

TRANSNATIONAL ECONOMIC CRIME: THE EXAMPLE OF “GOLD LAUNDERING”*

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1 INTRODUCTION: CORRUPTION AND MONEY LAUNDERING

Dear colleagues and friends

Allow me first to thank the organisers of this conference for affording me the honour of giving this opening speech.

The issues which the conference is addressing indeed are closely interlinked. Corruption almost always leads to money laundering. And, increasingly, new criminal methods are being developed, in particular the use blockchain technology.

From the perspective of the black-letter lawyer, though, we have become used to treating the topics of corruption and money laundering separately, because we focus on concrete offences – and rightfully so.

However, if you apply a social sciences approach or, even more so, if you look at the field of challenges from a development assistance perspective, a much broader picture emerges.

2 ILLICIT FINANCIAL FLOWS

The topic of illicit financial flows¹ reaches far beyond individual offences and encompasses illicit influxes into a country, for instance, corrupt payments by a foreign mining corporation trying to obtain licences or to lower its burden of taxes and royalties in an African country. As to illicit outflows, we come across Heads of

* Keynote Address delivered by the author at the *Economic Crime and Cybercrime Conference (ECCC)*, University of the Western Cape, 5 October 2018.

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1 UNECA (2015) *Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa* Addis Ababa: UNECA; OECD (2014) *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* Paris: OECD Publishing.

State, Ministers and the like using financial centres abroad, especially offshore centres, to hide the funds they have embezzled or accumulated through corruption.² And we would have to look especially at how corporations active in Africa “optimise” taxes – a nice word for evading local tax regimes, again with the help of offshore locations.

The *Panama Papers* have told us how this is done in the detail. Typically, shell corporations are founded by so-called lawyers who supply the personnel (including fake directors to sign the papers). The documents would be protected by attorney-client privilege of the under-regulated country hosting the shell corporations.³ Indeed, the issues we are talking about are part of a bigger puzzle, and the common denominator is that they contribute to impoverishing further the population at large, while allowing certain elites to become very rich.⁴

I would like to illustrate these mechanisms by considering a topic that has kept me busy for the last few months and that has a lot to do with Africa – the supply chain of gold. Africa is one of the main sources of gold worldwide and South Africa, until recently, was one of the world’s biggest exporters of gold.

3 THE SUPPLY CHAIN OF GOLD

Gold has an extreme attraction, both to corporate interests (large-scale mining or LSM) and to impoverished communities trying to make a living (artisanal and small-scale mining or ASM).⁵ At the same time, gold extraction occurs in highly problematic circumstances. Gold extraction as such is usually not illegal, but it attracts criminal operators of all kinds – as experienced during the times of the gold rushes in the 19th century.⁶ The typical stages of the supply chain are mining for

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- 2 Pieth M (2008) “Introduction” in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang.
 - 3 Obermayer B & Obermaier F (2016) *Panama Papers* Köln: Kiepenheuer & Witsch at 207 *et seq*; African Investigative Publishing Collective (2017) *The Plunder Route to Panama: How African Oligarchs Steal from Their Countries*, available at https://www.zammagazine.com/images/pdf/documents/African_Oligarchs.pdf (visited 20 March 2019).
 - 4 UN (2015) *Addis Ababa Action Agenda: Financing for Development*, available at www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf (visited 20 March 2019).
 - 5 OECD (2016) *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3 ed) Paris: OECD Publishing at 25 & 67.
 - 6 Green T (1981) *The New World of Gold* Johannesburg: Jonathan Ball Publishers at 5 *et seq*.

new gold, either by LSM or ASM (which may include dredging),⁷ or recycling⁸ of old gold (normally the quota worldwide is two thirds in mined gold to one third in recycled gold).

ASM depends heavily on local traders, exporters and the like to collect the gold and to feed it into the supply chain.⁹ These traders syphon off a large part of the earnings. LSM would typically send the gold directly to the refineries. The refineries are heavily concentrated. There are currently 71 certified houses in the London Bullion Market Association (LBMA). Six of these houses (4 in Switzerland, 1 in Japan and 1 in South Africa) control more than 80% of the world market.¹⁰ Others, such as the two refineries in Dubai, lack international certification but feed into the international markets.¹¹ Refineries are small, technical, high-precision operations, but they turn over thousands of tons of gold worth billions of dollars. From the refinery the gold goes on to central banks and so-called bullion banks, to jewellers, watch makers, wholesalers and retailers and, ultimately, to the consumers.

7 COSOC-GL (2015) *Gold Rush in Shabunda: Practices and Impacts of Dredging*, available at: <http://cosoc-gl.org/2017/gold-rush-shabunda-2015/> (visited 20 March 2019).

8 World Gold Council (2015) *The Ups and Downs of Gold Recycling*, available at <https://www.gold.org/supply-and-demand/ups-and-downs-gold-recycling> (visited 20 March 2019).

9 Public Eye (2015) *A Golden Racket: The True Source of Switzerland's "Togolese" Gold*, available at <https://www.publiceye.ch/en/campaigns/agoldenracket/> (visited 20 March 2019); Human Rights Watch (2005) *The Curse of Gold*, available at <https://www.hrw.org/reports/2005/drc0505/index.htm> (visited 20 March 2019); Society for Threatened Peoples (2018) *Switzerland — A Hub for Risky Gold?*, available at https://www.gfbv.ch/wp-content/uploads/berichtenglisch_neueversion_mit-links.pdf (visited 20 March 2019).

10 Their refining capacity in tonnes is: Heraeus Group, 400 to 500t; PAMP, over 450t; Valcambi, 2000t; Argor-Heraeus SA, over 400t; Tanaka Kikinzoku Kogyo KK, 540t; Rand Refinery, 600t. See BullionStar (2016) *The World's Largest Precious Metals Refineries*, available at <https://www.bullionstar.com/blogs/bullionstar/the-worlds-largest-precious-metals-refineries/> (visited at 20 March 2019).

11 US Government Accountability Office (2017) *Conflict Minerals: Information on Artisanal Mined Gold and Efforts to Encourage Responsible Sourcing in the Democratic Republic of the Congo* at 10, available at <https://www.gao.gov/assets/690/686745.pdf> (visited 20 March 2019).

4 PROBLEMS LINKED TO GOLD

The challenges linked to gold are many and very serious indeed. I shall bring some of them to your attention.

4.1 Ecological Challenges

Whereas LSM typically extracts gold by leaching with cyanide solution, ASM, in most cases, still works with mercury amalgamation. Both methods are extremely risky for people and the environment. There are entire areas – for example, in the Amazon forests of Latin America — which have been chopped down illegally and have been ruined with spilled mercury. Even where mining operations are closed, the problems continue. Think of the dumped debris (tailings) or the “acid mine drainage”, containing toxic substances, in South Africa.¹²

4.2 Forced Labour

Mining is linked sometimes to forced labour. To give an example: army conscripts who have fled Eritrea¹³ claim that they were forced to work at 45 degrees Celsius with no pay, little food and insufficient equipment in the Bisha Mine owned partly by the autocratic regime.¹⁴

The International Labour Organization (ILO) claims that one of the biggest challenges in African small-scale mining is child labour. According to the ILO, in Burkina Faso, 30%-50% of miners are underage, with half of them being under 15-years-old. They are forced to work in dangerous conditions, digging shafts, carrying ore, crushing rocks, applying mercury and so forth. They work long hours in insanitary environments, are provided with inadequate food, and frequently are exposed to violence, alcohol, other drugs and sexual abuse.¹⁵

Sexual exploitation typically is linked to ASM. Frequently women and girls are lured under false pretences to a mining camp, where they are held hostage and are forced to work as prostitutes.

12 McCarthy T (2011) “The Impact of Acid Mine Drainage in South Africa” 107(5) *South African Journal of Science* 1-7.

13 A UN commission claimed in 2015 that all sectors of the Eritrean economy relied upon conscripts.

14 Martell A & Blair E (26 September 2016) “We were forced to work at Western-run mine, say migrants who fled Eritrea” *Reuters*, available at <https://www.reuters.com/investigates/special-report/eritrea-mining-nevsun/> (visited 20 March 2019).

15 International Labour Organisation (2016) *Child Labour in Gold Mining: The Problem*, available at www.ilo.org/ippecinfo/product/download.do?type=document&id=4146 (visited 20 March 2019).

4.3 Organised Crime

There is a direct link between gold and organised crime. The latter is active in illegal deforestation, forced labour, illegal mining in general and is linked to smuggling, corruption and money laundering. Here the gold traders and exporters frequently are involved in smuggling (for example, from Burkina Faso to Togo¹⁶ or from the DRC to Uganda or Rwanda¹⁷). The organised criminals either take over the mine themselves or subject the miners to an illegal tax.

Non-governmental organisations (NGOs) have established the supply chain from mines in Burkina Faso, where children below 15-years of age are sent down mine shafts with insufficient equipment under extremely risky conditions, involving with frequent cave-ins or water immersions.¹⁸ Local collectors buy the gold and smuggle it across the border to Togo, where export taxes are much lower. So we have a double problem of child labour, tax and customs dodging and smuggling. The gold then is sold on the world markets and refined in places such as Switzerland.

4.4 Conflict

An escalation of organised crime is one of the consequences of the role gold has played in civil wars in many countries of Africa. The gold rush in Eastern Congo and the link to the genocide during the Second Congo War is well known. The situation today is only slightly better. Most mines in Eastern Congo are still militarised and there is interference by armed groups, nowadays by the “regular army” in particular.¹⁹

In a similar way, the wars in North and South Sudan (in particular around the Jebel Amir Mountains in North Darfur) are facilitated by control over the gold mines.²⁰

4.5 Land Grabbing

Another major issue in Africa are governments selling mining rights off to large corporations, thereby disrespecting the rights of traditional communities. We are

16 Public Eye (2015).

17 Human Rights Watch (2005) at 108 *et seq.*

18 Public Eye (2015).

19 De Koning R (2011) “Conflict Minerals in the Democratic Republic of the Congo: Aligning Trade and Security Interventions” *SIPRI Policy Paper No 27* at 4, available at: <https://www.sipri.org/sites/default/files/files/PP/SIPRI27.pdf> (visited 20 March 2019).

20 Tubiana J (2014) “Out for Gold and Blood in Sudan” *Foreign Affairs*, available at <https://www.foreignaffairs.com/articles/sudan/2014-05-01/out-gold-and-blood-sudan> (visited 20 March 2018).

talking here of land grabbing and illegal displacement.²¹ Ghana has become notorious in this regard.

Typically, governments have awarded official mining licences to large corporations over extended areas and for long time periods, some of them on land owned by traditional communities. Thereby they have driven the artisanal mines into illegality.²²

4.6 Tax Dodging and Smuggling

Whereas the smaller traders would smuggle the gold out of the country, multinational enterprises (MNEs) are known to circumvent tax and royalty laws.²³ Frequently, they would resort to corruption to cover up their deeds. And weak institutions would have little chance of countering these activities.²⁴

What we are talking about here are elaborate schemes of transfer pricing: profits are shifted to offshore financial centres with low or zero company tax – with the help of tricks such as overpriced internal billing. The profit is shifted from the place where the work is done and where the ecological and social costs arise, to places where the corporation pays minimal tax.

5 GOLD LAUNDERING AND SUPPLY CHAIN DUE DILIGENCE

If we look at all the criminal activities surrounding gold, the path to the glittering world of central banks, investors and jewellers has to pass through refineries. As indicated, they are highly concentrated at certain locations (such as Switzerland).

The refineries are the choke points at which to check provenance. They are the places where clean sourcing of gold could be ensured, if they would develop an interest in ascertaining from where the gold which they refine comes.

5.1 International Soft Law

Now, international organisations, in particular the Organisation for Economic Co-operation and Development (OECD), together with the International Conference of the Great Lakes Region (ICGLR), have developed detailed best practices for supply

21 Reisenberger B & Seifert T (2011) *Schwarzbuch Gold* Wien: Deuticke at 87.

22 Ayee J *et al* (2011) "Political Economy of the Mining Sector in Ghana" *World Bank Policy Research Working Paper 5730*. In the Ghanaian context, artisanal mining activity is referred to as "Galamsey".

23 OECD (2016) *Corruption in the Extractive Value Chain* Paris: OECD Publishing.

24 See Public Eye (2015).

chain due diligence.²⁵ Implementation of these texts is voluntary, but they are linked closely to the Guiding Principles for MNEs developed by the OECD²⁶ and the UN.²⁷

5.2 Self-Regulation by the Industry

Industry organisations, especially the LBMA²⁸ and the Responsible Jewellery Council (RJC),²⁹ have picked up the OECD Guidance and its Gold Supplement and translated it into practical rules. However, as a recent OECD monitoring study has shown, the implementation is still far off target.³⁰ In particular, refineries keep their business figures and due diligence practices confidential. The OECD evaluation found that the mandatory third-party auditors were below standard, that they lacked the required know-how and that they shied away from robust critique of deficient due diligence.

Overall, the NGO community has exposed a multitude of examples of how refineries source from child labour, from forced labour, from organised crime and from traders with close ties to war lords.³¹ Typically, in their due diligence, refiners go back merely to the immediate supplier (for example, the exporter) and do not assure themselves that the supplier has a human rights policy to which it adheres.³²

Once the material is refined, though, it is by definition clean (with a 99.5% to 99.999% purity score). That is why we are talking of “gold laundering”.

5.3 Money Laundering in the Value Chain

The supply chain is paralleled by a value chain, leading through financial institutions and financial centres. Money laundering prevention is only starting to focus on the

25 ICGLR (2011) *The Mineral Certification Scheme of the International Conference on the Great Lakes Region (ICGLR)*, available at www.oecd.org/investment/mne/49111368.pdf (visited 20 March 2019).

26 OECD (2011) *Guidelines for Multinational Enterprises* Paris: OECD Publishing.

27 UN (2011) *Guiding Principles on Business and Human Rights* New York: United Nations.

28 LBMA (2017) *LBMA Responsible Gold Guidance Version 7*, available at <http://www.lbma.org.uk/guidance-documents> (visited 20 March 2019).

29 Responsible Jewellery Council (2013) *Code of Practices*, available at <https://www.responsiblejewellery.com/rjc-certification/> (visited 20 March 2019); Responsible Jewellery Council (2017) *Chain-of-Custody (CoC) Standard*, available at <https://www.responsiblejewellery.com/files/2017-RJC-CoC-Standard.pdf> (visited 20 March 2019).

30 OECD (2018) *Alignment Assessment of Industry Programmes with the OECD Minerals Guidance* Paris: OECD Publishing.

31 Human Rights Watch (2005) at 108 *et seq*; Public Eye (2015); Society for Threatened Peoples (2018); Global Witness (2014) *City of Gold* Washington DC: Global Witness Limited.

32 LBMA (2017) at 10.

gold trade. Several African cases are known, where gold has been used as means of smuggling and laundering value. The FATF has collected the examples.³³

A quite elaborate scheme was discovered in Colombia in Latin America. Drug barons acquired gold abroad with drug money and imported it into Colombia. In Medellin, they encharged gold traders to declare it as collected artisanal gold by making up false documentation of provenance. They then re-exported the gold for refining to the USA, to be sold on the US retail market as Colombian artisanal gold.³⁴

6 WHAT DOES THE EXAMPLE OF GOLD LAUNDERING TELL US?

Africa is a rich continent, especially in natural resources. However, many African countries have a weak governance structure. These countries are easily exploited by MNEs, opening doors for themselves through corruption, grabbing land and exporting their revenue offshore. Local elites all too frequently are complicit and use the extractive industries as their private means of rent-seeking. As a consequence, the country in question will not be able to finance its essential services (such as health and education), despite all its riches. As an example from the mining industry, a certain businessman is said to have helped Glencore's subsidiary, Katanga Mining, by lowering the latter's royalties by USD 400 million,³⁵ which is the size of the Democratic Republic of Congo's (DRC's) education budget.³⁶ He is known to be a close friend of the DRC's former president, Joseph Kabila.

There are very concrete, technical ways out of the problems described above, starting with the formalisation and certification of artisanal diggers, and offering them direct access to the world market. There are also key techniques to make profit shifting and money laundering more difficult, such as the obligation to

33 FATF (2015) *Money Laundering/Terrorist Financing Risks and Vulnerabilities Associated with Gold*, available at www.fatf-gafi.org/media/fatf/documents/reports/ML-TF-risks-vulnerabilities-associated-with-gold.pdf (visited 20 March 2019).

34 OECD (2016) *Due diligence in Colombia's Gold Supply Chain: Gold Mining in Antioquia* Paris: OECD Publishing.

35 US Department of the Treasury (21 September 2017) *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe*, available at <https://home.treasury.gov/news/press-releases/sm0243> (visited 20 March 2019).

36 A nexus is disputed, however, and the presumption of innocence always is preserved. See ICIJ (27 October 2017) "Updated Statement by Glencore and Katanga to the International Consortium of Investigative Journalists", available at <https://www.icij.org/investigations/paradise-papers/glencore-responds-icij-questions/> (visited 20 March 2019); Garside J (28 January 2018) "Paradise Papers Businessman in African Bribery Inquiry" *The Guardian*, available at <https://www.theguardian.com/news/2018/jan/28/paradise-papers-businessman-african-bribery-inquiry-dan-gertler> (visited 20 March 2019).

identify beneficial owners of companies and bank accounts. Finally, there are ways to ensure a secure supply chain, in particular by making the OECD Standards mandatory.

Rarely does one see the problems of the worldwide gold trade placed in the wider context of illicit financial flows and the resource curse. We need to be keenly aware of the fact that for all the riches found in the earth of Africa, little value ever stays here.