PAN-AFRICAN UNITY AND SOLIDARITY TO END FINANCIAL SECRECY

POLICY BRIEF

JULY, 2022
Solidarity is neither charity nor welfare; it is an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and the maintenance of common goals or interests. Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole. No state may choose to exercise its power in a way that gravely threatens the integrity of the community.” Judge Macdonald R. St. J.

1 Introduction
African states ought to be leading the fight against illicit financial flows, and more specifically against financial secrecy. They ought to operate as one united front at every international forum articulating clear demands for greater transparency in the international financial system. More than that, they ought to be at the forefront, mobilizing all developing countries towards that goal. Instead, some African states are trampling upon their neighbours by introducing secrecy into their financial systems, adopting tax policies that are harmful to themselves and their neighbours and developing strategic alliances based on bilateral agreements that pose significant revenue threats to other African countries.

Yet, it was the 2015 report of the AU/ECA High Level Panel on Illicit Financial Flows from Africa (HLP Report) led by former President Thabo Mbeki that placed the issue of illicit financial flows from Africa on the global development agenda. More recently, the May 2022 resolution of African finance ministers called for negotiation towards a UN convention on tax and recovery of assets, thus heralding in another bold step from Africa in the fight against illicit financial flows. However, every step forward is gravely compromised by individual African states that take two steps backwards.

This policy brief will make a case for Pan-African unity, solidarity and accountability in the fight against illicit financial flows from Africa. The policy imperatives are founded upon the African Charter on Human and Peoples’ Rights (African Charter) and will propose tangible acts of solidarity for state parties to the African Charter.

2 Background
There are very strong geopolitical reasons for Pan-African unity and solidarity, made even stronger by the agenda for regional economic integration. However, beyond all such political imperatives, 53 African States undertook to work together to build African unity and solidarity and to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies. This undertaking was made in the form of a binding multi-lateral agreement under international law, and may be found in Articles 21(3) – 21(5) of the African Charter.

All member states of the African Union, except for Morocco, are state parties to the African Charter. They have binding and enforceable legal obligations under international law to work in unity and solidarity with each other to combat foreign economic exploitation particularly that practiced by international monopolies.

Today, illicit financial flows from Africa constitute the gravest form of foreign economic exploitation by international monopolies.

3 Tax havens, secrecy jurisdictions and international financial centres – the heart of the problem
There are many factors that fuel illicit financial flows. In this policy brief we will focus on the obligation of state parties to combat tax havens, secrecy jurisdictions and international financial centres (collectively referred to as “haven jurisdictions”) which lie at the heart of the problem.

International monopolies and ultra-rich oligarchs use these haven jurisdictions to shield their wealth and taxable income from state parties to the African Charter.

These haven jurisdictions can also be used to counter act sanctions as has been seen in the case of Russian oligarchs from 2014 after the annexation of Crimea and in 2022 because of Russia’s invasion in Ukraine. The powerful billionaires listed on the sanctions list use these jurisdictions to register their assets in shell companies, with the help of an army of lawyers and accountants, who enable them to shield their assets from sanctions. Beneficial ownership of these assets is consequently concealed within this complex system thus rendering the sanctions ineffective and simultaneously giving rise to the burgeoning sanctions evasion industry for lawyers and accountants.

Despite the dilatory effect of financial secrecy, banking secrecy and opacity on the effectiveness of these economic sanctions, the US, EU and G20 countries have not done enough to change the international financial system into one that is open and transparent. Not even to ensure that they maintain their political and economic hegemony.
These geopolitical concerns are clearly not as powerful as the corporate interests that benefit from financial secrecy. Consequently, it is unlikely that change will take place unless those with power are forced to do so. Africa should lead this initiative, and build on lessons learned from the efforts towards the prohibition of the lucrative slave trade industry and slavery, racial discrimination, apartheid and the right to self-determination. The prohibition of each of the above are now accepted peremptory norms of international law from which no derogation is possible.

These victories were not easily achieved and did not take place overnight. However, they did entail decisive, tangible and strategic acts of unity and solidarity within Africa and between Africa and its partners across the globe.

The African Commission on Human and Peoples’ Rights (African Commission) elaborated on the obligations of state parties under Article 21(5) and concluded that state parties have such an obligation under international law to protect their people from all forms of foreign economic exploitation.

4 Threats to solidarity in the fight against illicit financial flows – financial secrecy and the race to the bottom

The greatest threat to unity and solidarity in Africa’s fight against illicit financial flows is what the HLP Report calls the race to the bottom, where African countries, that are also state parties to the African Charter, use tax incentives, secrecy and other administrative measures to ease the process of doing business to outdo their competitors, other state parties to the African Charter. In so doing, they create greater openings within the continent for the illicit outflow of revenue and for international monopolies to exploit natural resources in a manner that does not benefit the peoples of Africa.

One of the major problems with secrecy is that the system conceals the true beneficial owner of accounts, assets and other resources. These jurisdictions adopt laws and policies that enable individuals and companies to register anonymous companies and other complex legal entities, which make it easier to conceal funds and thereby facilitate illicit financial flows.

Harmful tax agreements also pose a significant threat to unity and solidarity in the fight against foreign economic exploitation through illicit financial flows from Africa. For example under the double tax agreement between the DRC and South Africa, if the beneficial owner of royalties arising in the DRC is a South African resident, the treaty reduces the withholding tax on these royalties from 14% to 10%. Further, DRC’s domestic laws provide that dividends paid by resident companies to non-resident companies will be subject to a 20% withholding tax (10% for mining companies). However, the treaty with South Africa reduces the rate to 5% if the South African resident company holds at least 25% of the DRC company. In all other cases, the rate is reduced to 15%. While this double tax agreement is beneficial to companies resident in South Africa, it is harmful to domestic resource mobilisation efforts in the DRC. Arguably, it is a clear illustration of a contravention of article 21(5) of the African Charter and ought to be renegotiated.

Of major concern is the trend in Africa towards the establishment of international financial centres. This can be seen in the ongoing competition between Casablanca, Cape Town and Johannesburg for first place in Africa on the Global Financial Centre Index. The race to the bottom has enabled some African states to establish themselves as havens for illicit foreign economic exploitation through the newly established and growing Kigali international financial centre.

5 The Financial Secrecy Index – trends and lessons for Africa

The Financial Secrecy Index (FSI) ranks jurisdictions according to their secrecy and the scale of their offshore financial activities. The top five jurisdictions listed on the FSI are the US, Switzerland, Singapore, Hong Kong and Luxembourg.

None of the countries in Africa is listed among even the top 30 most financially secretive countries. However, some of the state parties listed below act as gateways into Africa for big corporations. Their banking, financial and tax systems have been used by foreign multinationals to exploit other state parties. These policies of haven jurisdictions are in direct contravention of their obligations under Article 21(5) of the African Charter.

Results from the FSI raise the following concerns for Pan-African unity and solidarity:

a.) The combined global scale weight of the state parties to the African Charter increased each year.

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<tr>
<th>GLOBAL SCALE WEIGHT</th>
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<td><strong>Combined For Africa</strong></td>
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<td>Libya</td>
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<td>USA</td>
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The global scale weight details how much financial service the jurisdiction supplies to residents of other countries. These figures are miniscule in comparison to the USA, Switzerland and the UK. Nevertheless, it remains concerning when analysing the trend toward or away from secrecy for countries in Africa. The trend is particularly concerning when compared to the concomitant decrease in Switzerland and the UK which begs the question as to whether there is a deliberate relocation of secrecy to friendly jurisdictions that can be easily controlled in Africa.

b.) The combined FSI share for Africa almost doubled from 2018 to 2020 and reduced marginally in 2022.

c.) Although most African countries listed on the FSI moved down on the secrecy scale, some moved from up as described in detail below.

<table>
<thead>
<tr>
<th>State Party to African Charter</th>
<th>2018</th>
<th>2020</th>
<th>2022</th>
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<td>Angola</td>
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<td>33</td>
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<td>Algeria</td>
<td>23</td>
<td>34</td>
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<td>Liberia</td>
<td>38</td>
<td>111</td>
<td>40</td>
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<td>Kenya</td>
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<td>24</td>
<td>41</td>
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<td>Nigeria</td>
<td>34</td>
<td>42</td>
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<tr>
<td>South Africa</td>
<td>50</td>
<td>58</td>
<td>46</td>
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<tr>
<td>Mauritius</td>
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<td>55</td>
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<tr>
<td>Egypt</td>
<td>46</td>
<td>56</td>
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<tr>
<td>Ghana</td>
<td>95</td>
<td>127</td>
<td>70</td>
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<tr>
<td>Cameroon</td>
<td>53</td>
<td>81</td>
<td></td>
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<td>Seychelles</td>
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<td>Tanzania</td>
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<td>93</td>
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<tr>
<td>Namibia</td>
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<td>Rwanda</td>
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<td>Tunisia</td>
<td>78</td>
<td>108</td>
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<td>Botswana</td>
<td>103</td>
<td>113</td>
<td>113</td>
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<td>The Gambia</td>
<td>106</td>
<td>124</td>
<td>138</td>
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<td>9</td>
<td>16</td>
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This is a fairly significant number as the US, listed as number one in 2022, had 5.74 of the global FSI share, the UK 1.61 and Switzerland was listed as having 3.43. Africa is certainly not a country. However, this trend is concerning and might reflect a geopolitical shift in FSI share without the concomitant financial benefit for its people/s.
6 African Commission’s conclusions

The African Commission emphasises the underlying principle of solidarity, state sovereignty and self-determination inherent in Article 21(5) of the African Charter. Moreover, that state parties bare the main responsibility for ensuring that the power to make economic decisions vests in the state itself and its people and not in international monopolies.

Finally, that the duty to respect creates an obligation on state parties to respect the ability of other African states to deliver rights to their people. This obligation is derived from the obligation of states to collectively exercise the right to free disposal of wealth.

The recommendations below arise from the principles highlighted by the African Commission.

7 Recommendations

Pan-African unity and solidarity will not materialise as a result of heartfelt speeches, proclamations, declarations, or even after adoption and ratification of the African Charter. Rather, it will be built upon a collection of concrete acts of solidarity demonstrated through state practice.

Proceeding from this position, and building upon the previous policy briefs what follows is a list of recommendations specifically for state parties to the African Charter that will form the building blocks of Pan-African unity and solidarity in the fight against financial secrecy:

1. State parties should ensure that they refrain from certain actions that could harm other state parties and take other positive steps that could build Pan-African unity and solidarity. This entails:
   - Refraining from encouraging corporations to use their jurisdictions to hide ill-gotten gains and evade tax, through their policies, regulations and financial systems.
   - Undertaking tax spill over assessments through which they assess the potential direct impact of their tax policy and level of banking secrecy, on other state party’s tax base, tax policy and economic activity and taking corrective action to minimise any harmful impact.
   - Renegotiating bilateral and multilateral agreements with other state parties.
   - Renegotiating resource agreements with multinational investors.

2. State parties should develop a common African position on:
   - A minimum corporate tax rate for multinational corporations that operate in Africa across all sectors.
   - Standards and protocols for beneficial ownership transparency.
   - Automatic exchange of information in tax matters.
   - Country by country reporting for all multinationals operating within the territory of states parties to the African Charter.
   - The introduction of a wealth tax in each country.

3. State parties should negotiate as a bloc on financial secrecy standards at global forums.

4. State parties should co-operate on tax matters and practice healthy competition among themselves rather than the harmful tax competition currently practiced by some state parties. They could for example share capacity and assist in the development of capacity of other state parties.

5. State parties should work together to hold multinational corporations accountable for transgressions from the transparency standards.

6. State parties should hold each other to account for transgressions from the transparency standards and from the provisions of Article 21 of the African Charter by using the interstate complaint mechanisms and other dispute resolution mechanisms within the African Charter.

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"We work to see a united, just and prosperous Africa, built on the rule of law and good governance."