATF and ESAAMLG 2009, para. 8). Given that PEPs make use of corporate entities and trusts to hide their beneficial ownership of assets, this was a major defect.

Further, it was highlighted that there was no specific requirement that accountable institutions applied enhanced due diligence for higher risk categories of customers, business relationships

or transactions, including PEPs or cross-border correspondent banking relationships (FATF and ESAAMLG 2009, para. 13).

As a result, the FATF introduced a targeted follow-up process in which South Africa was required to report to every FATF Plenary on the progress made in addressing deficiencies identified in the 2009 MER. This finally resulted in the enactment of the Financial Intelligence Centre (Amendment) Act 2017 (the 2017 Act). In November 2017, the FATF Plenary considered South Africa's 14th Mutual Evaluation Follow-up Report and noted the provisions of the 2017 Act, as well as substantial amendments to other legislation. The FATF concluded that with these actions, South Africa had addressed the remaining deficiencies relating to customer due diligence and recordkeeping adequately and decided to end the follow-up process. An eight-year process had finally achieved its goal.

Politically exposed persons and criminalizing money laundering

FATF Recommendation 3 requires countries to "criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention" and should "apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences" (FATF 2012–2019, 10).[33]

The importance of a global adherence to this recommendation means that African PEPs and those who assist them can be subject to a money laundering conviction in whichever state(s) the proceeds of crime are laundered. For example, James Ibori was the Governor of the Delta State in Nigeria from 1999–2007, when it was alleged that he defrauded the State of some US$89 million. The Panama Papers revealed that a series of offshore companies and trusts registered in the British Virgin Islands, among others, were used to launder the proceeds. Whatever constitutional or political protection he enjoyed as a state governor in Nigeria, this did not prevent his prosecution for money laundering in the United Kingdom. In 2012, at Southwark Crown Court in London, Ibori pleaded guilty to 10 counts of fraud and money laundering and was sentenced to a total of 13 years imprisonment. The case is also a neat example of the importance of developing the political will to pursue those who facilitate the laundering. In this case, it was Bhadresh Gohil who was a solicitor and partner in a law firm that acted for Ibori. He was also charged with money laundering. It was alleged that he had provided a client account for Ibori, through which Ibori had laundered money. In 2010, Gohil was convicted at Southwark Crown Court of money laundering and later pleaded guilty to eight more offenses, involving a conspiracy together with Ibori and others, to defraud two states in Nigeria said to involve some US$37 million. In April, 2011, Gohil was sentenced to a total of 10 years imprisonment.[34]

The use of financial institutions and DNFBPs, through which PEPs launder their proceeds of corruption abroad, is well documented and represents another example of the "you can't do it alone" principle. The Global Witness report, "Undue Diligence: How Do Banks Do Business with Corrupt Regimes," provides a stark reminder of how banks such as Barclays, Citibank, Deutsche Bank, and HSBC have undertaken dubious business relationships with PEPs from Angola, Congo, Equatorial Guinea, Gabon, and Liberia (Global Witness 2009). Thus, it is not just the PEPs who create the problem but, as the Commission for Africa has emphasized, also the bankers, lawyers, and accountants in other countries (CFA 2005, 150). It remains a matter of considerable concern, therefore, that so few financial institutions, or their senior staff or those working in DNFBPs, have been prosecuted for assisting PEPs to launder their proceeds of corruption.

Strategic deficiencies remain commonplace and can seriously undermine national AML efforts to prosecute corrupt PEPs. As the case of Botswana illustrates, the next section, the failure to comply with Recommendation 3, can also prevent effective assistance being provided to other countries.

Implementing the FATF recommendations in African states: International cooperation in dealing with politically exposed persons

In dealing with money laundering cases with transnational elements, effective cooperation between states is essential. This is because, under international law, enforcement jurisdiction is strictly territorial in nature. Thus, a typical PEP corruption-related case often involves a transnational element, in which information is held in another state concerning, for example, bank and other financial records, or there is a need to freeze the suspected proceeds of crime held in another state.

In such cases, a state (the requesting state) must seek the assistance of another state (the requested state) in gathering evidence or information in connection with a criminal investigation or prosecution, or to freeze and/or confiscate the proceeds of corruption held in the requested state. Mutual legal assistance (MLA) is thus "any assistance given by the requested state [to the requesting state] in respect of investigations, prosecutions or proceedings in a criminal matter …".[35] Strictly speaking, a formal MLA request is required, in which the requested state is being asked to exercise a coercive power or to obtain an order of a court. This is done by issuing a letter of request or *commission rogatoire*.

FATF Recommendation 37 states that:

> Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings. Countries should have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation.
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> *FATF 2012–2019, 25*[36]

Formal MLA arrangements can be effected by a bilateral treaty (BILAT) or multilateral treaty (MLAT). Some African states have entered into a number of BILATs, which permit the parties to set out more precisely the circumstances in which assistance will be granted or refused.[37] However, such treaties are expensive and time-consuming to negotiate, and unless there are any country-specific requirements to be included, the use of MLATs is often more practical.

The AU Convention, the Palermo Convention, and the UNCAC each provide a legal basis for such cooperation between state parties, although this does not preclude the according of assistance under other arrangements. For states of the Southern Africa Development Community (SADC), the SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002 is also available.[38] Commonwealth African states can seek assistance under the Harare Scheme, which was adopted in 1986 by Commonwealth Law Ministers.[39] Although the Scheme itself does not constitute a treaty, Commonwealth member states have adopted it by consensus. Each member state implements it through a statute, which is consistent with the provisions of the Scheme and which permits the relevant authorities of the requested country to respond to requests from other Commonwealth countries.[40]

In the case of extradition, Recommendation 39 states that, "[c]ountries should constructively and effectively execute extradition requests in relation to money laundering and terrorist financing, without undue delay" (FATF 2012–2019, 27). With regard to the problem in which a PEP seeks sanctuary in another country rather than face corruption charges at home, Recommendation 39 continues: "Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations" (FATF 2012–2019, 27).

The effectiveness of mutual legal assistance in African states

An excellent example of international cooperation is found in the case of Diepreye Alamieyeseigha, a former Governor of Bayelsa State in Nigeria. He had acquired a vast array of assets, derived principally from the theft of public funds and the receipt of bribes for the awarding of public contracts. A joint operation between the Economic and Financial Crimes Commission (EFCC) in Nigeria and the Metropolitan Police in London led to the identification of the proceeds of crime in South Africa, Cyprus, United Kingdom, and Denmark, among others. An MLA request from the EFCC to the UK authorities led to the English High Court making a worldwide criminal restraint order to secure the assets. Nigeria then brought civil proceedings in the English High Court to recover the assets in London, Cyprus, and Denmark.[41] South Africa was able to assist in the recovery of property held in Cape Town by securing a domestic freezing order in response to an MLA request from Nigeria.

The MERs published by the African FBs provide an excellent overview of the effectiveness of MLA provisions. As is the case with other Recommendations, the position is patchy. For example, the 2017 MER on Ghana provides a detailed examination of the MLA process and concludes that Ghana provides "constructive and timely MLA" (GIABA 2017, para. 291, 101). In the case of Botswana, however, the 2017 MER notes:

> Botswana has a legal framework in place to facilitate international cooperation in mutual legal assistance, extradition matters and to some extent other forms of cooperation. However, non-domestication of all offences set out in the Vienna, Palermo and Terrorist Financing Conventions limit the scope of international cooperation that can be requested and provided.
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> *ESAAMLG 2017, 15–16*

The reviewers, therefore, state: "Botswana should ensure that the legal system it has to facilitate international cooperation in mutual legal assistance and extradition is effectively used in ML/TF cases and that non-criminalisation of some of the predicate offences which might impede on such processes is addressed" (ESAAMLG 2017, 18).

The extent to which a particular country can (and will) provide the requested assistance will depend upon several factors.

Challenges in making mutual legal assistance effective

Inadequate mutual legal assistance laws

This is a problem in many African states. Two examples will suffice. The MER on The Gambia reports on the need for a "comprehensive ML Act" (GIABA 2014, 10). This has still not been addressed, as the country reportedly is still not compliant or only partially compliant with 29

of the Recommendations. In the case of Nigeria, there has been a long-standing dialogue between GIABA and the government over the inadequacy of ML laws, and in the 2015 follow-up report, Nigeria was urged once again to enact "comprehensive mutual legal assistance legislation" and to issue assets recovery and tracing regulations (GIABA 2015a, 14). The Mutual Legal Assistance Act of 2017 was designed to remedy this situation.

The political dimension

The decision of whether to seek assistance or provide assistance is ultimately a political one. Thus, a PEP may use his/her political power or influence to prevent a successful MLA request from being made. For example, a political decision may prevent (or delay) the making of an MLA request in a politically sensitive corruption matter, or political pressure on judges may ensure that legal challenges to MLA requests are upheld, even on the most spurious of grounds. For example, the Kenyan Anti-Corruption Commission (KACC) was investigating cases of alleged corruption and money laundering by PEPs, involving the use of a number of companies in the so-called Anglo-Leasing cases. A mutual legal assistance request was made to the Swiss authorities for information and documentation relating to one of the companies, Mercantile Securities Corp. This immediately led to a challenge in Kenya of the power of the director of the KACC to make such a request. In *First Mercantile Securities Corp v. Kenya Anti-Corruption Commission*, Justice Nyamu, in the High Court of Kenya, granted orders of *certiorari* and prohibition, effectively preventing the undermining of the investigation. This was on the spurious grounds that the director of the KACC had no power to make the request.[42] Three years later, the decision was rightly overturned, but the delay had served the purpose of undermining the investigation.[43]

Limits to the assistance that can be provided

There are three issues here. First, the authorities in the requested state must comply with their domestic laws and cannot execute a request for assistance, which would be in breach of its domestic law or require it to exercise powers that are not available in relation to a domestic offense. For example, a requested state cannot execute a request for the monitoring of a bank account owned by a foreign PEP if there is no statutory power to do so. Again, this emphasizes the vital importance of all states, ensuring they have in place effective and comprehensive AML and related legislation.

Second, effective cooperation requires that a request for assistance is executed in accordance with the requirement of the laws of the requesting state, because there is little point in a state responding to an MLA request that fails to meet the requirements of the requesting state and that is likely to render the evidence provided inadmissible in the intended criminal proceedings.

Third, practical issues may make it difficult to provide the information requested. For example, the ESAAMLG report notes that researchers encountered countries "in which company and land transfer registries have been in a dysfunctional state for some time" (Goredema and Madzima 2009, para. 49, 23). This is of particular concern when the requesting state believes that a PEP has laundered the proceeds of corruption through complex corporate structures, or the purchase of land through trust companies, or the like.

Dual criminality

There is a general prerequisite of dual criminality, that is, the alleged conduct must be a crime in both the requesting and requested states. This emphasizes, yet again, the importance of all

African states complying with their FATF "criminalization" responsibilities. Recommendation 37 states: "Countries should render mutual legal assistance, notwithstanding the absence of dual criminality, if the assistance does not involve coercive actions. Countries should consider adopting such measures as may be necessary to enable them to provide a wide scope of assistance in the absence of dual criminality" (FATF 2012–2019, 25).

Where dual criminality is required for the provision of MLA, that requirement should be deemed to be satisfied regardless of whether both countries place the offense within the same category of offense, or denominate the offense by the same terminology, provided that both countries criminalize the conduct underlying the offense. This is potentially problematic with offenses such as illicit enrichment, where the offense does not exist in the requested state, owing to constitutional problems.

Differing legal systems

The differing legal systems inherited by African states can create significant barriers to effective MLA arrangements. For example, suppose State A, a Francophone (civil law) African state, makes a mutual legal assistance request to State B, an Anglophone (common law) African state, for a search and seizure exercise to be undertaken at certain premises. Under the law of State B, a court will only authorize a search if there are reasonable grounds to suspect an offense has been committed and that relevant evidence will be found. However, in civil law states, the concept of a threshold standard for a search warrant does not exist. Generally, the investigating judge or magistrate will order a search, based on a reasonable belief that relevant evidence may be found as a result. Because of this divergence in approach, on the face of it, State B will be unable to comply with the MLA request from State A.

Such fundamental differences can prevent the rendering of assistance, and various solutions have been developed to overcome the problem. For example, states may agree that a request will be accepted for execution provided that it emanates from an authority responsible for criminal investigation or prosecution within the requesting state, or that the attorney general in a common law state is "deemed" to be a judicial authority for the purposes of a request. Thus, if the request emanates from or is endorsed by the attorney general, which is possible for most common law states, it will be considered to be a judicial request for the purpose of execution within a civil law state. Similarly, issues of dual criminality may arise, especially where the assistance requested concerns conspiracy or other preparatory offenses that are often unknown in civil law states.

Keeping mutual legal assistance laws arrangements up to date

Keeping MLA laws and arrangements up to date is essential in order to address new forms of criminality or technological innovations. The Harare Scheme is significant here as it can be amended by agreement at the Triennial Meetings of Commonwealth Law Ministers. The result is that it is constantly being updated, without the need for any legislative action or redrafting of MLA treaties on the part of member states. For example, at their meeting in Accra, Ghana, Commonwealth Law Ministers recognized that the Harare Scheme needed revision to enable prosecutors to access data preserved by internet service providers. As a result, the Scheme was amended by consensus to enable Commonwealth states to assist with requests to preserve computer data and facilitate direct requests from agency to agency because of the need for an immediate response in this context. Data would be preserved for 120 days, within which time a formal request for the production of the data could be made in accordance with the Scheme.

There is also a need for individual states to keep their local laws and rules of evidence up to date, not simply to comply with the Harare Scheme, but to account for new investigative and prosecution techniques. For example, one area that many African states have not addressed concerns the obtaining of witness statements and testimony through the use of video links. Using this technology, a witness in the requested state can be questioned by authorities in the requesting state on a real-time basis, or the evidence can be given live, directly to a court proceeding in the requesting state. Here the task is to ensure that the relevant criminal procedure code or equivalent provides for the admissibility of such evidence.[44] While recognizing that, for many African states, financial and other constraints make the use of such technology problematic, the advantages are significant in that it provides an important alternative to costly and complicated processes for obtaining information and evidence from witnesses outside the country.[45]

Conclusion

Combating money laundering by African PEPs is a unique challenge. PEPs "control the controls," so they are in a position to undermine national AML efforts, and they are assisted in their illegal actions by powerful financial institutions and professional money launderers.

Meeting this challenge requires an effective global response. Fundamentally, it is essential to develop the political will on the part of PEPs to introduce effective AML laws and institutions, whether they want to or not. This "persuasion" can only come in the form of effective international pressure, in this case through the work of the FATF and the African RBs. By demanding that all states become members of the FATF "family," whether they like it or not, and requiring all states to implement the FATF Recommendations, whether they like it or not, has created a situation in which one can truly refer to the ongoing development of AML laws in Africa. Thus, while the laws and legal systems in African states make it difficult to define what is exactly meant by "African law," in the case of the AML measures, it is entirely appropriate to refer to the development of "AML laws in Africa."

The demand for action from African states is backed up by the mutual evaluation process, designed to hold states to account for noncompliance with the FATF Recommendations and, if so, be subject to countermeasures. In this situation, state sovereignty is effectively bypassed—a remarkable position, especially given that the FATF is merely an intergovernmental organization.

The African RBs are to be congratulated. They have produced important reports regarding the link between PEPs, corruption, and money laundering, while the publicly available mutual evaluation reports have clearly set out the strengths and weaknesses of state compliance with the FATF Recommendations. Effective follow-up and monitoring continue to produce positive results as states, willingly or otherwise, strengthen their AML laws.

In practice, the position in Africa is one of steady but incomplete progress. States, such as South Africa, Kenya, and Ghana, have been "persuaded" by the African RBs to enact legislation to bring them into line with the FATF Recommendations. Further pressure from the African RBs is required in the cases of other countries for which AML laws and institutions remain less than fully compliant.

A related challenge is the seeming lack of knowledge of the Recommendations and AML obligations among key players in the AML process, including lawyers and accountants. This is a clear case for professional bodies, such as national law societies, to take the lead in ensuring that their members understand and comply with their AML obligations.

The victims of money laundering are the people of the country in which the economy is being weakened, and sometimes wrecked, by corrupt PEPs. Raising public awareness of the

FATF Recommendations can go a long way to ensuring that there is further scrutiny of PEPs. Civil society organizations (CSOs), including the media, have a key role to play, by keeping the public updated about AML issues and concerns. A good starting point is the national MER and the follow-up reports, which contain in-depth analyses of the compliance of each of the member states with the FATF Recommendations.

Overall, one can conclude that much has been achieved, but that much still needs to be done if the scourge of corruption and money laundering by African PEPs is to be combated effectively. Ensuring effective AML laws in all African states is an excellent starting point.

Notes

1 See, for example, the case studies of Sani Abacha (Nigeria), Frederick Chiluba (Zambia), and "Cashgate" (Malawi) in Nicholls QC et al. (2017).
2 Other "controls" include control over the public service and over corruption/anti-money laundering investigations and prosecutions: see Hatchard (2014).
3 For example, James Ibori was governor of Delta State in Nigeria from 1999 to 2007 but later convicted of money laundering (discussed later in the chapter). The Panama Papers showed that Mossack Fonseca, the law firm in Panama from which the leak emanated, was the registered agent of four offshore companies connected to James Ibori, including Julex Foundation, which was registered in the Seychelles and of which Ibori and family members were beneficiaries. Julex was the shareholder of Stanhope Investments, a company incorporated in Niue in 2003. Ibori was also connected to Financial Advisory Group Ltd. and Hunglevest Corporation, although Mossack Fonseca's files do not specify the exact nature of his connection: see https://offshoreleaks.icij.org/nodes/15006801, accessed August 25, 2018.
4 Although not all states have incorporated the provisions into domestic law, and thus, are reducing the effectiveness of the conventions.
5 Canada, France, Germany, Italy, Japan, United Kingdom, and the United States.
6 Australia, Austria, Belgium, Luxembourg the Netherlands, Spain, Sweden, and Switzerland.
7 The full membership list is: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong (China), Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States (as of August 2018).
8 See FATF website: www.fatf-gafi.org/countries/.
9 Angola, Botswana, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.
10 Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Príncipe, Senegal, Sierra Leone, and Togo.
11 Under art. 12 of the GIABA statutes, each member state undertakes to submit to evaluation, by other signatory states, of the compliance of its internal regulations with international standards for measures to combat money laundering.
12 The number has since risen to 19 states. See www.menafatf.org/about.
13 The FATF Standards are comprised of both the Recommendations and their Interpretative Notes (INs).
14 The Recommendations are subject to regular review and updating.
15 The FATF Standards are comprised of both the Recommendations and their Interpretative Notes (INs).
16 These include real estate agents, dealers in precious metal and stones, lawyers and accountants and trust and company service providers. See Recommendation 22 (FATF 2012–2019, 116).
17 The FATF calls upon its members to consider the risks arising from the deficiencies associated with each jurisdiction. See "More About the International Co-operation Review Group (ICRG)," www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html.
18 Examples of the countermeasures that countries can take are listed in the Interpretative Note to Recommendation 19 (FATF 2012–2019, 81).
19 Further pressure on states to adhere to the FATF Recommendations is found in UN Security Council Resolution 1617 of July 29, 2005, which "*[s]trongly urges* all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force's (FATF)

Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing" (UN 2005, 3–4) (emphasis added). These have since been incorporated into the FATF Recommendations.

20 For example, ESAAMLG members may be assessed in one of three ways: by an ESAAMLG Mutual Evaluation; by an IMF or World Bank-led assessment; or for the members of the ESAAMLG who are also members of the FATF or the Off-Shore Group of Banking Supervisors (OGBS), jointly by the FATF or the OGBS and ESAAMLG: see ESAAMLG Mutual Evaluation Procedures (ESAAMLG 2009).

21 For example, see the subsequent discussion on South Africa.

22 "Jurisdictions with strategic AML/CFT deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies… the FATF calls on its members to consider the risks arising from the deficiencies associated with each of the jurisdictions." See "More about the International Co-operation Review Group (ICRG)," www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html.

23 FATF also noted that São Tomé and Príncipe had now provided for the enforcement of its AML/CFT law in the new Penal Code.

24 LI 1987 of 2011, https://fic.gov.gh/wp-content/uploads/2015/11/AML-Regulations-2011-L.-I.-1987.pdf.

25 As noted in a GIABA press release, dated February 22, 2013.

26 The national financial intelligence unit is defined in Recommendation 29 as a "national centre for responsible for the receipt and analysis (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis" (FATF 2012–2019, 22).

27 FATF Recommendations 9 and 11, respectively.

28 The applicable threshold is US$/EUR 15,000: FATF Recommendation 10.

29 FATF Recommendation 12.

30 Act No. L/2006/010/AN of October 24, 2007.

31 See, for example, the GIABA Mutual Evaluation reports on Benin (2010b, para. 551), and Côte d'Ivoire (2013, para. 50); the MENAFATF Mutual Evaluation reports on Algeria (2010, para. 17); ESSAMLG (2009, 42–51); GIABA (2015b, 29).

32 Law no. 10-062 of December 30, 2010, instituted an obligation for customer due diligence on PEPs: see GIABA Third Follow-up Report on Mali (2011b, 10). Similarly, the MENAFATF (2010, para 102) Mutual Evaluation report on Algeria acknowledged the "major achievements" made in AML legislation since its previous evaluation in 2003.

33 This incorporates the more detailed provision found in the Interpretative Note to Recommendation 3 (FATF 2012–2019, 32–3).

34 The facts are taken from the judgment of Gross LJ in *R v. Gohil* [2018] EWCA Crim 140.

35 Article 2(1), Southern African Development Community Protocol on Mutual Legal Assistance.

36 Recommendation 37 also requires each state to have adequate domestic legislation permitting its relevant law enforcement or other agency (such as an anti-corruption commission) to make and receive MLA requests.

37 For example, Ghana has entered into BILATs with the United States, the United Kingdom, Brazil, Germany, and Italy, while Egypt and the United States have done the same.

38 Somewhat similar provisions are found in the ECOWAS Convention on Mutual Assistance in Criminal Matters.

39 Harare Scheme is formally known as the "Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth." The fact that Zimbabwe later withdrew from the Commonwealth does not affect the operation of the Harare Scheme.

40 The normal method of evidencing the countries to which assistance will be rendered in accordance with the Scheme is to include a Schedule to the national mutual assistance in criminal matters laws, a list of Commonwealth countries.

41 See *Nigeria v. Santolina Investment Corp* [2007] EWHC 3053 (QB). Santolina was one of Alamieyeseigha's offshore companies, incorporated in the Seychelles.

42 This was despite the explicit wording of §12 of the Economic Crimes Act 2003.

43 The Kenyan Judges and Magistrates Vetting Board later found Justice Nyamu "unsuitable to continue to judicial service," based, in part, on his ruling in the *First Mercantile* case, as well as several other

troubling decisions: see Judges and Magistrates Vetting Board "Determinations Concerning the Judge of the Court of Appeal," 2012 (JMVB 2012, 2).

44 It will also have to deal with issues such as perjury: if the witness in the requested state tells lies under oath, does this constitute an offense in the requesting state or requested state?

45 Some imagination can be used to implement such an arrangement. Thus, if the court in the requesting state does not have access to such technology, it might be possible to designate a place where this is available to be a court for the purposes of the hearing.

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