

THE GLOBAL AML FRAMEWORK AND ITS JURISDICTIONAL LIMITS

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ABSTRACT

The thesis examines the intricacies of the global AML/CFT framework focusing largely on the three jurisdictions of United Kingdom, Uganda and South Africa. These jurisdictions were selected to test the hypothetical model on which this study was undertaken. While appreciating the importance for states to embrace global prohibition regimes to deal with overlapping interstate issues such as money laundering, these regimes often tend to overlook practical realities in member countries they are implemented. Since the global AML framework is implemented through the compliance of individual states, its efficacy would depend on the propensity of individual states to harness it.

There is anecdotal evidence to corroborate the thesis that the current global AML/CFT framework is not compatible with the regulatory environment across the majority of LDCs. Thus, this presupposes that it cannot be applicable globally. LDCs are saddled by general systemic failure, lack of economic and social infrastructure; lack of physical and human resources, corruption and its corruptive effective on regulatory institutions and national governments. Even with the best intent, in the foregoing precarious environment, desired AML laws cannot effectively work as expected. Also, by design or default, soft law instruments (for example the FATF forty plus nine recommendations are not easy apply, let alone enforce globally.

The study proposes the need for countries to undertake desired reform programmes before they can countenance the adoption of the global AML/CFT framework. Since money laundering crimes are jurisdictional problematic—not amenable within the realm of individual states, it is imperative to introduce a global AML court. It is also imperative for states to consider adopting hybrid measures such as mutual recognition paradigm in Europe to ease their co-existence on overlapping global regulatory challenges. States should also explore the possibility of harnessing norms of CIL as opposed to prescribing regulatory regimes every time there is a crisis. However, it needs to be noted that the envisaged global AML/CFT regimes cannot crystallize into norms of CIL, unless they are willingly embraced by countries and not imposed.

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LIST OF ABBREVIATION

AIDS	ACQUIRED IMMUNO-DEFICIENCY SYNDROME
AML/CFT	ANTI-MONEY LAUNDERING/COUNTERING FINANCING TERRORISM
ARS	ALTERNATIVE REMITTANCE SYSTEMS
BCCI	BANK OF CREDIT AND COMMERCE INTERNATIONAL
BIS	BANK FOR INTERNATIONAL SETTLEMENT
BSA	BANK SECRECY ACT
CAM	CUSTOMER ACCOUNTS MONITORING
CATOC	CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIMES
CDD	CUSTOMER DUE DILIGENCE
CFT	COMBATING FINANCING OF TERRORISM
CIL	CUSTOMARY INTERNATIONAL LAW
CJA	CRIMINAL JUSTICE ACT
COMESA	COMMON MARKETS IN EAST AND SOUTHERN AFRICAN COUNTRIES
CRB	CRIMINAL REFERENCE BUREAU
CTC	COUNTER-TERRORISM COMMITTEE
CTAG	COUNTER-TERRORISM ACTION GROUP
DTOA	DRUG TRAFFICKING OFFENCES ACT
DCS	DEVELOPED COUNTRIES

ECOSOC ECONOMIC AND SOCIAL COUNCIL
ECHR EUROPEAN CONVENTION ON HUMAN RIGHTS
EAC EAST AFRICAN COMMUNITY
EEC EUROPEAN ECONOMIC COMMUNITY
ECOWAS ECONOMIC COMMUNITY OF WEST AFRICAN STATES
ECJ EUROPEAN COURT OF JUSTICE
EDA ECONOMIC DEVELOPMENT ACT
EDU EUROPEAN DRUG UNIT
EFTS ELECTRONIC FUNDS TRANSFERS
EU EUROPEAN UNION
EUROPOL EUROPEAN POLICE
FAS FINANCIAL SECTOR REFORMS
FBI FOREIGN BUREAU INVESTIGATIONS
FICA FINANCIAL INTELLIGENCE CENTRE ACT
FOPAC FOLKESTONE AREA PARTNERSHIP AGAINST CRIME
FATF FINANCIAL ACTION TASK FORCE
FEA FOREIGN EXCHANGE ACT
FDI FOREIGN DIRECT INVESTMENT
FIU FINANCIAL INTELLIGENCE UNIT
FSMA FINANCIAL SERVICES AND MARKETS ACT
FSAP FINANCIAL SECTOR ASSESSMENT PROGRAMME
FSF FINANCIAL STABILITY FORUM
FTR FINANCIAL TRANSACTION REPORTING
GATS GENERAL AGREEMENT ON TRADE IN SERVICES
GDP GROSS DOMESTIC PRODUCT

HIV	HUMAN IMMUNO-DEFICIENCY VIRUS
HRA	HUMAN RIGHTS ACT
ICC	INTERNATIONAL CRIMINAL COURT
ICT	INTERNET COMMUNICATION TECHNOLOGY
IGG	INSPECTOR GENERAL OF GOVERNMENT
IL	INTERNATIONAL LAW
ILO	INTERNATIONAL LABOUR ORGANISATION
IMF	INTERNATIONAL MONETARY FUND
IFIS	INTERNATIONAL FINANCIAL INSTITUTIONS
INCSR	INTERNATIONAL NON-CO-OPERATIVE COUNTRIES AND TERRITORIES
INTERPOL	INTERNATIONAL POLICE
IMOLIN	INTERNATIONAL MONEY LAUNDERING INFORMATION NETWORK
IOSCO	INTERNATIONAL ORGANISATION OF SECURITIES COMMISSION ORGANISATION
KYC	KNOW YOUR CUSTOMER CAMPAIGN
LCS	LOCAL COUNCILS
ML	MONEY LAUNDERING
NCBS	NATIONAL CENTRAL BUREAUX
NCCT	NON-COOPERATIVE COUNTRIES AND TERRITORIES
NGOS	NON-GOVERNMENTAL ORGANISATIONS
NRM	NATIONAL RESISTANCE GOVERNMENT
OECD	ORGANISATION OF ECONOMIC COOPERATION AND DEVELOPMENT

OAS	ORGANISATION OF AMERICAN STATES
OGBS	OFFSHORE GROUP OF BANKING SUPERVISORS
OFCS	OFFSHORE FINANCIAL CENTRES
USA PATRIOT	UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT TERRORISM ACTS
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SAPS	STRUCTURAL ADJUSTMENT PROGRAMMES
SIS	SCHENGEN INFORMATION SYSTEM
SOAS	SCHOOL OF ORIENTAL AND AFRICAN STUDIES
SOCA	SERIOUS ORGANISED CRIMES AGENCY
TB	TUBERCULOSIS
TI	TRANSPARENCY INTERNATIONAL
UCB	UGANDA COMMERCIAL BANK
UCIL	UNION CARBIDE OF INDIA
USA	UNITED STATES OF AMERICA
UEL	UNIVERSITY OF EAST LONDON
UNCAC	UNITED NATIONS CONVENTION AGAINST CORRUPTION
UN	UNITED NATIONS
URA	UGANDA REVENUE AUTHORITY
UNACAC	UNITED NATIONS CONVENTION AGAINST CORRUPTION
UNDP	UNITED NATIONS DEVELOPMENT PROGRAMME
UNDCP	UNITED NATIONS DRUG CONTROL PROGRAMME
UNSCR	UNITED NATIONS SECURITY COUNCIL RESOLUTIONS
VAT	VALUE ADDED TAX

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I wrote my thesis on the global AML/CFT framework to highlight the complexities of harnessing it across different jurisdictions. By focusing the analysis of the study on United Kingdom, Uganda and South Africa, my objective was to assess how the varied dynamics of development across DCs and LDCs are likely to play out in the implementation of global AML/CFT regimes in the respective jurisdiction. Therefore, this is an original study that could potentially spur further studies on the subject of money laundering and its regulation in different jurisdictions.

On a personal note, “my PhD journey” has not been without setbacks. However, it has also been a wonderful experience from which I have learnt a great deal. If I can proffer my advice (though unsolicited) is that a prospective PhD student needs not have only cognitive capability judged on professional accomplishments but also requisite maturity to handle the pressures to this programme.

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CHAPTER ONE: THE FRAMEWORK ANALYSIS OF THE STUDY

1.1 introduction

The study examines the dynamics of the global AML framework with a view to evaluate the ease of adapting it across different jurisdictions. The thrust of the thesis is that desirable as it is, the efficacy of the global AML/CFT framework is dictated by the local regulatory environment in individual jurisdictions where it is implemented. Thus, my submission is that the global AML regulatory framework should be designed with an ethos of flexibility so that is easily adaptable in different jurisdictions. The thesis has been undertaken by assessing the potential for countries to harness the UN, AML treaties, FATF forty plus nine recommendations and other AML regimes. United Nations AML treaties and the FATF recommendations are critical components of the global AML framework because they constitute a framework of rules, principles, procedures, norms and regulatory guidelines for states to adopt in regulation of money laundering and its predicate crimes. However, desirable as it is, the thesis posits that uniform regulatory regimes are not easy to harness across countries because they tend to be incompatible with the dynamics of development in individual states. For instance, the majority of LDCs are saddled with multiple challenges, predisposing them to capacity deprivation in harnessing global AML regimes. Secondly, the global AML framework operates in the realm of international law; and it is not immune from the failures of the international legal system. The thematic focus of the thesis has

been to fill the gap in the current global AML/CFT framework and its adaptability across different jurisdictions. The global regulatory system and the AML framework specifically are driven by requisite information. Thus, the applicability of the global AML framework depends on the individual state's capacity to generate and harness requisite information. LDCs such as Uganda are deficient in the capacity to generate and process requisite information. Information is a prerequisite for AML agencies such as Financial Intelligence Units (FIUs) and the police to function effectively. Without requisite information, law enforcement agencies cannot secure a successful prosecution against arraigned money laundering/terrorist culprits.¹ This is because the envisaged global AML regimes, such as the "KYC" are difficult to apply, let alone enforce in some countries, given that the ease of implementing them depend on availability of requisite information on bank clients. The majority of LDCs are either deficient in robust centralized data registries to generate data on the magnitude of crime typologies or the little data generated is too patchy to inform the adoption of normative policy choices.

1.2 The liberal market economy and incidences of ML in Uganda

The transition to the market economy in Uganda presented opportunities for those who had criminal inclinations to establish their presence into the country. Prior to liberalisation of current and capital accounts, it was only the

¹ Ian Carrington and Heba Shams, 'The Elements of Effective AML/CFT Framework: Legal, regulatory, and Best Institutional Practices to Prevent Threats to Financial stability and Integrity', Seminar on 'Current Development in Monetary and Financial Law', Washington, D.C., October 23-27, 2006.

central bank of Uganda that would approve and effect payments for goods and services to and from foreign countries. With liberalisation of foreign exchange controls; exporters were allowed to operate foreign currency denominated accounts within the country. This was after a series of stabilisation and reform programmes, which had been undertaken since 1987.² This allowed freer entry of institutions into the system, which was characterized by the fast expansion of banking and non-banking sectors after 1994.³ The transition to the market economy in Uganda also precipitated an environment where national institutions were sidelined from providing effective regulatory oversight, information gathering and the enforcement of prudential norms because they did not want to be seen undermining the liberal market philosophy.⁴ The relaxation of foreign exchange controls by the bank of Uganda created an environment where businesses could operate without being properly supervised.⁵ There was the proliferation of financial and non-financial business enterprises offering financial services in the major cities such as Kampala. This environment coupled by lack of effective supervision of financial and designated non-financial businesses enabled criminals to exploit the system by, for instance, introducing counterfeit currencies into the financial economy. Counterfeit currencies would be co-mingled with clean money and introduced into the financial system, through shopping in foreign countries⁶, where liberal business attitude, lack of sophisticated technology

² L. A. Kasekende, "Capital Account Liberalisation in Uganda: the Ugandan Experience", Paper Presented at the Overseas Development Institute (London) 21, June 2000.

³ Kasekende, (n 2).

⁴ Benu Schneider at the Overseas Development Institute, "Capital Account Liberalisation: A Developing country's Perspective", 21 June, (2000).

⁵ Schneider, (n 4).

⁶ Some businessmen in Kampala (Ugandan Capital City) were at ease to discuss the issue of currency counterfeits; and how it infested the economy.

and fragmented AML laws⁷ enhanced the possibility of absorption of dirty money into the financial system. Foreign countries were targeted literally as 'washing machines' to cleanse "tainted funds" and to reintroduce it into the financial system as clean money.⁸ Therefore uniform global frameworks such as the Basle 111 capital adequacy framework are necessary to foster interstate co-operation but they need to be pragmatically implemented to apply across the board.

1.3 The Basle 111 Capital Adequacy Regulatory Framework

It has become distinctly clear that the Basle Committee principles on banking supervision and the FATF forty plus nine recommendations are not sufficient to caution countries against exigencies in the global financial markets.⁹ In my view prescribing new regimes cannot offer a lasting solution to the failures of earlier ones unless engendered regimes are imbued with a measure of flexibility to apply across countries. It has become a custom for oversight institutions to evolve new regimes often in response to global crises to caution economies against similar crises in future. While the practice of evolving regimes in response to global crises is acceptably necessary, it also underscores the failure of global regulatory regimes to caution countries against global exigencies. It is time states have become more proactive to ensure that crises do not happen, which justifies the adoption of a more

⁷ I was also able to learn that countries with tenuous infrastructure were targeted to introduce comingled money into the system. In some countries such as Malaysia, the absence of sophisticated technology manifested by hand count of money, enhanced placement of tainted money into the system.

⁸ Schneider, (n 4).

⁹ *The Financial Times*, 26 June 2010.

robust Basle 111 regulatory framework. The Basle 111 regulatory framework could suffer the fate of its predecessors unless it is imbued with mechanisms to harmonise regulatory differences across jurisdictions. The adoption of global regulatory regimes cannot be sufficient in the absence of a clear direction on how to implement and enforce them in all participating member countries. This has prompted the twenty seven central bank governors from different countries to propose the adoption of Basle 111 regulatory framework. This proposed framework is to compel banks to hold more capital reserve as a caution for future financial crises. Basle 111 as a regulatory model will include a minimum core “Tier 1” of somewhere between 7 and 9 percent of their risk bearing assets, including “capital conservation buffer.” Tier one refers to bank’s capital reserve, which is intended to absorb shocks more robustly, as opposed to the core level of 2 percent under existing rules. The core level of 2 percent was deemed too inadequate to caution economies against financial shocks in the event of a financial crisis. Basle 111 will include a minimum Tier 1 ratio of 4.5 to 6 percent with the additional capital reservation buffer of 2 to 3 percent. The anticipated outcome of Basle 111 regulatory framework is that any bank that fails to keep above that buffer would have to curb payouts such as bonuses and dividends.¹⁰ However, it would seem that the highly capitalized banks will receive a disproportionate advantage over less capitalized ones and this is likely to become a potential area of contention for the proposed regulatory measures to work across the board. Less capitalized banks could face a long road to recovery and an increase in capital—both Tier 1 and capital conservation buffer would

¹⁰ The Financial Times, (n 9).

undercut the amount of money which banks can lend out to businesses. Banks might also be constrained from trading freely in innovative financial products such as syndicated loans since they will have their operational capital substantially reduced. Thus, less capitalized Banks will be less inclined to support the proposed Basle 111 as necessary as it is. While I appreciate the need for a more robust framework attuned to overlapping regulatory challenges, it might not be easy to implement it due to inequalities that characterise the global financial system. Poorly capitalised banks are most likely to be less inclined to implement Basle 111. In my contention, the proposed Basle 111 capital framework cannot be an effective global framework because it is inclined to favour banks in developed financial centres (which are highly capitalised as opposed to those in LDCs). Although Basle 111 regulatory framework is still a proposal, I hope that when it is finally adopted the mistakes of its predecessors will not be repeated.¹¹ The proposed high liquidity ratio has also been criticised that it is likely to damage the financial sector and the wider economy. High capital and liquidity requirements are proposed to ensure that banks are better prepared to deal with crises than they have been through lately. Regulators are pressuring banks to build up buffers, well in advance of the 2019 Basle 111 regulatory framework deadline in the hope of making them safer in good time.¹² While central banks are pumping money into the economy in form of liquidity easing so that banks can start lending to small businesses, banks are withholding that money to build their regulatory buffers before the deadlines kick in. Small businesses are important for the economy in terms of jobs and

¹¹ The detailed reading about Basle 111 can be found from the consultative paper of the Bank for International Settlement, available at: www.bis.org (last visited at 8th April 2011).

¹² The Daily Mail, 12th June 2012.

providing sales outlets for big industries. This means that when small businesses are constrained due to lack of credit facilities such as loans, it can potentially inflict damage on the well being of the wider economy. Basle 111 regulatory framework is not sustainable because it puts pressure on banks and could harm the economy in the long run. Banks should have the flexibility to draw on their liquidity buffers to absorb current pressures as they may be encountered from time to time. In my view, the one size fits all approach overlooks important practical realities and it might not work and if it does, it has the potential to perpetuate inequalities—some banks may be outcompeted by well resourced ones and are likely to burst.

In my view, the responsibility for global governance of financial markets should be vested in countries which have a competitive advantage in financial markets. Since the G-12 countries have a high competitive advantage in financial markets, they have every right to spearhead measures to protect their markets. While acknowledging the need for robust reforms at an individual state level, the engendered regimes should be implemented pragmatically in different countries. In my view, unless less developed countries are given some concessions in implementation of desired regimes, they are likely to remain predisposed to conditions of regulatory failures. It is necessary for international financial institutions such as the World Bank and IMF to continue providing leadership of the global economy. For globalisation of markets to work better, there is no country that can afford to posture because it can be misinterpreted to mean that “globalisation is good for you and not for me.”

In view of the foregoing analysis, this thesis addresses the following novel questions: Can the global AML framework or any global prohibition regimes be effectively implemented in total disregard of the underlying development dynamics in a respective country? What are the prerequisites for the successful implementation of a regulatory regime; and what factors inhibit its successful implementation? Can there be such a thing as 'a global law', what are its discerning features? By answering these questions will provide insights into the ease and complexities of harnessing a global AML framework in an asymmetric global landscape.

1.4 Suggested measures to ease adoption of the global AML framework across states

The current global AML/CFT framework is oriented to the regulatory environments in DCs as opposed to LDCs. Thus, there is a possibility for disparities in its application across countries. These disparities can be alleviated by the introduction of a global AML court, the principle of mutual recognition (used in integration of European Markets) as an AML paradigm and other necessary measures globally.

1.5 Mutual Recognition Paradigm

As this study has already elucidated, the global prohibition regimes generally; and the AML/CFT regimes specifically should be implemented pragmatically

to suit varied regulatory environments across different jurisdictions. A robust global AML regulatory model, capable of being adopted globally, should be predicated on the principle of “mutual recognition” operated in integration of financial markets in Europe.¹³ Mutual recognition is a regulatory system based on the recognition and harmonisation of a managed regulatory system, as opposed to issuing hundreds of directives to foster uniformity in all EU member states. Mutual recognition is a central plank of the Second Banking Directive,¹⁴ based on the fact that rather than emphasising convergence of the system (which would not be possible given different legal systems and cultural backgrounds across EU member states), supervisory authorities should instead recognise systems operated by other European member states provided they fulfil certain basic conditions.¹⁵ The principle of mutual recognition was enunciated by their Lordships decision in the case of *Cassis de Dijon*.¹⁶ The case concerned a French Liqueur with an alcoholic level of 15% to 20% instead of 25% prescribed for liqueur by Germany alcohol content requirements. The court denied the admissibility of such a limitation and upheld the principle of mutual recognition (known as Cassis de Dijon principle) signifying that a product manufactured according to regulations and

¹³ This was designed to foster a single market doctrine in banking and financial services, with no internal barriers to EC banks establishing branches in other parts of the EC or in providing cross-border services. A bank licensed in one EU member State had a passport to establish branches or to provide services in other EC Member States. A single licence is required rather than licensing in each member state. However, the licence does not apply to a branch of a bank established outside of the EU; the third bank must incorporate a subsidiary in the community and be licensed in at least one jurisdiction there.

¹⁴ Council Directive: 89/646/EEC.

¹⁵ Council Directive: 89/646/EEC.

¹⁶ The principles enunciated by their Lordships in *Cassis de Dijon* doctrine has also expanded geographically, beyond EU borders. Through the conclusion of the EEA (European Economic Area) Agreement and the EC-Turkey customs union, the principle of mutual recognition has, with some variations, now been extended to goods coming from Norway, Iceland and Liechtenstein (as EEA members) and Turkey. In order to implement this principle, the European Commission has insisted that EU member states insert a mutual recognition clause into all commercial agreements.

permitted in one EU member state must be permitted in other EU member states. The exception can only be made to serve public interest (e.g. protection of health, the environment or consumers). Mutual recognition is used in the commercial sphere to overcome the hindrance of international movement of natural and juristical persons, goods and services inherent in different EU member countries.¹⁷

It should be noted that the global market system is not monolithic.¹⁸ Far from it, it is made up of multiple jurisdictions, different legal systems and traditions, different customs and cultures, regions and varying development dynamics. The thesis explores the varying regulatory environments across states to evaluate their effect on the implementation of desired AML regimes. Different regulatory environments across states have far reaching implications for states with regard to their preparedness to harness AML regimes. There is a need for harmonisation of interstate laws based on the principle of mutual recognition in Europe. This principle was introduced by the Second Banking Directive in 1989 fronted on the premise that the integration of financial markets in Europe did not necessarily mean ‘a one-size-fits-all’ approach, but to forge unity in diversity. Harmonisation of laws is necessary to avoid the adverse effects of the ‘prisoner’s dilemma’, in which each participant is unsure of whether others will cooperate, or engage in behaviour detrimental to the stability of the global economy. Different global AML regimes (by different market domains) can potentially complement each other in safeguarding

¹⁷ Case 120/78 (1979) ECR 1-64.

¹⁸ A single unitary system characterized by uniform laws, rules and customs and approach.

against regulatory arbitrage¹⁹ or regulatory failures.²⁰ Regulatory arbitrage and regulatory failures are characteristics of an uncoordinated global market system. In order for aspects of a large-scale regulation of transnational challenges to be effective, it must be coordinated and formulated on a global wide basis.²¹

Mutual recognition was adopted as recognition that since EU member states are characterised by different internal legal systems (contract laws and employment laws, different regulatory environments co-existing within EU law), it would not be practically feasible to subject them to a rigorous EU regulatory system uniformly. Without 'mutual recognition' fostered through the EU member states willingness to surrender part of their sovereignty, an integrated single European market would never have been a reality. Mutual recognition emphasises the equivalence of the objective of national legislation and the existence of similar public interest goals.²² Mutual recognition also implies and requires mutual trust. Mutual trust in turn is fostered through the adoption of common rules. Mutual recognition and minimum harmonisation in the European Union are accompanied by other pillars: home country control

¹⁹ This identifies and exploits any inconsistencies in the market and undermines the effectiveness of capital regulation. See Chris Mattens, 'Managing Capital Accord' (2000) p. 4, available on the Internet at http://www.riskglossary.com/articles/regulatory_capital.htm (date accessed 30 August 2006).

²⁰ Capital adequacy framework has been criticised for failing to take into account disparities across financial Institutions. The stipulated eight percent capital reserve as a caution for banks is arbitrary, since it does not reflect the lows and highs of a business. In an ideal world, a well-designed regulatory system should see capital reserves rising during periods of high profitability and earnings for banks and falling in a recessionary period. See E.I. Altman and A. Saunders, 'An Analysis and Critique of the BIS Proposal of Capital Adequacy and Ratings', (2001), 25 *Journal of Banking and Finance*, 26-28.

²¹ Saunders, (n 20).

²² Rosa M. Lastra, 'Law Reform in Emerging Economies', (2008), 3(2) *Journal of International Banking Law Regulations*, 419.

and a single banking licence.²³ With regard to the principle of home country control, the home country undertakes to control and supervise its financial institutions as a substitute for host country supervision.²⁴

In order for mutual recognition paradigm to work effectively, EU member states are required to adopt the legal systems of other countries alongside their national legal systems. In practice, however, 'mutual recognition' would be difficult to implement in a situation where desired laws have not been internalised by individual countries into their national legal systems. In the absence of an operative law, law enforcement authorities cannot clamp down on potential money launderers. Banks also face the risk of law suit if they freeze customers' accounts of potential money launderers or disclose information relating to their accounts to AML agencies. For laws to regulate undesired conduct, they need to have been enacted and in existence.²⁵ It needs to be noted that laws cannot be implemented in a vacuum. Thus, the absence of specific AML laws in some countries underscores their inability to harness desired AML regimes. Some states operate in secrecy—disguising definitions of certain crimes, presumably for fear of generating an anti-investment climate at home.²⁶ As already noted, Uganda has not adopted an AML law in accordance with its international obligations. It adopted an AML Bill in (2009) and three years on, it has not yet operationalised it into law.²⁷ In my view, the failure to implement AML laws in Uganda does not only

²³ Lastra,(n 22).

²⁴ Lastra (n 22).

²⁵ This renders societies prone to drug trafficking and money laundering, scaring off potential investors who usually prefer a sound regulatory regime to safeguard their investments.

²⁶ In Zambia, during the Presidency of Fredrick Patrick Chiluba, journalists who reported on the prevalence of HIV/AIDS in the country would be imprisoned; for fear that they would sabotage the economy.

²⁷ The East African Business Week of 10th September 2010.

undermine its economy but also the concerted efforts of the international community towards fighting money laundering and its predicate threats. Similarly, without requisite laws in place, banks are vulnerable to criminal exploitation, risks of lawsuits and loss of trust if they breach confidentiality by reporting customers whose identities are then revealed.²⁸ In view of the foregoing analysis, there is a need for states to transpose their international AML/CFT obligations so that there is a harmonised approach on overlapping matters of money laundering across countries.

1.6 The need for a global Court

There is a need to introduce a global AML court fronted on the equivalent of the Dispute Settlement Mechanism (DSA) in the WTO. The proposed court could play a facilitative role in streamlining how engendered AML/CFT standards are internalised into individual national jurisdictions. Before the adoption of the DSA in 1995, the world trade system (under the GATT 1947) lacked transparency and credibility and it was at the verge of collapsing. This trend would later change after the adoption of DSA at Marrakesh in Morocco in 1995. The WTO dispute settlement panel has adjudicated cases submitted to it by disputant parties, delivered judgments, streamlined application of rules and introduced a dosage of sanity into the world trade system. The use of DSA has minimised the challenge of dynamics of power dynamic in the WTO. For instance, in the dispute between the US and EC over the importation, sale and distribution of Bananas, brought two major global players before the

²⁸ See Ross Cranston, *Principles of Banking Law*, (Oxford University Press 2003) 168; see also the highly cited case of *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461.

WTO, Dispute Settlement Panel.²⁹ This would have been hard to achieve before the advent of the DSA (the big players would ally against small ones); but it can also be used as a precedence to highlight that the evolved rules need to be enforced, if they are to foster desired behaviour in the society. The importance of the court can also be reinforced by the role played by the ECJ in the integration of European Markets. Through its preliminary reference procedure, the ECJ adjudicates matters concerning state and state; and its state citizens on the consumption of EU law by streamlining its application in a member state. The decisions of ECJ must be respected *Pacta Sunt Servanda* (in the goodwill spirit to uphold norms of international law). In so doing the court has helped to diffuse tensions between member states and to streamline how the EU law is to be internalised into a member state. The ECJ has therefore provided a platform for harmonisation of diverse laws and systems to regulate behaviour that is not in conformity with EU law. It's high time the AML court was introduced to enhance the implementation of AML/CFT laws across jurisdictions. The role of courts in fostering the stability of financial markets cannot be underestimated.

Owing to lack of robust AML laws and policies in some African countries, foreign financial institutions have resorted to the adoption of internal or sectoral measures to fill the vacuum in their internal AML control measures.³⁰ This has been facilitated by the use of macro-economic linkages with their parent home country institutions, whereby financial institutions domiciled in a foreign country are governed by the policies of parent authorities. Other

²⁹ See, the WTO Document WT/DS27/R/ECUB (22May 1997) available on its website at www.wto.org (accessed 20th April 2013).

³⁰ This issue has clearly been articulated in Chapter one of this thesis.

financial institutions have developed tailored policies to regulate money laundering (such as Barclays bank, 'Africa policy (2001) for the prevention of money laundering').³¹ These 'hybrid' measures are based on AML legislation of UK³² and the AML Directives of the EU.³³ These two instruments are used as model policy frameworks to fill gaps in the Ugandan legal system and enable financial institutions to operate harmoniously.

In the absence of a specific AML/CFT legislation in some countries, money laundering crimes can only be prosecuted on the grounds of customary international law.³⁴ Customary international law means that if the international practice of states does not condone money laundering as a legitimate activity because of its adverse effects on societies, then it cannot be condoned in any society. Customary international law generates obligations on the state regardless of whether it has enacted a law on an issue or not.³⁵ State practice is manifested differently according to different individual states. Some states have transposed the envisaged regulatory norms in a way that constricts or narrows the scope of the grounds of jurisdiction laid down in international treaties.³⁶ Others have employed delaying tactics, literally 'dragging their feet' for many years before they take action to implement desired laws. For

³¹ Peter Edopu, 'Infrastructure to Detect and Control Money Laundering and Terrorist Funding in Uganda', available on the Internet at [http://uk.f524.mail.yahoo.com/ym/showletter?msgid=\(L 166\) 77](http://uk.f524.mail.yahoo.com/ym/showletter?msgid=(L 166) 77) (date accessed, 10 December 2011).

³² The Proceeds of Crime Act (2002) as amended.

³³ Section 2(2) of the Second Anti-money Laundering Directive: (91/308/ECC).

³⁴ There is a possibility of prosecuting money laundering and its predicate offences under customary law.

³⁵ While Egypt ratified the Fourth Geneva Convention, it has never operationalised it into law. This, in principle means, that this framework cannot be implemented as envisaged in Egypt.

³⁶ A case in point is the US legislation implementing the Fourth Geneva Convention of 1949. While the Geneva Convention lays down the 'universality principle' on all war crimes, this principle is replaced in the USA in blatant breach of the conventions by the traditional principle of 'Active and Passive personality'. See also, Antonio Cassese, *International Criminal Law*, (Oxford University Press 2003), 306.

example, in Uganda, while crimes which generate illicit proceeds of crime such as drug trafficking are proscribed under the Ugandan law, money laundering is still treated as a derivative offence.³⁷ But the use of customary international law in regulation of markets would also presuppose that there is consensus of the international community not to condone money laundering as legitimate activity in any jurisdiction where it is committed. To fully examine the dynamics of the global AML/CFT framework, the study was undertaken on the basis of the following objectives, hypotheses and methodology:

1.7 Aims and objectives of the study

- (a) To examine the effectiveness of the global AML framework in cautioning states against fighting money laundering globally.
- (b) To assess the ease and challenges of harnessing, a robust global AML framework across countries.
- (c) To assess the impact of economic disparities on the effectiveness of normative AML regimes in some countries.
- (d) To propose ways how the envisaged global AML/CFT framework can be harnessed across different jurisdictions.

1.8 Hypotheses of the study

H1: Globalisation has created an environment for criminal exploitation

³⁷ Edopu,(n 31).

H2: Global AML regulations cannot be assumed to work across jurisdictions without a requisite environment through which to implement them.

H3: Corruption has a tactile potential to erode the efficacy of AML institutions

H4: Global regimes cannot work without states first positioning themselves properly to global regulatory changes and challenges.

H5: Inter-state cooperation on overlapping global issues through institutions such as FATF, WTO, the World Bank and IMF is necessary despite its inherent challenges.

1.9 Methodology

The methodology of undertaking this study was both theoretical and analytical of primary and secondary data resources and synthesizing them in the light of the objectives of the thesis. The purpose was to evaluate the credibility of source materials and the relevance to the study given that different regions are characterized by different development dynamics.

The theoretical analysis of primary and secondary data sources was geared to establish the dynamics and weaknesses of the current global AML/CFT framework. The global AML/CFT framework is a patch work of measures based on UN, AML/CFT treaties, the EU AML laws such as Directives and Regulations, the FATF forty plus recommendations and the Basle Committee supervisory guidelines, the World Bank bank/IMF and other AML oversight organisations. These organisations have pioneered guidelines for states to adopt in creating domestic AML/CFT counter-measures. Secondary data sources were analysed from data in academic text books, journal papers, electronic sources (websites of AML agencies), policy and research papers from specialist institutions such as the World Bank/IMF, the Institute of security Studies (ISS) in South Africa and others. I also utilised decided cases (especially on United Kingdom) to delineate how the global AML regimes are utilised to facilitate prosecution of money laundering offences. The role of national institutions and administrative frameworks (in the rubric of chapter six of this thesis) remains a critical component of the current global AML framework. States are required to create appropriate institutional and administrative frameworks (Courts, NGOs CSOs), laws and other measures to provide competent authorities with the necessary duties, powers and sanctions. The analysis of primary and secondary data sources therefore provided significant insights into the ease and challenges of harnessing the global AML/CFT framework across states.

Cognizant of the fact that money laundering is a clandestine crime—it is manifested by the commission of a wide range of crime activities such as corruption, drug trafficking, motor vehicle trafficking and extra. Therefore the study utilised (what has been coined by United Nations) as an “indirect approach methodology” which expands the scope of money offences to cover a wide range of crime activities which generate proceeds of crime.³⁸

Undertaking a scoping review of primary and secondary data sources helped to delineate the dynamics, gaps, contradictions and weaknesses of the current global AML/CFT framework. It was also useful in providing insights into the challenges states face in harnessing the global AML/CFT framework.

1.10 Timescales and Research Tools

The study was undertaken in three phases: the first phase was to review the literature in order delineate work already undertaken on the subject of money laundering in the context of this study. To appraise the adaptability of local jurisdictions to the AML framework, we carried out a review of the literature in LDCs focusing on Uganda. Then, the Ugandan AML regulatory experiences were analyzed on the assumption that it would reflect experiences of LDCs

³⁸ This method was used by the United Nations Drug Control Programme in 1996-7 in quantifying the size of illicit proceeds of crime globally (accessed from it website at www.undcp.org on 20th October 2010).

holding other factors constant.³⁹ To ensure additional peer review of the literature I published papers focusing on the major themes of this study.⁴⁰

The second phase focused on evaluating the suitability of the global AML framework using both primary and secondary data sources on United Kingdom, South and Uganda. This was necessary to assess the credibility and relevance of secondary data generated by AML/CFT agencies such as FATF, the World Bank and Transparency International (TI) and many other agencies.

The last phase of the study was the office based data analysis which was dedicated to knitting the project together. This phase entailed transcribing data, reports, documents collected; and internalizing them into the study. In conventional terms this phase is known as “writing up”. The latter part of this phase was dedicated to tidying up the thesis and to internalize any changes as and when they became apparent (new information from conferences presentations and meetings with my supervisors).

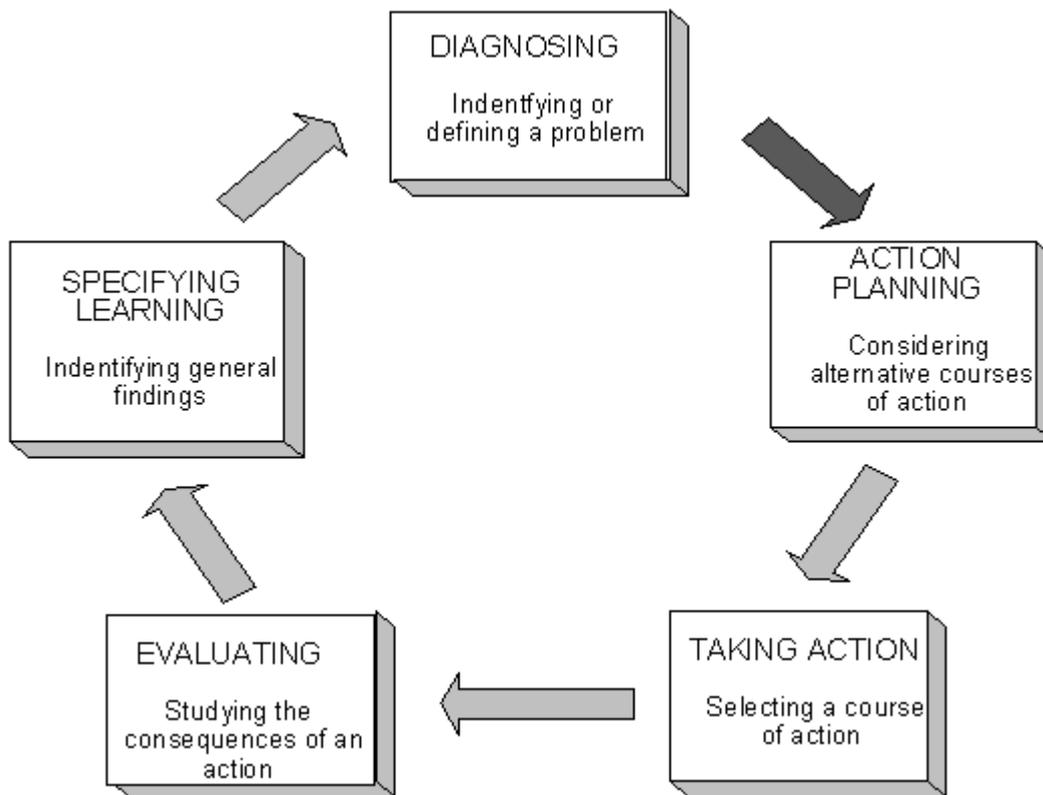
The following framework sums up the model of analysis of the study.

1.11 Model of Analysis

³⁹ For instance, if there is a functional government and a requisite environment for markets to function properly.

⁴⁰ Norman Mugarura, “The Institutional Framework against Money Laundering and Its Underlying Predicate Crimes”, (2011) 19(2) *Journals of Financial Regulation and Compliance*, 174-194.

The research is undertaken on the following model framework.



1.18 The conceptual design of the study

Globalisation is a broad field of enquiry in which to undertake a study. Bearing this challenge in mind, the study focused its analysis on three countries to evaluate the adaptability of the global AML framework.⁴¹ The rationale for adopting this approach was that since DCs and LDCs are characterised by distinctive features—these features are likely to be mirrored across countries in the same cohort. It can be inferred that since the majority of LDCs are

⁴¹ The “Generalisation approach” has been utilised by the World Bank and IMF in implementation of Financial Sector Reform Programmes across LDCs. This approach works in such a way that similar benchmarks are used in introducing desired reforms in borrowing member countries irrespective of their varied dynamics of development.

characterised by a harsh regulatory environment, they are likely to be deficient in requisite capacity to harness the global AML/CFT framework. The findings of the study have revealed that United Kingdom and Uganda cannot be assumed to have the same level of effectiveness in harnessing the global AML framework. This is because countries which are subject to different predispositions and development dynamics cannot be assumed to respond in a similar way to their novel challenges. For example, the United Kingdom is endowed with a requisite infrastructure, institutions, laws and systems to implement the global AML/CFT framework nationally, unlike LDCs (such as Uganda) which lack this leverage.

The thesis is defined by two dimensions: the analysis of the global AML regimes; and the ease with which they are harnessed across individual jurisdictions. In undertaking this study, we have analysed a dichotomy of variables—the global regulatory climate (an independent variable); and the prevailing local climate (a dependent variable) in order to tease out their varied implications for states. In my contention, unless the discrepancies between the global and the local regulatory environments are harmonised, the envisaged global AML/CFT framework will remain elusive for some jurisdictions. The study contends that the narrower the disparity gap between the local and global regulatory domains (highlighted by the case of United Kingdom), the higher the possibility for that jurisdiction to harness normative AML/CFT regimes than it is when the disparity gap is wider (highlighted by the case of Uganda).

In order to evaluate the effectiveness of the global AML framework and the ease of its adaptability across jurisdictions, we deconstructed it in Uganda and in other jurisdictions. The findings yielded were compelling in supporting the thesis that the propensity of a state to harness global AML/CFT regimes depends on its regulatory environment locally and not what has been agreed at a global level. It can also be inferred that countries which are deficient in the requisite regulatory systems would find it harder to domesticate the global AML/CFT framework. Does this mean that countries which are endowed with an effective regulatory system such as DCs have transposed the global AML framework? This remains a moot point. However, it is possible that since the majority of DCs are endowed with a palatable regulatory environment, they would have corresponding capacity to harness the global AML framework. The efficacy of the global AML framework could also be dictated by factors such as the prevailing domestic political climate, the cost-benefit analysis and the willingness of a respective state to implement it.

1.12 The fundamentals of a robust AML/CFT framework

The FATF AML/CFT guidelines require states to adopt the following framework. Therefore, the structure for an effective AML/CFT system should focus on developing a legal and institutional framework to achieve the following:

- (i) Laws that create money laundering and terrorist financing offences and providing for freezing, seizing and confiscation of the proceeds from a crime and terrorist funding;⁴²
- (ii) Laws, regulations or in certain circumstances other enforcement measures that impose the required obligations in financial institutions and designated non-financial businesses and professions;⁴³
- (iii) An appropriate institutional or administrative framework, laws and other measures that provide competent authorities with the necessary duties, powers and sanctions;
- (iv) Laws and other measures that give a country the ability to provide the widest range of international co-operation. This is essential to ensure that the system is effectively implemented.

The FATF, AML/CFT regulatory measures (2004) highlights the need for states to adopt the following further measures:⁴⁴

- (a) The respectability of principles such as transparency and good governance;
- (b) A proper culture of AML/CFT compliance shared and reinforced by governments, financial institutions, designated non-financial businesses and professions, industry trade groups, and self-regulatory organisations (SROs);
- (c) Appropriate measures to prevent and combat corruption, including where information is available, laws and relevant measures, jurisdictions,

⁴² FATF (rrecommendation 3).

⁴³ FATF (rrecommendation 4).

⁴⁴ The detailed FATF AML regulatory framework, See Appendix 1

participation in regional or international anti-corruption initiatives (such as the UN Convention against corruption).

- (d) There should be a reasonably efficient court system that ensures that judicial decisions are properly enforced;
- (e) The need for high ethical and professional requirements for police officers, prosecutors, judges, accountants etc, measures and mechanisms to ensure these ethics are observed;
- (f) The availability of a system for ensuring ethical and professional behaviour on the part of the professionals such as accountants and auditors.

1.13 The statement of research problem

The thesis highlights the need for a coordinated and a robust approach on money laundering and its predicate crimes on a proactive basis.⁴⁵ However, while there is international consensus for states to work in concert to prevent criminal organisations from abusing the financial system, a robust global regulatory framework should have an ethos which reflects the varying development conditions across different jurisdictions. It is necessary for states to enact uniform AML laws so that they are not exploited as conduits for money laundering.⁴⁶ However, since desired laws cannot be harnessed in abstract, the ease with which normative regimes are implemented should vary according to each individual state's capacity. Thus, the effectiveness of the

⁴⁵ F. Bellay, 'The Role of the World Bank', Fordham Law School Occasional Papers (2004) p. 111; see also J. Gieger, 'The Case for Harmonisation of Securities' (1997), 241 *Columbia Business Law Review*, 299-307.

⁴⁶ This underscores the reason for the adoption of United Nations Convention on Illicit Drug Trafficking and Other Psychotropic Substances, (otherwise known as the Vienna Convention) (1988).

global AML/CFT framework cannot be adopted based on assumptions but the country's capacity to harness requisite laws, to create institutions and a palatable policy and regulatory environment. While, we agree with the philosophy that states need to think globally, the reality remains that they need to act locally in pursuing their interstate relations. Therefore this study explores the interplay between the local and global factors and how they play out in the implementation of the global AML framework across jurisdictions.

It needs to be noted that the global system generally is not monolithic. Far from it, it has come to be associated with a variety of specific trends: an increasing reliance upon the market, a significant growth of institutions in determining the viability of national priorities, a diminution in the role of the state, the privatisation of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities and the increased role of civil society organisations.⁴⁷ The foregoing trends have become ubiquitous in almost every state or region. It has also become increasingly apparent that criminal organisations tend to exploit loopholes in the global system to launder the proceeds of crime using legitimate international trade. This has been facilitated by the use of innovative financial products such as letters of credit, electronic money transfers and the list goes on.⁴⁸ The advent of cyber-crimes, offshore financial centres and increased investment vehicles are ruthlessly exploited to evade AML/CFT regulations

⁴⁷ This has been adopted from the statement of the 'Committee on Economic, Social and Cultural Rights on Globalisation and Economic Social and Cultural Rights' of 11/05/98, available at <http://www.unhchr.ch/htm.menu2/6/cesnote.thm> (date accessed, 20 August 2008).

⁴⁸ Louise Shelley, 'Transnational Organised Crimes: A new Authoritarianism' in Richard Friman and Peter Andreas, *Illicit Global Economy & State Power*, (Rowman & Little Field Publishers 1998), 25-40.

and other risk management models.⁴⁹ Globalisation has created instrumentalities for criminal exploitation (such as the Internet) and enhanced the means of transferring money from one place to another; making it increasingly easy to move the proceeds of crime around. In the words of a US treasury official, “once the funds go abroad either through our financial systems or having been physically smuggled, there is virtually a smorgasbord of business structures, supported by laws of dozens of countries, which serve to obscure ownership, and frustrate the government’s ability to unravel schemes.”⁵⁰ Funds can be moved among corporate entities and financial institutions in many countries in a split second using telegraphic funds transfer, which makes untangling more and more difficult at every stage.⁵¹

Criminals have also gained access to new markets by exploiting discrepancies between legal systems of countries in different parts of the world.⁵² The emergence of new markets oriented economies has enabled criminals to develop the capacity to operate on a world-wide scale.⁵³ The large volume of legitimate capital moving into the global financial economy at any one particular point, coupled by the reduced regulatory controls on capital movement, has made it possible for large amount of money to enter the world

⁴⁹ D. Caruso, J., Elvin, and A. James, Negreira, ‘Trade Related Money Laundering Schemes Pose Increased Threats to Financial Institutions’, EY Anti-Money Laundering Team, Thompson Financial publishing, Payment Efficiency and Risk reduction Bulletin (2000), 2 Summer, 1-10.

⁵⁰ FinCeN Trends, Financial Crimes Enforcement Network, US Treasury Department, ‘International Cooperation Against Money Laundering Gains Momentum’, 2 Guidance Notes for Mainstream Banking, Lending and Deposit Taking Activities, (1996), London, 5.

⁵¹ FinCeN Trends, (n 50).

⁵² Heba Shams, *Legal Globalisation: Money Laundering and Other Cases*, Sir Joseph Memorial Series, (British Institute of International and Comparative Law (2004), 65.

⁵³ This is underscored by the recent financial crisis which started in the USA Subprime Markets, spreading swiftly to other jurisdictions due to global interconnectedness.

financial markets unnoticed.⁵⁴ The diverse use of international money transfers has facilitated criminals; in the same way it has facilitated legitimate businesses to move funds internationally in a disguised fashion.⁵⁵ This can potentially disrupt audit trails as law enforcement is stymied by jurisdictional and legal boundaries. Indeed, the foregoing challenge is also compounded by the growing diversification of international financial instruments, and fragmentation of AML laws between countries.⁵⁶

The lightly regulated financial centres are targeted by criminals to cleanse illegally acquired assets; and to then reintroduce them into developed financial centres, after it has been cleansed. It is common for developed countries to be targeted by criminals to integrate illicit proceeds of crime into their economies.⁵⁷ The transition to the market economy has facilitated criminals with opportunities to invest illicit proceeds into the newly privatised enterprises. Firstly, the market economy has created opportunities for criminals to invest their dirty money into economies where opportunities abound.⁵⁸ Secondly, the increasing integration of financial markets has induced a dramatic increase in the number of jurisdictions offering financial services without appropriate controls or regulation while banking secrecy laws

⁵⁴ Financial Action Task Force (FATF) Asia Secretariat, "Disposal of Proceeds of Crime Money Laundering Methods Workshop Report of the Expert Group in Hong Kong 14 November 1996.

⁵⁵ The Bank of Credit and Commerce International (BCCI) was closed down in 1991, following the discovery of massive fraud and money laundering by US regulators. The BCCI had grown to become the world seventh largest private bank with assets of US\$23 billion and with operation in 72 countries. The chief victim of the bank malpractices were depositors and governments in developing economies. See, George A. Walker, *International Banking Regulation, Law, Policy and Practice* (Kluwer Law, 2000), 10-59.

⁵⁶ Walker (n 55).

⁵⁷ Walker, (n 55).

⁵⁸ Louise Shelley, *Transnational Organised crimes: A new Authoritarianism in Richard Friman and Peter Andreas, Illicit Global Economy & State Power*, (Rowman & Little Field Publishers., 1998), 25-40.

is still an uphill challenge in many jurisdictions. For example in South Africa, illicit proceeds from 'daga trade' is said to be invested in the SA stock exchange, real estate and currency trading on the open market.⁵⁹ The growing complexity of money laundering schemes underscores the reason why it cannot be overcome using national law enforcement measures alone.⁶⁰ The issue of criminal law underpins national sovereignty—which is regarded as an exclusive domain of individual states and is jealously protected.⁶¹ This is why states need to forge common initiatives to respond appropriately to overlapping global issues such as money laundering.

The weak regulatory environment coupled with laxity in enforcement of AML regimes in some jurisdictions explains why they are susceptible to sophisticated money laundering schemes.⁶² The foregoing environment has made it easy for drug traffickers and other criminal organizations to move illicit proceeds about and establish in pariah states.⁶³ Through the ubiquitous global market system, risks generated from one part of the global are able to navigate to other jurisdictions with ease. The inherent challenges of poor oversight of financial institutions across LDCs have translated into failure of law and policy on many interstate issues including regulation of money laundering.⁶⁴ In some countries across Africa, there is no comprehensive

⁵⁹ Charles Goredema, 'Observations on Typologies of Money Laundering', Institute of Security Studies paper, March 2003.

⁶⁰ Anthony P. Maingot, Money Laundering Schemes, (1995), 37(4) *Journal of Anti-American Studies and World Affairs*, Winter, 1-24.

⁶¹ Some countries such as Bermuda, Cayman Islands, Cyprus, Malta, Mauritius and San Marino are very attractive to money launderers. See D.Murphy, Contemporary Practice of the United States, (2000), 94(4) *American Journal of International Law*, 667.

⁶² D.Murphy, 'Multilateral Listing of States as Money Laundering Havens' (2000), 94(4), *American Journal of International Law*, 695-696.

⁶³ Murphy, (n 62).

⁶⁴ Julian Harris, 'Risk Territories' (2008), *Company Lawyer*, 1-3.

framework on money laundering in relation to identification, seizure and forfeiture of the instrumentalities of money laundering crimes. Therefore this study investigates the dynamics of the global AML/CFT framework with the view to assess its suitability across different jurisdictions.

1.14 Major findings of the Study

The findings of the study have confirmed the assumptions/hypotheses on which it was undertaken as credible. Firstly, there is a uniform AML framework applicable globally but by default or design, it has not been apply across jurisdictions. Despite its inherent challenges, the global AML framework proved useful for states in dealing with money laundering and its predicate crimes globally. Using the global AML/CFT framework, the FATF has been able to admonish non-complying member countries and getting them to change their laws in line with expected global AML/CFT standards. This was highlighted by the cases of Austria and Turkey with regard to anonymous bank accounts; and the case of Seychelles regarding the investment law, which it was asked to retract because of its potential to encourage money laundering. FATF was able to pressure the above countries to change their laws in accordance with the global AML/CFT standards. There is also a framework at a United Nations level to counter not only money laundering and its predicate offences but also financing of terrorism. There is a uniform global framework on money laundering encompassing criminalisation, confiscation, mutual legal assistances, extradition and other aspects of money laundering and financing of terrorism. By bringing financing of terrorism within the purview of the United Nations Charter (1945), technically means that if the

acts of an obdurate state are seen to constitute a threat to international peace and security (Art. 39,) sanctions could be invoked on that State pursuant to chapter seven: in particular, articles, 41 & 42 of the charter.⁶⁵ This is highlighted by the military intervention of NATO forces in Afghanistan—launched in the aftermath of September 2001 terrorist attacks on the USA. NATO operates on the principle that an attack on one of its members constitutes an attack on all other NATO member countries.⁶⁶ Therefore an attack on the United States of America by terrorists in 2001 was construed to constitute an attack on all NATO member states, which justified the use of force under Article 42 of the UN Charter (1945). The UN also operates other AML/CFT mechanisms such as freezing of assets. These are underscored by the UN Resolution 1267 (1998)⁶⁷, which were adopted under chapter VII of the UN Charter (1945). By virtue of the foregoing Resolution, states are required to take the following measures (in connection with any individual or entity associated with Al-Qaeda, as designated by the UN 1267 Committee):

- freeze without delay the funds and other financial assets or economic resources of designated individuals and entities [assets freeze],⁶⁸

⁶⁵ The Security Council has the discretion (article 41) to decide on measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon any Members of the United Nations to apply such measures. These measures could take the form of economic sanctions coordinated by the Security Council against a member deemed in breach of international law. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁶⁶ See, Article 5 of NATO (1949) and 51 of the Charter of United Nations (1945) on collective self-defence.

⁶⁷ For this entire paragraph, see the UN Security 1267 Committee available at on www.un.org (last visited on 20th April 2012).

⁶⁸ United Nations Security Council 1267 Committee, (n 67).

- prevent the entry into or transit through their territories by designated individuals [travel ban], and
- prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities [arms embargo].⁶⁹

Primarily, the majority of the judicial decisions (reported cases) consulted in undertaking this study were based on United Kingdom and United States. While, data on money laundering in United Kingdom and United States was almost overwhelming, there was no sufficient data on money laundering on Uganda. This was used to infer from the foregoing disparities that United Kingdom (as a DC) has garnered the capacity to harness the global AML/CFT framework as opposed to Uganda (LDCs). The high prevalence of reported cases on money laundering in UK could also signify that it is highly targeted for illicit criminal activities. Thus, the foregoing analysis can be used to support the hypothesis that while LDCs are targeted by criminals to cleanse illicit proceeds of crime, developed economies are targeted to integrate the same proceeds into the economy.⁷⁰ There was scanty data on money laundering and its predicate crimes on Uganda. However, this does not mean that there are no incidences of money laundering and its related predicate offences in Uganda. One can therefore deduce from the foregoing analysis

⁶⁹ United Nations Security Council 1267 Committee, (n 67).

⁷⁰ The United Kingdom has been categorised by the Bureau of International Narcotics as 'the jurisdiction of primary concern' (See, Appendix 1.) as it is highly targeted by money launderers. The attraction of UK to Narcotic trafficking is presumably because of the high street prices which act as a pull factor.

that the legal system in Uganda is not robust enough to adapt a global AML/CFT system based on FATF international standards. The absence of data (reported cases) on money laundering in Uganda and South Africa underscores the weaknesses of these countries to fight money laundering and its predicate crimes. Countries operate different legal systems and procedural rules, which potentially impacts on their systems differently. For instance, in some jurisdictions such as France, the duty to the client is absolute and trumps the duty to the court. In others such as Germany, the duty to institutions or corporate entities trumps the duty to the client.

The disparities in prosecution of money laundering and its predicate offences in Uganda and United Kingdom confirm the inability of some states to harness the global AML/CFT framework. It can also be inferred that the Ugandan legal system is not robust enough to caution countries against the exigencies of the dynamic global market system.⁷¹ By contrast in UK and by virtue of its demonstrated ability to investigate and prosecute money laundering offences corroborates that its institutions of law such as courts are effectively working.

The findings yielded by this study on Uganda and South Africa have corroborated that poverty and its attendant environment undermines the capacity of countries to harness the global AML/CFT framework. There is evidence as highlighted in chapter four that the majority of LDCs in Africa cannot easily implement the global AML/CFT safeguards such as “KYC” in an environment of general systemic failure. In the majority of LDCs, either the

⁷¹ First there is the challenge of corruption in the judiciary but also independence of the judiciary is undermined by political meddling, the resource constraint effects, making it less robust in terms of fostering an environment for the rule of law.

reporting mechanisms are slack, none-existent or antiquated. The foregoing regulatory challenges have translated into an environment for regulatory failure. It is this same environment why AML institutions in Uganda are not able to function effectively.⁷²

Secondly, the global AML framework is riddled with gaps and saddled by challenges. These are manifested by the absence and fragmentation of national AML laws in different countries and across regions. This can be used to corroborate the fact that the current global AML/CFT framework is not robust enough to stem or regulate the threat of money laundering and its attendant threats across jurisdictions. I have demonstrated that there are so many countries which are deficient in the requisite capacity to harness the global AML/CFT framework. For instance, Uganda is deficient in a requisite infrastructure and fares poorly on many requirements prescribed by FATF as the prerequisite to harness the global AML framework. This also confirms the viewpoint that the normative AML/CFT system, based on FATF standards evolved without consulting individual member countries might not be compatible with the economic environment in LDCs. In South Africa, in transposing its AML/CFT obligations, the government negotiated exemptions from the wholesale application of the FATF, AML/CFT framework. The wholesale application of the desired AML regimes would have excluded many nationals from accessing financial services and products due to lack of verifiable residential addresses and other identification requirements such as passports and driving licences. In the majority of all developed economies,

⁷² For a detailed discussion regarding the role of Inspector general of Government (IGG) in Uganda, see chapter seven of this thesis.

every citizen has a verifiable residential address essential to ease identification of potential bank clients as opposed to LDCs—where they are unavailable. The findings yielded on Uganda can be used to corroborate the fact that the majority of LDCs lack the capacity to harness the global AML/CFT framework. Uganda is deficient in almost every benchmark (prescribed by FATF, 2004) countries need to have as a prerequisite of harnessing an effective AML system. Uganda does not have a law transposing its AML/CFT obligations. By contrast, the United Kingdom as a developed economy can apply a global AML/CFT framework with ease unlike Uganda and South Africa. The United Kingdom has garnered the capacity (manifested by its developed infrastructure and systems) to enable her implement its international AML obligations with ease.

There is no doubt that regional integration of economies has been a positive force in creating development opportunities either within some or across regions. The flipside is that the transition to the market economy has also presented a new typology of challenges to states and regions. It also needs to be noted that in the absence of a robust legal system and a framework to harmonise interstate differences, integration of markets might not work as expected. For instance, the successful of the European Union regional market can be contrasted with the demise of the East African Community (1977), ten years after it had been created. The skewed nature of the EAC system resulted in a disproportionate distribution of the benefits accrued between Kenya, Uganda and Tanzania. Kenya was accused of taking a lion's share of the benefits accrued from the community, an issue which Uganda and

Tanzania were disenchanted about. Therefore, it is not likely for countries subject to varying development dynamics to gain proportionately from common initiatives. Secondly, understanding the dynamics of the global AML framework requires one to understand the perverse nature of the global market system.

1.15 Limitations

Globalization generally and global AML/CFT regimes specifically merit a broad field of enquiry given that it encompasses a wide range of issues which transcend different legal jurisdictions. While the study examined the adaptability of the global AML framework in Uganda and United Kingdom, the effect of globalization might not be captured by sampling a handful of countries. There was not enough data on money laundering and its predicate offences on Uganda. Money laundering crimes are glossily understudied in Uganda and because of this; it was also not possible to access sufficient data to corroborate some aspects of this study. By contrast, data generated on money laundering and its predicate crimes on UK was almost overwhelming.

It would have been better to work closely with AML/CFT agencies to gain an all round empirical AML/CFT experience in the three jurisdictions the study was analysed. This collaboration was not possible due to the reasons highlighted earlier in this study.

While it is possible that the study digressed into the discussion of the intricate global theory, the digression was acceptably necessary since the context of the study was globalisation. As for the review of the literature was, while many books and journal papers have been published on the twin issue of globalization and money laundering, it was not easy to access specific literature articulating the interplay between them in the context of this study.

I did not conduct interviews as had been earlier planned because I failed to secure funding. Carrying out interviews would have helped to mitigate the bias inherent in the use of secondary data sources. It would also have corroborated the complexities of money laundering and its regulation in the three countries the study was analysed. I sent out questionnaires to some individuals and organizations in Uganda with the aim of corroborating this study. Unfortunately, the questionnaires were not returned to us, presumably because they were not answered. It was also not possible to generate a comparative analysis of the three countries of Uganda, South Africa and United Kingdom based on available data. In United Kingdom, data generated on various aspects of this study was almost overwhelming; and by contrast, it was not possible to access sufficient data for this study on Uganda.

1.16 Conclusion

This chapter has provided the framework for analyzing complexities of harnessing a global AML/CFT framework across different jurisdictions. It has articulated the importance of the global AML/CFT framework and desired

changes in the way global AML/CFT framework are evolved and harnessed. The theory of globalization generally is based on the false premise of clustering states together regardless of their individual development dynamics. The limitations of the global AML/CFT framework notwithstanding, it is still necessary for states to adopt it as a common legal grid to deal with overlapping issues, to foster international cooperation and to leverage poor countries with regard to sharing resources such as intelligence information.⁷³

⁷³ For a more detailed reading on the advantages of globalization, see Alec, Stone Sweet's paper: 'Integration and Europeanisation of the Law', Queen's Paper on Europeanisation (NO.2/2002), (2003) Nuffield College Oxford.

CHAPTER TWO: MONEY LAUNDERING, SUBSTANTIVE OFFENCES AND TYPOLOGIES⁷⁴

2.1 Introduction

This chapter underscores the genesis of money laundering and the multifaceted dimensions in which it is conceptualised. The phrase 'money laundering' is relatively new, having come into parlance in the mid-1970s.⁷⁵ It was coined as a term of art from the early practice of American criminal organisations operating laundromats as cash intensive businesses to hide their criminal wealth. It has become a term of art in titles of relevant legislation and legal texts. It can be found, for example, in titles such as the US Money Laundering Control Act (1986) and the 1990 European convention on money laundering, search, seizure and confiscation of crime proceeds.⁷⁶ The earliest legal development against money laundering took place in the United States with the passage of the Bank Secrecy Act (BSA) (1970).⁷⁷ The Bank Secrecy Act fully recognised the link between money laundering, including security fraud and the global dimension of the problem.⁷⁸ BSA required banks to report cash transaction of \$10,000 and this provision was also enacted in the money laundering Act (1986), for the first time defining money laundering as a federal

⁷⁴ This chapter substantially draws on chapter two of my book: Mugarura Norman, *The Global AML Regulatory Landscape in Less Developed Countries*, and (Ashgate, Gower: 2012), 36-61.

⁷⁵ Jeffrey Robertson, 'The Laundrymen', (London 1994), pp. 10-12. See also Heba Shams 'Using Money Laundering Control to Fight Corruption: An Extraterritorial Instrument', (2001) *Law and Business Law review of Americas*, 2-3.

⁷⁶ Heba Shams, *Legal Globalisation: Money Laundering law and Other Cases*, International Financial and Economic Law, (5 the British Institute of International and Comparative Law 2004).

⁷⁷ Shams, (n 76).

⁷⁸ Shams, (n 76).

crime.⁷⁹ Until 1980s, money laundering was also not a distinct offence in United Kingdom; it would only be prosecuted under various Statutes such as Theft Act 1968. For instance, section 22 of this Act created a framework for the prosecution of launderers who dishonestly handled stolen Assets. The concept of money laundering in UK can also be traced back to the House of Lords decision in *R v. Cuthbertson* [1980].⁸⁰ This decision underscored a failure of forfeiture laws to deprive the offender of the proceeds of crime. The case was about the defendants who were engaged in long term criminal enterprises involving the supply of controlled substances. The defendants were charged for laundering over £750,000, some of which were placed into bank accounts in Switzerland and France. Pleading guilty, the defendants were convicted and the court ordered that their assets to be forfeited. The Appellant appealed to the House of Lords against the sentence and the forfeiture orders of their assets. The question of law presented before their Lordships was the interpretation of Misuse of Drug Control Act (1971) and the section on which the court was empowered to order the forfeiture of the said assets.⁸¹ It was concluded that the powers of the court to order forfeiture of assets did exist but only when the asset in question was a tangible property and not choses in action such as cheques or other intangibles.⁸² The Drug Control Act (1986) was passed to consolidate confiscation orders of criminal assets by stripping criminals of the proceeds of their criminal activity. Section 24 of the Act creates an offence of assisting another to retain the proceeds of Drug Trafficking. However to secure a successful prosecution, the defendant

⁷⁹ United Nations Drug Control Programme at <http://www.unodc.org> (date visited 21st September 2010).

⁸⁰ [1980] 2 All ER 401.

⁸¹ [1980] 2 All ER 401.

⁸² Shams, (n 76).

would need to demonstrate that he/she knew or suspected that the owner of the property has been engaged in drug trafficking or has benefited from drug trafficking.⁸³ Section 24 was however only applicable in relation to confiscation of the proceeds of drug trafficking, an issue that for sometime confined money laundering to drug trafficking. The international efforts towards combating financial systemic abuse and specifically money laundering intensified in the late 1980's due to the growing concerns about drug trafficking and the limited scope of earlier regimes. The wide spread use of drugs in America in relation to production, distribution and consumption—sensationalized as 'the war on drugs campaign' was seen as a threat to humanity and the fabric of human society. The wide spread use of Narcotic drugs did not only have adverse social effects on societies; but also seen as an assault on social justice, civil liberties, tax evasion, disrespect of the law, erosion of work ethic, violence and corruption in relation to the lucrative black market.⁸⁴ These concerns led to the adoption of United Nations AML instruments such as the Vienna Anti-Narcotic Convention (1988); and later Palermo Convention on Transnational Organised Crimes in December 2000.

2.2 A brief Overview of the UN AML initiatives

⁸³ Shams, (n 76).

⁸⁴ S. Wisotsky, *Breaking the Impasse in the War on Drugs*, (Greenwood Publishing Group, 1986) 303; see also Margaret E. Beare, *Critical Reflections On Transnational Organised Crime, Money Laundering, and Corruption*, (University of Toronto 2005) 145.

In December 1988, the United Nations adopted a Convention on Illicit Drug Trafficking and Other Psychotropic Substances in Vienna.⁸⁵ The adoption of this instrument was preceded by a series of General Assembly Resolutions⁸⁶ where the concern over drug abuse was expressed by delegates from many national governments. In the foregoing UN Resolutions, drug abuse and trafficking was viewed as of increasing concern in international arena, prompting the UN General Assembly to adopt Resolution 39/141 of December 1984 entitled “Draft Convention against trafficking in narcotic drugs and psychotropic substances.”⁸⁷ The securitisation of drug abuse and trafficking through their conceptualisation as a threat resulted in the call for a specialised conference⁸⁸ to deal with the threat of drug trafficking and its social effects on societies. In adopting a similar securitisation discourse, the then Secretary General of United Nations⁸⁹ stated that existing resources were inadequate to deal with the drug plague, which was contaminating, corrupting and weakening the very fabric of society. In UN Resolution 40/121 describes activities of transnational criminal organisations engaged in drug trafficking as “threat to the well being of people; the stability of democratic institutions; and the sovereignty of states”, and calls in its second paragraph for maximum priority to the fight against drug production, demand and traffic and related

⁸⁵ This consolidates and supersedes the antecedent laws enacted by the United Nations on Illicit Drug Trafficking, such as ‘the Single Convention on Narcotic Drugs (1961)’; ‘The Protocol amending the 1961 Single Convention against Narcotic Drugs (1972)’.

⁸⁶ The United Nations Convention on Illicit Drug Trafficking on Narcotic Drugs (1961), available at www.undoc.org (date accessed, 10th January 2011).

⁸⁷ ‘The UN Economic and Social Council, Implementation and Development of International Instruments on the control of Narcotic Drug, and Psychotropic Substances’, a Report of the Secretary General, DOC.E/CN. 7/1987/2 of 17th June 1986, p. 2.

⁸⁸ M. Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation*, (OUP: Oxford, 1989) 41-42.

⁸⁹ The then United Nations Secretary was Javier Perez De Cueller.

international activities.⁹⁰ The UN Resolution 40/122 on the other hand, expressed the same concerns through the decision to convene the conference in 1987 at the Ministerial level: “as an expression of political will of national, regional and international levels and to adopt a comprehensive multi-disciplinary outline of future activities which focuses on concrete and substantive issues directly relevant to the problems of drug abuse and illicit trafficking.”⁹¹ The absence of international legal instruments was identified as a potential challenge to law enforcement officials in investigating the flows of money across national borders; but also there was a need for an international framework within which states could respond to the overlapping character of money laundering offences. The treaty offers a meticulous definition to the specific elements that encompass trafficking in drugs and other related drug substances. Thus, the foregoing concerns led to the adoption of the UN Convention on illicit traffic in narcotic drugs and other psychotropic substances (1988). This instrument had a limited purview—covering drugs and drug trafficking but void on other serious predicate crimes such as smuggling, fraud, serious financial crimes, and the sale of stolen goods.⁹² In December 2000, the United Nations Convention on Transnational Organised Crimes and its attendant three protocols were adopted in Palermo (Italy). The primary focus of Palermo Convention was to address the limitations of Vienna Anti-Narcotic Convention (1988) with regard to its limited scope of activities constituting serious predicate money laundering offences. In addition, Palermo Convention created four additional offences: participation in

⁹⁰ Anderson, (n 88).

⁹¹ UN Convention, (n 86).

⁹² Rick McDonnell, ‘Money Laundering Methodologies, International and Regional Counter-Measures’, National Crime Authority, NSW, (May 1998), paper presented at Australian Institute of Research in Sydney.

organised criminal groups, money laundering, corruption and obstruction of justice. It also establishes modalities for extradition through mutual legal assistance, law enforcement and co-operation in the area of information exchange.⁹³

The 1996-7 survey by the Financial Action Task Force (FATF)⁹⁴ on money laundering measures noted that along with drug trafficking, financial crimes (bank fraud⁹⁵, credit card fraud, investment fraud, advance fee fraud, bankruptcy, fraud, embezzlement and the like) were the most mentioned sources of proceeds of crime.⁹⁶ The European Union Council of ministers approved the revisions of EU's, AML framework to reflect desired international changes in scope and definition of money laundering predicate offences.⁹⁷

2.3 The transposition of AML norms into sovereign countries

To appraise the applicability of the global AML framework, the study deconstructed the envisaged AML regimes in United Kingdom, Uganda and South Africa. This was undertaken to provide insights into the ease and challenges of harnessing the global AML/CFT regimes in different

⁹³ Article 1 of the United Nations Convention against Transnational Organized Crimes of 15th December (2000).

⁹⁴ Claes Norgren, 'The Control of Risks associated with Crime, Terror and Subversion', (2004) 7(4) *Journal of Money Laundering Control*, 201-206.

⁹⁵ A large scale money laundering operation involving one or more of a Country's financial institutions and how that it could put the global financial institution at risk was highlighted by the the case of the *BCCI v Bank of England* in (1991).

⁹⁶ Claes Norgren, "An Overview of the Global Money Laundering Problem paper: International Anti-Money Laundering Standards and the Work of the Financial Action Task Force", (2005), p. 34.

⁹⁷ The Directive also imposes anti-money laundering obligations on 'gatekeepers' requiring a broad range of professional (including independent legal professionals, accountants, auditors, and notaries) to abide by AML regulations with 18 months of the date of adoption.

jurisdictions. The World Bank and IMF have played a prominent role in spearheading normative financial sector reform programmes across countries. In so doing, they have facilitated fledging states to develop the requisite capacity needed to implement the desired AML initiatives. The World Bank/IMF financial sector reform programmes have also helped to strengthen the capacity of fledging countries to develop a requisite economic and social infrastructure.⁹⁸ There is evidence that there are gaps in the global AML laws manifested by the fact that some countries (for instance, the ones already referred to)⁹⁹ have not domesticated the UN Convention on Transnational Organised Crimes (2000) in Italy.¹⁰⁰ While it is essential for states to adopt AML regimes to level the playing field in implementing its provisions across countries; it needs to be noted that states have the discretion to decide the extent of their cooperation. For instance extradition proceedings are still not easy to invoke as it is not automatic. The state has the discretion to decline extradition request from another state for alleged anti-money laundering offences unless both states treat money laundering as a criminal offence (double criminality).¹⁰¹ For a requesting country to secure extradition proceedings, the alleged offences should have been constituted as an offence in both countries (double criminality). In jurisdictions where money laundering has been purposely defined as fiscal offence, extradition will be denied on the

⁹⁸ 'The Financial Action Tasks Force on Money Laundering condemns New Investment Law in Seychelles', O.E.C.D, Press release, 12 December 12 (1996).

⁹⁹ These countries are Angola, Democratic Republic of Congo (DRC), Tanzania, Namibia and Malawi.

¹⁰⁰ This Convention is available on the UN website at: www.un.org/transnational_crimes.htm (last visited on 20th December 2011).

¹⁰¹ Double criminality is a crime punished in both the country where a suspect is being held and a country asking for the suspect to be handed over or transferred to stand trial.

ground of being a matter for the domestic state's jurisdiction.¹⁰² Thus, there is a need for a uniform global framework to prevent criminals from exploiting loopholes in the regulatory system.

2.4 The justification for global prohibition regimes

Global regulatory regimes have been defined as rules, principles and norms that require agreement on normative behaviour of all participating actors in international relations. International prohibition regimes are derived from the voluntary agreements among judicially equal actors. The conceptualisation of global regimes is rooted in the classic characterisation of international politics as relations between sovereign entities dedicated to their own self-preservation, so that individual states do not have to depend on themselves for survival.¹⁰³

The adoption of global prohibition regimes is justified by the fact that contemporary crimes are multifaceted and not amenable in the realm of individual states. With this in mind, the adoption of global AML/CFT regulatory framework is justified because it circumvents the adverse effect of the prisoner's dilemma where participants are not sure whether others will lend their support against certain exigencies or not. The adoption of global regulatory regimes can level the playing field in application of engendered

¹⁰² Article 2 of the second additional protocol to the European Convention on Extradition abolishes the blanket fiscal offence exception. See Gert Vermeulen & Tom Vander Beken, "New Convention of Extradition and the European Union: Analysis and evaluation", (1997), 15 *Dick. J. INT'L LAW* 256, 293-294.

¹⁰³ Stephen Krasner, "Structural causes and regime consequences: regimes as intervening variables", (1982), 36(2) *International Organisations*, *Massachusetts Institute of Technology*, 185-190.

norms across states. It also needs to be noted that subscribing to a common regulatory framework based on international standards strengthens the individual state's capacity to deal with overlapping challenges.¹⁰⁴ It needs to be clarified that international cooperation cannot mean that countries should be on the same level of development. However, international cooperation is necessary to level the playing field across jurisdictions to prevent regulatory arbitrage and free riding.

In LDCs, which are characterised with weak structures and tenuous legitimacy, the global AML/CFT framework is justified by the fact that the power wielded by transnational criminal groups can be overwhelming on the power of the sovereign state.¹⁰⁵ It is therefore imperative for governments to adopt common regulatory initiatives to deal with contemporary threats to national security. The contemporary securitisation discourse encompasses threats broad enough to undermine societies in the dispensation of their responsibilities. The transnational element of security has undermined the fabric of society in three dimensions: against the individual, the state and the international system of states.¹⁰⁶ Some of the aforementioned threats are insidious and pervasive to national sovereignty due to permeability of national borders. In the current global environment, societies have been disorganised by the activities of organised criminals' such as corruption, fear of violence or intimidation, national stability and state control, creating a rival authority

¹⁰⁴ F. Bilali, 'The Role of the World Bank', (2004) 1 Fordham Law School Occasional Papers, 111; see also J. Gieger, 'The Case for Harmonisation of Securities', (1997), 241 *Columbia Business Law Review*, 299-307.

¹⁰⁵ Maria Los, 'Beyond the Law: The Virtue Reality of Post Communist Privatization, in Governable Place', (2004), 4 *Journal of Government and Crime Control*, 239, 244-245.

¹⁰⁶ P. Williams, 'Transnational Criminal Organisation and International Security', (1994), 36(1) *Survival*, 94.

structure, or a state without a state-based system, a black market economy, and infiltration of the State and financial institutions by criminals.¹⁰⁷

The global regulatory initiatives are also necessary to ease cooperation of states and prevent criminals from taking advantage of the system.¹⁰⁸ There is a need for countries to subscribe to common global regulatory initiatives to enhance interstate cooperation.¹⁰⁹ The adoption of unilateral measures at a domestic state level cannot safeguard state against the inherent challenges in the global market system. Home country control (where the parent company oversees the affairs of the branch) can prevent market abuse at an institutional level, but it cannot be used to freeze and confiscate assets in the absence of a domestic law. Invariably, this means that if municipal and foreign laws are not harmonised by way of an enabling legislation, markets could be undermined by unfair competition and regulatory arbitrage.¹¹⁰ Globalisation of financial markets is manifested at three levels: the movement of financial institutions such as banks, investment houses, insurance companies, securities firms, across the border.¹¹¹ Another dimension of financial globalisation is manifested by the movement of capital across borders; and the development of financial regulations due to cross border movement of funds.

¹⁰⁷ Williams, (n 106).

¹⁰⁸ This is highlighted by the adoption of United Nations Convention on Drugs and Other Psychotropic Substances, (otherwise known as the Vienna Narcotic Convention) in 1988.

¹⁰⁹ The transmission channels between the financial institutions and real sectors: a critical survey of the literature, (2011) 18 BCBS Working Papers, 1-30.

¹¹⁰ If foreign banks are tightly regulated when their local rivals are not, they will be out-competed by their local rivals.

¹¹¹ Ephyro Luis B. Amatong, "Regulatory Equivalence and the U.S-E.U Financial Services Dialogue", (2004), International Finance seminar paper, 4-10.

As already noted, global exigencies are overlapping and not amenable within one state's regulatory domain. For instances, it has been a challenge for law enforcement agencies to control telecommunication related crimes, such as theft of intellectual property rights, electronic dissemination of offensive materials, electronic money laundering and electronic vandalism through physical land borders.¹¹² The prospect of cyber crimes has threatened to pose fresh problems for policing since they cut across geographic, social and political and gendered boundaries, calling into question conventional notions of space, place and time in the narrow confines of modern states.¹¹³ Far from the politics of borders, the link between crimes and relaxed border controls cannot be flatly dismissed.¹¹⁴ It is possible that relaxed border controls in certain regions could act as a pull factor for drug traffickers and other criminals such as small arms trafficking, illegal immigration to perpetuate cross border crimes. Therefore the nexus between relaxed borders controls and an increase in cross border crimes cannot be overly dismissed. Traditionally borders represent operational limits for law enforcement agencies from the other side of the border. Different borders connote different countries, different languages—and the possibility of language barriers, different legal systems, different laws and procedures.¹¹⁵

¹¹² Amatong, (n 111).

¹¹³ Amatong, (n 111).

¹¹⁴ Studies carried out in Britain in the run up to the Schengen Agreement (1985) revealed that abrupt searches by the Police, Immigration and Customs Officials, on cars, trucks crossing the borders into Britain revealed that opening borders could undermine British security. See, Ian Taylor, 'International Drug Trade and Money Laundering: Border Controls and Other Issues', (1992), 8 (2) *European Sociological Review*, 181-193.

¹¹⁵ Europol Publication available at http://parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm (date accessed 28 October, 2009).

With regional integration agreements (RIA), physical land borders have become more porous and permeated than ever before.¹¹⁶ In the field of crimes control, the official line between domestic and non-domestic crimes has become blurred especially in the area of criminal justice system.¹¹⁷ In view of the foregoing challenges, the local and the global discrepancies should be harmonised to prevent criminals from taking advantage of the system.

2.5 The open borders and crime floodgate theory

The interplay between the issue of relaxed border controls and its potential to increase cross-border crimes is supported by two propositions: opening borders is seen as opening crime floodgates. However, the nexus of relaxed borders and crimes floodgates has not been properly supported by empirical evidence. However, what is not in dispute is that decisions erstwhile taken in the domain of sovereign states are now taken at the peripheral regional level. This can be demonstrated by implementation of decisions and rules taken by European Union institutions into United Kingdom and other EU member countries mandatorily. It can be inferred that the traditional state—manifested by physical land borders, is sidelined in exercising its constitutional mandate because of the growth of supranational initiatives in many regions of the world today.¹¹⁸ Similarly, enhanced global media system coupled by technologies of

¹¹⁶ Louise Shelley, in Richard H. Friman and Andreas Peter, *Illicit Global Economy and State Power*, (Rowman & Little Field publisher, 1999), 25.

¹¹⁷ M.F. McDonald, 'Globalisation of Criminology: The New Frontier in the Frontier' (1995) 1 *Journal of Transnational Crime*, 6-7.

¹¹⁸ Norman Mugarura *The Global anti-money laundering regulatory landscape in less developed economies in less developed economies*, (Ashgate, Gower, 2012): chapter three.

rapid communication and travel have rendered national borders porous and permeable by people travelling for all sorts of purposes. As such, the issue of relaxing border controls—an attendant facet of most regional trade agreements can potentially trigger negative externalities across countries.¹¹⁹ The foregoing proposition is confirmed by studies carried out on this same subject in Canada and United Kingdom.¹²⁰

In the foregoing scholarship, opening internal borders is hyped as opening 'crime floodgates.'¹²¹ This theory has been espoused by those who seek to portray immigration parochially based on its negative externalities—what migrants “take and receive” and underplaying their contribution to host economies.¹²² In other scholarships, the issue of “open borders and crime floodgates theory” is dismissed as baseless and a myth.¹²³ It is this supposed mythology that has been exploited for political expediency.¹²⁴ The open border and crime floodgate dichotomy is designed to drum up fear against market integration in some regions and to maintain the status quo.¹²⁵ Paradoxically, anti-immigration sentiments are laudable in countries which are proponents of the global market system. It is this same theory that is exploited to drum up fear against integration of markets. In these two theories, there is both an element of truth; and an element of falsehood. Firstly, drawing on

¹¹⁹ Ian Taylor, "The International Drug Trade and Money Laundering: Border Control and Other Issues", (2000), 8(1) *European Sociological Review*, 181-193.

¹²⁰ Taylor, (n 119).

¹²¹ Taylor, (n 119).

¹²² The issue of borders and immigration is hijacked for political point scoring in parts of the World.

¹²³ A. Palmer, 'Global Crusade Can Never be won', (Sunday Telegraph, 31 August 1997).

¹²⁴ There is evidence that some political parties have sought to exploit the anti-immigration sentiments to get a head in elections.

¹²⁵ Palmer, (n 123).

example of terrorism as a transnational crime, it has long predated the advent of regional integration.¹²⁶ The open borders and crime floodgate dichotomy is over-emphasised to create 'a ring of steel' around some regions, for example Europe, in order to repel the threatened flood of immigrants from less developed regions of the world. The right wing politicians have tried to articulate a clear connection between illegal immigrants and a corresponding increase in serious crimes. The removal of internal border controls is likely to have a very little impact on spreading and planning of terrorist crimes as frontier controls have never prevented terrorism in the past.¹²⁷ For example the 7/7 terrorist attacks in London were orchestrated (though allegedly with outside influence) and committed by home grown British passport holders—they did not cross any border. The same view applies to drug trafficking because the adoption of strict border controls can undermine the efforts of traffickers in the short term but it cannot suppress drug related crimes in the long run. Heavy policing of national borders can constrain supply and undercut drug consumption in the short term. However, drawing on the economic principles of demand and supply, the lower the supply, the higher the prices. This environment will attract drug traffickers and money launderers into a country, apparently to take advantage of high market prices for drugs.¹²⁸ This is why countries like Netherlands—which operate a liberal drugs policy have achieved a higher success rate in controlling drugs than those which apply stringent anti-drug laws such as the United States of America. There is the issue of high street prices for drugs in USA, which will

¹²⁶ The Convention for the Prevention of Terrorism in 1937 adopted by the League of Nations as a framework for the Prevention and Punishment of Terrorism.

¹²⁷ John Benyon, 'An Audit of Crime, Policing and Criminal Justice Issues', (1994), 1 Law and Order Review, 87.

¹²⁸ Palmer, (n 123).

continue to work as a “pull factor” for drug traffickers—dealers exploiting every avenue possible to smuggle them into the country. On other hand, it is also true that relaxed borders could be exploited for criminal purposes, especially in countries which are deficient in requisite infrastructure and oversight regulatory institutions. The issue of immigration is complicated because it generates both social-economic benefits to an economy; but it also generates negative externalities on host economies.

2.6 The role of IL in localisation of global AML regimes

In a legal context, globalisation is a loose term that is devoid of a clear definitive legal meaning. The proliferating global regimes are independent and often not amenable within the realm of state regulatory domains.¹²⁹ There are many global regulatory regimes, which have emerged through *ad hoc* arrangements such as the FATF forty plus nine recommendations for the prevention of financial crimes.¹³⁰ Furthermore, the default of the global system is that what we often call ‘global’ is manifested locally; and is a confederation of states or institutions affiliated to a group of states. Technically the distribution of legitimate powers and decision-making processes within countries are dictated by the principle of separation powers between the judiciary, the executive and the legislature. The paradox of globalisation is that there is often no global central authority to co-ordinate the relationship

¹²⁹ Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk*, (Oxford University Press, 2000), 37.

¹³⁰ This skewed nature is manifested by the way both the Basle Committee Banking and Supervisory Standards; and FATF regulatory Standards are evolved.

between different market domains and to articulate distribution of legitimate global powers between different constituencies.

Markets cannot function across countries without harmonisation of legal systems, procedures, customs that span the globe. Harmonisation initiatives are either based on either ratified interstate treaties or the soft law instruments—enunciated at various market domains. Treaties are implemented subject to the individual states consent; while soft law instruments are regulatory guidelines that are not meant to be legally binding. Soft law instruments are only intended to harmonise existing differences between jurisdictions and enhance interstate cooperation.¹³¹

The majority of global prohibition regimes tend to be deficient in effective enforcement mechanisms. This has made scholars such as Axelrod and Keohane to brand globalization processes and concomitant failures as “Anarchy”.¹³² The global AML/CFT framework as it stands today cannot be effectively implemented globally unless its ethos reflects the varying global market conditions, which cannot be exclusive of local conditions. As states surrender their sovereign space to reconstitute at a regional level (as manifested by the United Kingdom’s accession to the EU in 1972), criminals have demonstrated the agility to fill that void in the regulatory system. For example, the growth of motor vehicle trafficking crimes—a manifestation of cross border threats in the East African region¹³³, is attributed to weak border

¹³¹ Ephyro Luis B. Amatong, “Regulatory Equivalence and the U.S-E.U Financial services Dialogue”, (2006), International Financial seminar paper, *Harvard Law School*, 19-20.

¹³² *Achieving Cooperation under Anarchy*, Strategies and Institutions, (1986) 40 Winters, 139.

¹³³ Amatong (n 131).

controls between the East African member countries. On the converse, there have been no reported incidences of cross border crimes between Indo-Pakistan borders because of strict border controls over the issue of Kashmir.¹³⁴

2.7 Money laundering as a criminal offence

As noted earlier, money laundering is relatively new, having come into parlance in the middle 1970s.¹³⁵ It is derived from the early practice of criminal organisations in the US where they used to operate laundromats as cash intensive business to hide their criminal wealth. It has since become accepted as the term of art and is used in titles of relevant legislation and legal text. It can be found for example in titles of US Money Laundering Control Act (1986); and the 1990 European Convention on money laundering, search, seizure and confiscation of crime proceeds.¹³⁶

Money laundering underscores the process of manipulating legally or illegally acquired wealth to obscure its existence, origin or ownership for the purpose of avoiding law enforcement.¹³⁷ The phrase “money laundering”¹³⁸ refers to

¹³⁴ India and Pakistan have fought at least three wars over Kashmir, including the Indo-Pakistani Wars of 1947, 1965 and 1999. India and Pakistan have also been involved in several skirmishes over the Siachen Glacier, available at: www.google.com (last visited on 12 February 2012).

¹³⁵ Heba Shams, *LEGAL GLOBALISATION; Money Laundering Law and Other Cases*, Sir Joseph Memorial Series Vol. 5, International Financial Economic Law, (The British Institute of International and Comparative Law, 2004) 17. According to J. Robinson, the phrase Money laundering could have been in use as earlier as 1920s, apparently when steel gangs sought to know the origin of money their rackets were generating. See Nicholas Ryder, “The Financial services Authority and Money laundering: A Game of Cat and Mouse”, (2008), 67(3) *Cambridge Law Journal*, 635.

¹³⁶ Shams, (n 135).

¹³⁷ Shams, (n 135).

“the conversion or transfer of property; the concealment or disguise of its origin; its acquisition or possession or use; and the participation or association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the foregoing acts.” It also underscores the conduct, which in effect is similar to the offence of handling of the proceeds of crime.¹³⁹

Money laundering is a complicated process which involves the following elements when committed intentionally: the conversion and transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.¹⁴⁰ The act of concealment or disguising of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity. The acquisition, possession or use of property, knowing, at the time of the receipt that such property was constituted criminal activity or an act of participation in such activity. Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the actions mentioned in the foregoing indents.¹⁴¹ Requisite

¹³⁸The Joint Money laundering steering Group, Prevention of Money laundering/Combating Financing of terrorism: Guidance for the UK Financial Sector Part 1 (London 2006), pp. 5-8. This definition is based on section 2(2) of the European Council Directive (91/308/EEC: OJL166, 28.6.1991) on prevention of the use of financial systems for the purposes of money laundering of 10.6.1991

¹³⁹ This is set out in section 22 of United Kingdom Theft Act 1968.

¹⁴⁰ This definition is adopted from article 3(1) (b) of the United Nations Convention Against illicit Traffic in Narcotics Drugs and Psychotropic Substances (hereinafter the Vienna Convention of 1988).

¹⁴¹ See, United Nations Drug Control Programme (UNDCP): ‘An Overview of the UN Conventions and International Standards Concerning Anti-Money Laundering Legislation’ dated February 2004, available from its website at www.undcp.org, (last visited on 20th October 2010).

knowledge, intent or purpose as an element of the foregoing activities is satisfied when these activities have been carried out in the territory of another member state or in that of a third country.¹⁴² 'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title or interests in such assets.¹⁴³

The element of conversion underpins the meaning of money laundering offences because it marks the stage where illicit cash is turned into a less suspicious form, so that the true source or ownership of tainted assets is concealed and a legitimate source created. The limitation with the Vienna Convention (1988) is that it was specifically limited to the laundering of the proceeds of drug trafficking. Following the adoption of Vienna Convention in 1988, a number of countries based their AML laws on this framework limiting the definition of money laundering offences to the laundering of drug profits. Subsequently, there has been a move to extend the definition of money laundering to include the proceeds of other serious criminal activities, including smuggling, fraud, serious financial crimes and the sale of stolen goods.¹⁴⁴ The 1996-7 survey by the Financial Action Task Force (FATF) of money laundering measures noted that along with drug trafficking, financial crimes (bank fraud, credit card fraud, investment fraud, advance fee fraud, bankruptcy fraud embezzlement and the like) were the most mentioned

¹⁴² United Nations Drug Control Programme (UNDCP) (n 141).

¹⁴³ Article 3(1) (b) of the United Nations Convention on Illicit Drug trafficking and Psychotropic Substance 1988.

¹⁴⁴ Rick McDonnell, 'Money Laundering Methodologies: International and Regional Counter-Measures', National Crime Authority, NSW, paper presented at the Australian Institute of Research in Sydney in May 1998.

sources of proceeds of crime.¹⁴⁵ Many countries have extended the scope of money laundering offences, taking into account a wide range of activities which generate illicit proceeds of crime.

Money laundering is also described by the process through which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means. It is a three stage process where initially the dirty money must be severed from the predicate crime generating it; (ii) characterised by a series of transactions designed to obscure or destroy the money trail in order to foil pursuit; and (iii) reinvesting the crime proceeds in furtherance of the objectives of the business (launderer). This is a well-established offence in many EU member states¹⁴⁶ except that money laundering would incur a higher penalty than mere handling of the proceeds of crime.¹⁴⁷ Thus, the conduct constituting money laundering extends beyond mere handling of stolen goods as would be the case in relation to section 22 of Theft Act 1968. As regards money laundering, there has to be action beyond mere possession of stolen goods such as assisting in retention or removal of property for the benefit of another person.¹⁴⁸ The Proceeds of Crime Act assimilates money laundering offences introduced by the Criminal Justice Act (CJA) 1988 as amended by the CJA 1993. Section 93A (1) (a) of the CJA 1988 focuses on assistance when the retention or control by or on behalf of another (A) of A's proceeds of criminal conduct is facilitated whether

¹⁴⁵ "An Overview of the Global Money Laundering Problem: International Anti-Money Laundering Standards and the Work of the Financial Action Task Force," quoted in Rick McDonnell, (n144).

¹⁴⁶ Shams, (n 135).

¹⁴⁷ Shams, (n 135).

¹⁴⁸ P. Alldrige, *Money Laundering Law*, (Hart Oxford 2003), 92

by concealment, removal from the jurisdiction or transfer of nominees or otherwise.¹⁴⁹

2.8 Money laundering several outcomes

The definition of money laundering envisages several outcomes. The definition envisages that the launderer is scheming to hide the existence of the wealth or its amount, as in the case of tax evader who wants to shelter his wealth from the reach of tax authorities; but it also envisages that he or she could be intending the following as well:

- He/she could also be intending to hide or disguise the ownership of the generated wealth, as in the case of a drug lord who wants to obscure the money trail that might lead to his detection by severing the link between him and the funds through a shell company or a trust;
- He/she could be intending to hide its disposition where the money is intended for investment in a criminal or terrorist organisation;
- He/she could be intending to disguise the origin of funds by fabricating another legitimate source of wealth.

The outcome of the money laundering process depends on the purpose of the launderer him/herself as well as on the law and law enforcement in the jurisdiction where the activity is taking place.¹⁵⁰ The money launderer's overriding objective is to reinvest the illegal wealth in another illegal enterprise, by obscuring the ownership of the money or its trail to the illegal

¹⁴⁹ Section 327 of Proceeds of Crime Act (2002).

¹⁵⁰ Rider, B.A.K, 'Taking the Profits Out of Crime', in *Money Laundering Control*, (Cambridge University Press 2001), 2-3.

destination. Disguising the source and legitimising it will be irrelevant when the launderer invests his wealth in jurisdictions which operate a lax approach to the illegality of the funds.

2.9 Typologies of Money laundering

Money laundering patterns are said to fall into three distinct categories. The first one is internal money laundering—characterised by the laundering of proceeds of crime committed within a given country or assets to be used in committing more crimes there; citing the prominent case of ‘daga’ trade.¹⁵¹ The second pattern is the incoming/inflowing money laundering, which entails the laundering of assets derived from crime committed outside the country and reintroduced as investment. The most notorious of this being foreign currency importation; and the third last category is the outgoing money laundering which very closely mimics the classical cases. In this typology the proceeds of crime committed within the country are exported to one or more countries as highlighted by the case of currency counterfeits in Uganda. The overriding objective¹⁵² of the launderer is to get the money to the international money markets at some stage where total flexibility can be achieved. The provenance of the funds having been totally concealed, the beneficiary can

¹⁵¹ A report on Organised Crime and Money Laundering in South Africa by Institute for Security Studies (ISS), Cape Town, available at www.iss.org (date visited on 20th October 2011).

¹⁵² This section has drawn from a panel discussion paper on money laundering presented by Mr. Kessy Herman to the Interim Executive of East Africa and South Africa Anti-Money Laundering Group (EAASMLG) in South Africa in May 2010.

pose, as a rich person who invests anywhere in the world legitimately using the Banking system at will.¹⁵³

2.9.1 The process of money Laundering

The ultimate objective of the money launderer is always to ensure that 'illicit proceeds of crime' also known as 'the dirty money' is eventually safely placed into the financial system as clean money as one would expect. The dirty money would have passed through what is literally likened as 'a washing cycle' where the dirty money is washed up clean in a series of washing circles. There are two main objectives of the money launderer. These are mainly avoiding the gaze of the law; and using money laundering as a strategy of transmitting the proceeds of crime from point A to B.

2.9.2 Avoiding Law enforcement

Any money laundering scheme ultimately aims at circumventing law enforcement and evading the reach of the law. The purpose of the launderer is to secure or avoid the confiscation of his ill-gotten wealth or to avoid or evade tax authorities from slashing his wealth. For those who extend money laundering to civil wrong, the launderer's purpose could be to avoid the enforcement of a court ruling against his assets in a divorce case.¹⁵⁴ But money laundering is also exploited as strategy of achieving the launderer's objective of placing tainted money safely into the financial system.

¹⁵³Herman, (n 152).

¹⁵⁴Shams (n 135).

2.9.3 Strategy

Money laundering is used as a strategy of transmitting money from point A to B. The launderer must change the form of the money of illicit cash to another asset so as to conceal the true source or ownership of the illegally acquired proceeds, and the creation of the perception of legitimacy of the source and ownership.¹⁵⁵ For example, drug trafficking, is highly cash intensive. Indeed in case of hard drugs (heroin and cocaine) the physical volume of notes received from street dealing is much larger than the volume of drugs themselves.¹⁵⁶ Reliance on cash as a central medium of exchange in turn gives rise to at least three common factors: drug dealers need to conceal the true ownership and origin of the money; the money launderers need to control the money and to foster their criminal enterprise. Money laundering strategies must be differentiated from money laundering techniques. There are as many techniques used in committing money laundering as one can possibly think of.

2.9.4 Techniques of Money Laundering

In an effort to achieve their goals of undertaking a money laundering operation, money launderers have resorted to the use of a variety of techniques. The most common ones include: currency smuggling; the

¹⁵⁵McDonnell (n 144).

¹⁵⁶ P. O'Brien, 'Trafficking Narco-Dollars: The Evolution of Potent weapon in the Drug War' 21 *Inter-American Law Review*, (1990): p. 643.

conversion of cash into negotiable instruments; the creation or use of facilities offered by financial and tax havens; the establishment and use of the front or shell companies; the use of currency and brokerage houses; the creation of false or inflated invoices; the use of casinos and other gambling enterprises; the use of credit cards obtained from tax haven banks; the use of facilities provided by underground or parallel banking systems; and resort to cash purchases.¹⁵⁷ The techniques of money laundering are innumerable, diverse, complex, subtle and secret. What is not in dispute however, is the ability of the launderer to manipulate the legitimate process in his transactions. The analysis of the Canadian money laundering police files¹⁵⁸ revealed that over 80 percent had an international dimension suggesting that the perpetrators of this trade exploit the transactional movement of goods, capital and people, just in the same way the legitimate business community does in this global era. As the EU commission has noted, internationalisation of economies and financial services are opportunities which are seized by money launderers to carry out their criminal activities, since the origin of funds can be better disguised when put outside the reach of national authorities where the crime was initially committed.¹⁵⁹ This proposes the need for international cooperation against money laundering such as bank secrecy laws and making sure it is criminalised internationally.

The acts or transactions which constitute money laundering are limited only by the purpose for which they are structured and the skill of the launderer.

¹⁵⁷ O'Brien, (n 156).

¹⁵⁸ M.E. Bearer *et al*, *Tracing Illicit Funds: Money Laundering in Canada*, Ministry of Solicitors General of Canada, (Ottawa) (1990), p.304.

¹⁵⁹ This was the overriding objective of the First EU AML Directive of 1991.

There is almost an unlimited number of ways in which the launderer can achieve his purpose. This process encompasses the three money-laundering stages, which are treated separately under techniques of money laundering.¹⁶⁰

Money can be laundered using one of the following techniques:

Investing the 'dirty money' in legitimate businesses either through shell companies or through genuine companies in pseudo names;

- The launderer may acquire assets from the proceeds of crimes;
- Deposit of money in banks in non-co-operative countries and remittances through banking channels to the host country;
- Use of non-banking channels to transfer money such as hawala and hundi which is now a common method of remitting money to Uganda and other East African Community countries;
- Over-invoicing of goods in seemingly normal business transactions;
- Theft and smuggling of luxury motor vehicles within and into the region, commonly used in East Africa and Eastern seaboard of Southern Africa;
- Routing money through tax haven countries, Cayman Island and the Caribbean have been very prominent in this respect.

These techniques are further broken down in each of the stages (placement, layering and integration) through which the 'money washing cycle is processed.

The first one is the placement stage where the illegitimately acquired or destined assets are placed into the financial system. This initial stage can also

¹⁶⁰ O'Brien (n 156)

involve greatest risks for the culprit since the placement stage often requires substantial sums of money across the counters of the bank and other financial institutions. According to Barry Rider¹⁶¹ ‘money in flight will first be noticeable when it literally first splashes into the pool.’ Thus, money laundering operations are more noticeable, and thus easier to stop, when money is first introduced into the system (the placement stage) since deposits without an apparently bonafide commercial reason more easily arouse suspicion at the point of face-to-face contact with the bank. However detection has often been avoided by the process known as ‘smurfing’ which involves the use of what is a small army of individuals who deposit cash sums, which ¹⁶²fall below the reporting threshold.¹⁶³ It may be said that individual bankers are in the best position to monitor and report suspicious financial transactions. However, the attempt to stop money laundering at the placement stage has exerted considerable pressure on banks and indeed on the tradition of the laws of countries. Several issues arise here: the banks requirement to report to the authorities not only knowledge and suspicion of illicit activities but the duty the bank owes to the customer based on the principle of customer confidentiality.¹⁶⁴

¹⁶¹ Herman, (n 152).

¹⁶² C. Howard, ‘The Mens rea Tests for Money Laundering Offences’(1989), 4 *New Law Journal*, 118-119. The article distinguishes the following categories of the mental state that constitute knowledge: (i) Actual knowledge; (ii) willfully shutting one’s eyes to the obvious; (iii) willfully and recklessly failing to make such enquiries an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man and; (v) knowledge of circumstances which would put an honest and reasonable man on enquiry.

¹⁶³ Cash from unknown persons in mixed denominations is often a cause of suspicion. For this reason many drug traffickers and professional launderers have sought to operate from behind the cover of cash intensive business such as casinos, bars or restaurants.

¹⁶⁴ *Tournier v. National Provincial Union Bank of England* [1924] 1K.B. 46.

During the placement stage, one or all of the following aspects are likely to happen:

- Physical disposal of bulk cash proceeds—because a large volume of cash may draw attention to their illegal source and carry a continuous risk of theft or seizure, criminals are motivated to exchange small denomination bills for larger bills, to deposit cash and buy financial instruments or otherwise dispose of bulk cash promptly.
- Structuring/Smurfing—of cash transactions (deposits, monetary instrument purchases), to evade the common regulatory requirement that transactions, which exceed a certain amount of money, be recorded and sometimes reported.
- Bank complicity—where money laundering is facilitated when bank personnel are corrupted, intimidated or controlled.
- Misuse of exemptions—unsupervised unilateral ability of a financial institution to exempt itself or its customers from a reporting or recording regime can offer money launderers a way in which to avoid an audit of their cash transactions.
- Committing of licit and illicit funds—committing of funds and establishing front companies is a way to take advantage of these circumstances, by obscuring illicit proceeds in a forest of illicit transactions (co-mingling) or masking them with the appearance of legitimate receipts of a largely cash business activity (front companies).
- Assets purchased with cash—large-scale purchases can support a luxurious life style, change the form of the proceeds from conspicuous form; or obtain major assets, which will be used to further the criminal enterprise.

□ Currency smuggling—the cross border smuggling of currency and monetary instruments by various methods accomplishes the desired physical transfer without leaving an audit trail.¹⁶⁵

What generally happens at this stage is illustrated by the following two metaphors:

□ Money laundering is analogous to throwing an object¹⁶⁶, (say a stone) in water. Immediately the object is thrown in water, one can see the ripples where it first hit. But as it sinks and goes deeper the ripples disappear with it, to a point when they can be seen no more. At some point, it is hard to tell that the object was even thrown in water. Drawing on this metaphor, it has been said that unless money laundering is prevented at the placement stage, it becomes very difficult to control at a layering and integration stage when it has 'sunk deeper' within the financial system.

□ Money laundering typologies have been¹⁶⁷ explained in the following analogous terms. Hand Wash—when a criminal organisation uses the money (generally small amounts) to buy goods and services for the organisations. Family Washing Machine—when criminal organisations or family launders its money according to family goals and collusion with banks or financial institutions. Washing programs can consist of the short cycle, such as opening a deposit account in a bank in the name of a given person and depositing the money there; the long cycle, which involves terms such as prewash, wash, rinse and drying to describe the different passages from

¹⁶⁵ J. Robinson, *The Laundrymen Pocketbooks*, London (1995), p. 35.

¹⁶⁶ Robinson, (n 165).

¹⁶⁷ D. Savona, 'Mafia Money Laundering versus Italian Legislation' (1995), 3 *European Journal of Criminal Policy and Research*, 35.

cleaning the money to its investment in legitimate activities. Then there is Condominium Washing Machine—when several families belonging to the same criminal syndicate, such as mafia, organise a laundering enterprises with complicity of someone in a bank of financial institution. Last but not least is what is called a launderette—when a criminal organisation offers criminal and criminal syndicates a money laundering service with different cycles: short cycle for cleaning the money only, or the long cycle which includes all the activities from laundering to investment.

The second is the layering stage or agitation stage where numerous transactions designed to act as a smoke screen to disguise the true origin of the money. One of the many such transactions used as part of the layering stage is over invoicing of the value of imported goods. The use of gold is also much favoured by money launderers in view of its highly mutable qualities. Whether in form of ingot, a ring, bracelet, pendant or ornament, its value remains constant therefore a single piece of gold can be changed many times in order to disguise its original form without any significant change in its worth. This approach to a great extent mirrors parallel calls to transplant interpretations of knowledge on the basis of the case law on constructive trusts in criminal law sphere in order to include a broadly defined concept of wilful blindness.

□ The creation of a false paper trail—the intentional production of false documentary evidence to disguise the true source, ownership, location, purpose of or control over the funds.

- Cash converted into money instruments—once illicit proceeds have been placed into a bank or a non-bank financial institution, they can then be converted into monetary instruments such as traveller's cheques, letters of credit, money orders, cashiers cheques, bonds or stocks. Conversion into monetary instruments allows the proceeds to be more readily transported out of the country without detection, to be deposited into other domestic financial institution accounts, pledged for loans etc.
- Tangible assets purchased with cash and converted—to benefit offset transaction costs: the identity of the parties may be obscured by untraceable transactions, and the assets become difficult to locate and seize.
- Electronic funds or wire transfers—possibly the most effective layering method available to money launderers. They offer criminals the much-needed speed, distance and minimal audit trail and virtual anonymity amid the enormous daily volume of electronic funds transfers, all at minimum costs.

The third stage of money laundering process is the integration or reintegration stage. This stage occurs when the dirty money has been safely placed and then layered to the extent that it is safe to return to the launderer via the legitimate financial system.¹⁶⁸

- Real estate transactions—property can be bought by shell corporations using illicit proceeds. The property can then be sold and the proceeds appear as legitimate sales proceeds. A reduced price can be declared and partial payment made in cash to the seller, guaranteeing a paper profit when the

¹⁶⁸ The three stages in the laundering of dirty money are intended as a simplistic overview of what in reality is a complex and sophisticated process.

property is resold at the market value. Inflated prices can be established by a series of trades, enabling the last seller to show a legitimate source of substantial, although fictitious profit or providing justification for inflated loan transactions.

- Front companies and sham loans—in this way the owner can pay his foreign laundering subsidiary interest on the loan and deduct it as business expense, thereby reducing his tax liability.

- Foreign bank complicity—money laundering using accomplice foreign banks represents a higher order of criminal sophistication and presents a very difficult problem both at technical and political level. Such a bank can conceal many incriminating details relating to persons and transactions; not to mention providing sham loans secured by criminal proceeds, while guaranteeing immunity from law enforcement scrutiny due to the protective banking laws and regulations.

- False import/export invoicing—fictitious transactions, overvaluation of entry documents and/ or overvaluation of exports serves to justify funds transfers involving criminal proceeds.¹⁶⁹

It should be noted that the foregoing stages are not cumulative constituent elements of money laundering, in a sense that they should all exist before the offence is committed. The commission of any one of them may be sufficient for guilt to arise. It is however improbable that layering or integration could occur without placement having preceded them. As is apparent in the three

¹⁶⁹ Savona and De Foe, 'International Money Laundering trend and Prevention/ control policies, in Savona E.U. (ed), *Responding to Money Laundering: International Perspectives*', (Harwood Academic Publishers, Australia, 1997), 27-28.

dimensions of money laundering, there are instances when money laundering is committed without the placement stage.

- The two phase model, distinguishing between: money laundering of first degree, concerning the laundering of money stemming directly from illegal acts; and second degree laundering, indicating mid or long term operations, through the laundered money appears as a legal income and is restructured in the legitimate financial system (recycling);
- The circulation model, based on the cycle of water and divided into seven stages;¹⁷⁰
- The four sector model, in which the sector contains a refinement process; and
- The destination/teleological model based on diverse money laundering targets (for example integration, investment, and tax evasion, financing of organised crime).

As far as the underground criminal economy is concerned, money laundering is embedded primarily in its potential to facilitate the evasion of detection of the underlying criminal activity that generates the profit¹⁷¹. Secondly, money laundering can sustain the enjoyment of profit from crime or their reinvestment in future criminal activities. Thirdly, money laundering facilitates the

¹⁷⁰ Schematically the cycle goes as follows: (Rain insertion of cash)—insertion of water in the soil (first wash)—creation of undercurrent waters (creation of reserves)—creation of underground seas through drainage (preparation and transportation abroad)—recollection in the underground seas (preparation for legitimation)—water pumping station (entrance to legitimate financial system)—biological cleansing installations (second wash)—consumption/use (transportation and investment)—evaporation (legal reintroduction into the country of origin)—new rain (new insertion of cash from criminal activities). This model is cited in Valsamis Mitsilegas, *Money Laundering Counter-measures in the European Union: A new Paradigm of Security Governance versus Fundamental Legal Principles*, (Kluwer Law International, 2003), 29.

¹⁷¹ De Foe, (n 169).

development of trans-national networks, and linkages with criminal environments of disparate origins. Law enforcement authorities have come to the conclusion that by combating money laundering activities, they can disrupt the cycle used by criminal groups to derive benefits from illegal profits, and thereby weaken or even destroy their viability. If the primary motivation behind syndicated crime is economic, and the economic gain is removed, the crime will cease.

Sophisticated attempts to conceal the sources of money can involve hundreds, perhaps thousands, of bank accounts in numerous jurisdictions in an attempt to create as complex a web as possible. This makes it difficult to trace transactions by presenting law enforcement authorities with administrative barriers against obtaining financial details, making it impossible to do so.¹⁷²

It needs to be noted that in any type or stage of money laundering process, the goal of the launderer remains to conceal the true ownership and origin of criminal proceeds and change their form by constantly maintaining control¹⁷³. The element of concealment or disguise is integral to the conceptualisation of money laundering phenomenon and essential to distinguish it from the simple hiding of illicit proceeds.¹⁷⁴ This is not always taken into account by certain theorisations on the process of money laundering, especially in models such as hand wash—which involves the use of a small amount of money to buy

¹⁷²Jorrod Wiener 'Money Laundering Transnational Criminals, Globalization and the Forces of Redomestication', (1997), 1 *Journal of money laundering control*, 54-66.

¹⁷³ Wiener, (n 115).

¹⁷⁴ United Nations, Office Drug Control and Crime Prevention at [http:// undoc.org](http://undoc.org) (visited 7th August 2008).

goods. It doesn't involve the intention to conceal the origin of the criminal proceeds and may not involve the use of credit and financial institutions.

2.10 The responsibility of banks in fighting money laundering

Financial institutions are by law required to create a normative anti-money laundering environment—laws and ethics based on international standards. This environment is necessary to ensure that banks are not exploited as vehicles for the transmission of illicit proceeds through the banking system. The banks' vulnerability to money laundering schemes is clearly demonstrated by the fact that banks, apart from offering a frontline service of receiving deposits and paying money to its customers, they also sell sophisticated financial products such as traveler's cheques, letters of credit, e-money, and so forth and so on, to members of the public. The foregoing challenge has exposed banks to risks of money laundering through sophisticated money laundering schemes which could prima facie look legitimate. On the other hand, it can also be argued that banking is a business, which means that banks should be allowed to do just banking and to leave enforcement of regulatory regimes to oversight anti-money laundering institutions. For instance banks are required to report suspicious transactions, to monitor clients and their accounts, and to perform any other related duties as part of executing their customer due diligence (CDD) mandate. The CDD mandate puts the bank in a supposedly invidious position of reporting on its very customers and perhaps causing them to get arrested by the authorities. How do banks square the foregoing reporting regime with

the principle of customer confidentiality and its responsibility to the authorities not to tip off customers? It would seem that requiring banks to report suspected money laundering activities would arguably sideline the bank in terms of its business operations. It would create a hostile business environment—for example does it not scare off potential customers or generate an anti-business climate in a particular bank?

2.10.1 Bank—customer relationship

The bank-customer relationship raises significant issues of the banks duty of customer confidentiality and that of tipping off. These duties are owed by the bank both to the customer and the regulatory authorities as well. The bank's duty of disclosure can potentially conflict with the duty of confidentiality owed to the customer by virtue of the contractual obligations between the bank and the customer; but also if the bank knowingly assists in receipt of deposits generated from money laundering it could be liable as an accessory to the alleged money laundering offences. What does the bank duty of confidentiality entail?

2.10.2 Bank's duty of confidentiality

It is an established tradition in English common law that the relationship between a bank and a customer is a contractual one; and that the bank has a legal duty arising out of this contract to protect the information relating to a

customer which it received as a confidant.¹⁷⁵ An implicit term of the contract is that the bank should not disclose to third parties either the state of the customer's account or any of his transactions with the bank or any information relating to the customers acquired through maintenance and administration of the account.¹⁷⁶ In *Tournier v. National Provincial Union Bank of England*¹⁷⁷, Bank L.J clearly argued that this duty extends at least to all the transactions that go through the account...even beyond the period when the account is closed... {and} extends to the information obtained from other sources than the customer's actual account.¹⁷⁸ While the duty not to disclose is a legal one arising out of the law of contract, it is not an absolute one but qualified. The first qualification is where there is a duty to the public to disclose; secondly where disclosure is under a compulsion by law, thirdly where the interest of the bank requires disclosure; and lastly where disclosure is made with the express or implied consent of the customer.¹⁷⁹ The implied consent of the customer is manifested in a situation where, for instance, the customer has filled the consent form and authorised the bank to pass information to a third party.

There are circumstances in which courts have allowed money to be followed at common law into the hands of a subsequent transferee¹⁸⁰; and the position of the law seems to assert the common law right to follow an asset and to

¹⁷⁵ The nature of this relationship is clearly articulated in *Foley v. Hill* [1848] 2 H.L. cas. 28; *Joachison v. Swiss Bank Corporation* [1921] 3 K.B. 110; see also Lord Chorley and P.E. Smart, *Law of Banking*, (4th Edition, Sweet and Maxwell, London 1998), 88.

¹⁷⁶ Atkin L.J dictum in *Tournier v. National Provincial and Union Bank of England* [1923] All ER 550-558

¹⁷⁷ [1923] All ER 550.

¹⁷⁸ E. Ellinger, E. Lomnicka, Richard. J. A. Hooley, *Modern Law of Banking*, Oxford University Press, 3rd Edition, (2005) p.152.

¹⁷⁹ Ellinger and others, (n 121).

¹⁸⁰ *Banque Belge Pour L'Etranger v. Hambouck* [1921] 1 K.B. 321.

recover it in personal action, just as much as in case of a debt or other chose in action.¹⁸¹ The instructive example in this situation is the Court of Appeal decision in *Banque Belge Pour L' Etranger v. Hambrouck*¹⁸², in which the facts of the case were as follows:

The first defendant, Hambrouck, fraudulently obtained a number of crossed cheques drawn, or purporting to be drawn in his favour by his employer, paid these into a bank account opened in his name for that purpose and, after the proceeds had been collected by his bank from the plaintiff banker, and credited to his account, drew a cheque on that account in favour of his mistress, the second defendant, who paid them into her own bank account with the third defendant. The plaintiff bank there upon brought an action against all three defendants for the declaration that the money paid by the second defendant into her account with the third defendants was the property of the plaintiff, and an order for payment to them. The third defendant paid the sum in question into the court and was dismissed from the action. The plaintiff succeeded against the remaining defendant, and the second defendant appealed. The Court of Appeal rejected the appeal on the grounds that the right to follow the money had and received was lost by the appellant's payments of money into the banking account, upholding the decision of the earlier court. Both Banks L.J and Atkin L.J were of the opinion that the money, having been paid into the third defendant and by them into the court, was clearly identifiable as money to which the plaintiff were entitled, and which

¹⁸¹ *Re Diplock* [1947] 1 Ch. 716 at p. 746.

¹⁸² [1921] 1 K.B 321.

they could thus recover at common law, in an action for money had and received.¹⁸³

2.10.3 The bank as an accessory in money laundering offences

If the bank does not adhere to tight regulatory standards and accepts a wrong mandate, for example tainted proceeds of crime, the bank could be liable for aiding and abetting money laundering. Similarly, if the bank does not adhere to the required standards in relation to its operations and knowingly accepts deposits accrued from the sale of criminal property, it will be liable for knowing receipt. As regards aiding and abetting, the law on accessories is set out in 'Accessories and Abettor Act 1861' thus: 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence...shall be liable to be tried, indicted and punished as a principal offender.'¹⁸⁴ Where two or more people agree to an act in prohibited circumstances, the law has long adopted a view that they should be liable for the direct and agreed consequences of that joint enterprise. The only problem would be when one of the parties exceeds what was agreed.¹⁸⁵ For the defendant to be liable in a joint enterprise offence, the defendant (the bank in this case), will have had requisite *mens rea* in relation to its own conduct, notably an intention to encourage the commission of money laundering. This could take the form of *mens rea* in respect to the principal offence and its consequences or it could

¹⁸³ Alastair Hudson, *Principles of Equity and Trusts*, (Cavendish Publishing Limited, 2004), 433-465.

¹⁸⁴ The liability of secondary offenders governed by 'section 8 of Accessories and Abettors Act 1861'.

¹⁸⁵ *R v. Powell and Another; R v English* [1977] 4 All ER 545 (HL).

involve *mens rea* in relation to mental state of the principal offender.¹⁸⁶ Similarly, the foregoing situation could also elicit issues of conspiracy to commit money laundering under Conspiracy Act 1977. Section 1(2) of the Act requires that in order for the defendant (bank) to be liable for an offence of conspiracy, the defendant must intend or know that the prohibited circumstances will exist when the offence is committed. Since conspiracy is a crime of specific intent, the prosecution will have to prove that the bank has committed the conduct and the consequence element of the substantive money laundering offences.¹⁸⁷ In the case of *Gray v. Johnson*¹⁸⁸, it was clearly established that unless the bank has misapplied the funds, amounting to a breach of trust or where the bankers are privy to the intent to make the misapplication of the trust funds.¹⁸⁹ Equally, banks are not under any fiduciary obligation as trustees to its customers or third party, but in circumstances where there has been *mal fides* for example in situations where the bank is sufficiently aware of money laundering, the bank may be liable to the victim of this conduct as 'a constructive trustee.'¹⁹⁰ The bank will not be made a constructive trustee simply because it acts as the agent of the trustee in transactions within their legal powers, unless they have assisted with the knowledge and fraudulent design on the part of trustees.¹⁹¹ As such, for the prosecution to succeed, it will have to clearly articulate a causal relationship

¹⁸⁶ C.M.V. Clarkson and H.M. Keating, *Criminal Law, text and materials*, London Sweet & Maxwell (1998), pp. 546-547.

¹⁸⁷ In the Canadian case of *Claiborne Industries Ltd v. National Bank of Canada* 302 (1989) 59 D.L.R., the release of lenders security to the plaintiff, which was subsequently taken by the defendant through his private company was found to constitute conspiracy to defraud the bank.

¹⁸⁸ [1968] LR 3 HL 1.

¹⁸⁹ *Tassell v. Cooper* (1850) 9 CB 509.

¹⁹⁰ Ross Cranston, *Banks' Liability and Risks*, (Lloyd's of London Press Ltd. 1995), 64-65.

¹⁹¹ Cranston, (n 190).

between the defendant's intention (in this case the bank), and the commission of the substantive offences, which is the basis of conspiracy.¹⁹²

If the bank converts negotiable instruments, an oft-used method in the layering stage of money laundering process, it could be liable for the tort of conversion. Equally where the bank has knowingly received funds which have been misappropriated in breach of trust or fiduciary duty, it will be liable for 'knowing receipt.' knowing receipt is a form of secondary liability where the wrong doer is primarily liable for the act or omission committed.¹⁹³ This is a form of personal liability rather than proprietary liability, manifested in a situation where the bank receives the funds properly and then applies them for its own benefit.¹⁹⁴ One of the prerequisite for knowing receipt is where the money has been disposed of in breach of trust; and where the bank has applied the money for its own benefit.¹⁹⁵ The prosecution will have to prove that the bank had knowledge that it was misapplying the money in breach of trust. The liability of the bank is through its officers and agents, who have requisite knowledge of the money or its proceeds.¹⁹⁶ Knowledge is delineated as 'actual knowledge' or 'constructive knowledge.' The bank is deemed to have knowledge, where it wilfully shuts its eyes to the obvious, wilfully or recklessly fails to make such inquiries as an honest and reasonable bank would make; knowledge of circumstances which would indicate the facts to an honest and reasonable bank; knowledge of circumstances which would put an

¹⁹² (2008), 72 *Journal of Criminal Law*, 245-250.

¹⁹³ Ross Cranston, *Principals of Banking Law*, (Oxford University Press 2003), 192.

¹⁹⁴ Cranston, (n 193).

¹⁹⁵ *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265

¹⁹⁶ M. Bryan, 'When Does a Bank Receive Money?' (1995), 3 *Journal of Business Law*, 165.

honest and reasonable bank on inquiry.¹⁹⁷ Constructive knowledge is to be inferred from objective factual circumstances, if the defendant is not able to explain or to provide evidence exonerating him of the alleged money laundering offence.¹⁹⁸

It is possible that the bank could also be liable for knowing assistance offence, if it acts to facilitate fraud on the trustees either by receipt of information in breach of confidence or where it induces breach of trust or fiduciary.¹⁹⁹ In *Barnes v. Addy*²⁰⁰, for the bank to be liable for this form of liability, there has to be 'a dishonest and fraudulent design' on the part of the trustees. Secondly, there has got to be an element of fault, although knowledge has been said to suffice.²⁰¹ The dishonest test adopted in relation to the above is the Cunningham subjective test rather than an objective bystander test otherwise known as Caldwell test recklessness.²⁰² As such questions like, would an honest and reasonable bank acted differently at the time have got to be asked.

2.10.4 The Banks mandate in Customer Identification Requirement

¹⁹⁷ *Baden Devaux and Lecuit v. Societe Generale pour Favoriser le developement du commerce et de l'Industrie en France SA* [1992] All ER 161, 235.

¹⁹⁸ Section 3(1) (b) in the definition of money laundering offences according Vienna Convention (1988).

¹⁹⁹ P. Finn, 'The liability of third parties in knowing receipt or Assistance', in Ross Cranston (2003), (n 193).

²⁰⁰ (1874) LR 9 Ch. App. 244.

²⁰¹ *Agip (Africa) Ltd. V Jackson*, (n 195).

²⁰² *R v Gosh* [1982] QB 1053.

Banks are required by law to exercise customer due diligence and to ensure other regulatory standards are implemented.²⁰³ In some jurisdictions such as the US, non-compliance with regulatory rules has been exacted with the imposition of severe penalties on the person requested (including financial institutions as juristic persons), giving priority for US to enforce its domestic laws on other jurisdictions.²⁰⁴ Section 319 of the PATRIOT Act exports the forfeiture of criminal assets to financial institutions otherwise beyond American control, with the intended effect of coercing such financial institutions into implementing acceptable AML programmes and placing institutions against their customers.²⁰⁵ Section 319 of the foregoing Act presents foreign banks with two stark choices: either they have to comply with the American investigations and police their customers to ensure that no assets subject to forfeiture are ever deposited with them, accept the possibility of disruption and loss of termination and forfeiture of correspondent accounts or cease to do business directly with domestic financial institutions.²⁰⁶ The FATF replicates the same enforcement regimes, asking banks to ensure that they are vigilante in their dealings with customers.²⁰⁷

Financial institutions²⁰⁸ are required to satisfy themselves as to the identity of 'their customers', whether they are dealing with occasional or usual

²⁰³ Recommendations 5 and 6 of the FATF (2001), available on fatf website at <http://www.fatf.org> (ldate accessed 20th November 2010).

²⁰⁴ Ethan Preston, "The Analysis of the USA PATRIOT Act: New Adventures in American Extraterritoriality", (2004), 10(4) *Journal of Financial Crimes*, 105.

²⁰⁵ Preston, (n 204).

²⁰⁶ Preston, (n 204).

²⁰⁷ The reporting requirements for financial institutions are set out in recommendations 14 to 21 of the FATF (1996) as revised in 2003.

²⁰⁸ These are persons or entities whose activities include: lending; financial leasing; transfer of money or value; trading in foreign exchange, derivatives, securities, commodities, futures and the like; life insurance and other investment related insurance.

customers. Identification must be established by official or any other equivalent satisfactory documents.²⁰⁹ This requirement aims to ensure that the financial system is not used as a channel for criminal funds. As such, banks are asked to undertake reasonable measures and determine the true identity of all customers requesting the institutions services. According to this requirement banks are no longer allowed to hold anonymous accounts. In this case, the bank needs to satisfy itself as to the independence and reliability of information relating to third persons. Particular care is taken in identifying the ownership of all accounts and those using safe custody facilities.

While the adoption of customer due diligence measures is necessary to ensure that the banking system is not exploited for criminal purposes, this chapter postulates that banks which adopt sophisticated AML procedures in place should always be compensated (in form of tax rebates) for onerously acting as a policeman on behalf of regulatory authorities. This would also encourage all financial institutions to apply the same regulatory standards and counter the challenge of regulatory arbitrage—where rules are applied differently or arbitrary.

2.11 Money laundering predicate offences

The Council of Europe Anti-Money Laundering Convention in 1990 defined predicate offences broadly to include “any criminal offence as a result of

²⁰⁹ Before opening customer’s accounts, the financial institutions should undertake customer due diligence to ensure that no anonymous or fictitious accounts are opened. Documents like passports, photo card driving licence and at least two recent utility bills should be obtained for purposes of ascertaining the identity of natural persons.

which proceeds were generated that may become the subject of money laundering”.²¹⁰ While the FATF approach leaves choice to national legislatures to include or exclude corruption as a predicate offence for money laundering, the approach of the Council of Europe does not seem to give such a choice.²¹¹ In the UK law, predicate offences are defined by section 93A of the Criminal Justice Act (1993), which extends money laundering offences to include “any criminal conduct which constitutes an offence triable on indictment in the crown court”.²¹² The Strasbourg Convention and the FATF, however provide for optional extension of criminalisation to further categories of predicate offences.²¹³ The scope of money laundering predicate offences is clearly elaborated in the glossary to FATF 40 recommendations to encompass the following. It includes participation in organised criminal groups and racketeering; terrorism, (including financing of terrorism); trafficking in human beings and illegal migrant smuggling; sexual exploitation (including sexual exploitation of children); illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; currency counterfeiting; counterfeiting and piracy of products; environmental crimes; murder or grievous bodily injury, kidnappings, illegal and hostage taking; robbery or theft; smuggling; extortion; forgery; piracy; and insider trading and market manipulation.²¹⁴

²¹⁰ Article 1(e) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime (Nov. 11, 1990) available at conventions.coe.int/treaty/en/treaties/html/141.htm. (accessed 25 April 2007).

²¹¹ Robert Stokes & Anu Arora, ‘The duty to report suspicious transactions under the Money Laundering Legislation in the United Kingdom (2004), 5 *Journal of Banking Law*, 332-356.

²¹² Stokes & Arora, (n 211).

²¹³ EC Directive 91/308/EEC.

²¹⁴ EC directive (n 213)..

Countries are given the discretion to exclude crimes committed abroad or to eliminate those crimes they do not deem truly relevant from the definition of domestic predicate crimes such as corruption.²¹⁵ Corruption as an economic crime generates illicit proceeds and qualifies as money laundering predicate crime. The term “predicate crime” covers a wide range of activities which generate illicit proceeds of a crime. Corruption is defined as ‘the abuse of public office, either to commit some act in breach of a duty or to demand some kind of favour in return for doing something which one is bound to do anyway, that is, for a private gain’.²¹⁶ Corruption often concerns the behaviour of public officials, whether politicians or civil servants, in which they improperly or unlawfully enrich themselves or those who are associated with them.²¹⁷ The World Bank defines corruption as “the abuse of public office for a private gain.”²¹⁸ This definition is fairly straight forward to capture a wide range of crime activities that fall within this working framework. Thus, corruption can be viewed as a specific type of violation against moral norms and values of the society for selfish personal reasons. Corruption is a domestic offence when committed within the boundaries of a single country, for example an official of the government offering a bribe to secure a business contract in a company registered in a country. Transnational corruption on the other hand transcends national boundaries and occurs within many jurisdictions. Transnational corruption is illustrated by a hypothetical example, where for instance, an

²¹⁵ Marco Arnone “International Anti-Money Laundering Programmes: Empirical Assessment and Issues in criminal regulation”, (2010), 13(3) *Journal of Money Laundering Control*, p. 226.

²¹⁶ Richard Alexander, “Corruption as a financial crime”, 9(1) *Company Lawyer*, (2009) 1.

²¹⁷ Cyrille Fijnaut and Leo Hubert (2002), *Corruption, Integrity and Law Enforcement*, (Kluwer Law International), The Hague, p.3.

²¹⁸ Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures* 8, International Monetary Fund Working Paper, WP/98/63. 1998. See also Heba Shams, “Using Money Laundering Control to Fight Corruption: An extraterritorial Instrument”, available on the University of Queen Mary website at <http://qmul.ac.uk> (date accessed June 2005).

American company offers bribes to a government official, say in Uganda, in order to secure its interests in a government contract. However, the bribe can also be given by a government official to gain a contract in a foreign country. In both of these cases, the act of the perpetrator amounts to corruption. In view of this analysis, the World Bank definition of corruption is limited in scope as it does not capture corruption committed in the private sector such as bribery in private businesses. Another example of private sector corruption can be manifested by corporate fraud where a director of a company defrauds it of millions of dollars.²¹⁹ Private sector corruption would seem more prevalent in developed economies while public sector corruption is rampant in developing economies.²²⁰

2.11.1 Corruption as a ML predicate offence

In many developing countries, money laundering schemes are inextricably linked to corruption, being both a cause and predicate offence. Money received in corruption constitutes illicit proceeds of crime which makes it satisfy the definition of predicate offences. The laundered assets either constitute the proceeds of corruption or the process of laundering illicit proceeds is facilitated by corrupting law enforcement officials to place illicit proceeds into the system.²²¹ The use of corruption to facilitate money laundering related threats such as drug trafficking, prostitution, small arms

²¹⁹ Here so many cases abound, not least that of Bernard Murdoch who allegedly is said to have defrauded the company which he was a director of \$65 billion, siphoning it to foreign jurisdictions.

²²⁰ It is true that developed economies are dominating global businesses and as such companies tend to employ corruption as a mechanism of winning contracts from business rivals. See Vito Tanzi, (n 159).

²²¹ Charles Goredema, 'Money Laundering in Southern Africa: Incidence, Magnitude and Prospects for its Control', Institute of Security Studies, Paper 92, October 2004, p.4.

trafficking, illegal currency trafficking has destroyed the myth that corruption is a domestic political issue amenable within individual states.²²² Therefore the design of anti-corruption policy measures should encompass effective implementation strategy of customer due diligence such as “KYC” and proper enforcement of anti-corruption laws.²²³

It needs to be noted that “the money” accrued from corruption constitutes criminal property under AML legislation in many jurisdictions.²²⁴ Criminal property is defined as “property of any kind that one knows or suspects to be derived from criminal conduct.”²²⁵ Criminal conduct includes not only offences committed in United Kingdom, but also any act which, although it was committed abroad, would have constituted an offence had it been committed in United Kingdom.²²⁶ Therefore the remit of the foregoing definition covers a British resident who embezzles government money in their own countries before coming to United Kingdom. For example, somebody who occupies a position of power in which he/she is expected to work in the interest of the state and then embezzles government funds, or abuses his position in any other way such as taking a bribe will have committed a criminal offence.²²⁷ Another example could be highlighted by a situation where a government official accepts a gift from a representative of or the agent of a company so that he/she could influence a bid for a contract.²²⁸

²²² The centrality of corruption issue to facilitating cross border threats is expressed in the preamble of the United Nations Conventions against Corruption. 9th December, 2003.

²²³ This proposition is in line with Article (2005), 52 (5) and 6 of United Nations Convention Against Corruption (UNCAC).

²²⁴ In United Kingdom, this is defined by section 340(2) of POCA 2002.

²²⁵ See Recommendation 1, of the Financial Action Task Force (FATF).

²²⁶ See, s 340(2) (b) of the Proceeds of Crime Act (2002).

²²⁷ Alexander, (n 216).

²²⁸ This is type of behaviour constitutes criminal conduct in its wide manifestations.

The causes of corruption are many and vary from society to society where it has been committed. In Uganda, corruption and money laundering are manifested by tax evasion; the swindling of public funds and siphoning it to foreign jurisdictions.²²⁹ In some countries corruption has eroded the fabric of society and it has proved stubborn to overcome.²³⁰ Corruption has remained intractable despite countries having taken positive measures such as campaigning vigorously against it; and introducing rigorous laws against it.²³¹ Kickbacks, commissions, or representation fees are sought in return for rigging bids; that is, manipulating laws adopted to govern the privatisation process. Apart from weakening support for liberalisation of markets and desired market reforms, corruption creates laxity in creating laws and reform programmes.²³² Lax financial regulation has attracted money launderers because to a large extent in such an environment, the authorities do not fully co-operate in international efforts aimed at suppressing the threat of money laundering.²³³

There is a close connection between corruption²³⁴ and money laundering in many jurisdictions. Where the money launderer cannot achieve their aims

²²⁹ Apparently corruption has become endemic and a multifaceted issue in many Countries. Funds given in Aid from Western Governments to some LDCs is often siphoned out back to Western banks courtesy of corrupt public officials.

²³¹ The Leadership Code (2002): Leaders in public offices are supposed to account for their wealth prior to taking offices. The code was enacted pursuant to article 3 of UNCAC where member states were mandated to take necessary measures to fight corruption, including imposing punitive against those who perpetuate corruption in government.

²³² Susan Rose George Ackerman, *Corruption and Governments*, (Cambridge University Press, 1998), P. 27.

²³³ Ackerman, (n 232).

²³⁴ Susan Rose George Ackerman, *Corruption and Government: Causes, Consequences and Reform*, (Cambridge University Press, 1999), p. 7

through the use or threat of the use of violence, they will employ corruption as a strategy to infiltrating the system. There are many forms of corruption such as bureaucratic corruption where officials take bribes or political corruption, which includes politicians²³⁵ taking bribes to award contracts, influencing elections or providing patronage. Grand corruption involves misuse of power by heads of state, ministers and top officials for private pecuniary profit, and even noble cause corruption where the instruments of government such as intelligence services are used to provide finance and other support for criminal activity, such as assisting terrorism, providing secret arms supplies beyond the scrutiny of political process and laundering secret funds.²³⁶

2.12 The role of the World Bank in fighting Corruption

The World Bank and IMF have (through the imposition of SAPs) cultivated an environment of good governance in many borrowing member countries.²³⁷

Good governance includes promotion of transparency and accountability in member countries to ensure that borrowed funds are properly utilised.²³⁸

Although the World Bank has a limited mandate²³⁹ to enforce its will within a member state, it nevertheless ensures that soft law obligations are

²³⁵ Classic cases cited on corruption include Mobutu Sese Seko in the DRC, Kamuzu Banda in Malawi, Sani Abacha in Nigeria, Ferdinand Marcos of Philippines and Daniel Arap Moi in Kenya. For the detailed account of Corruption in Africa, see Transparent International Report (September 2009): available on its website at <http://www.ti.org> (date accessed on 15th November 2009).

²³⁶ Barry Rider, *Corruption: the Enemy Within*, (Kluwer Law International, 1997), 8-34.

²³⁷ The IMF acts as an open forum for the discussion of corruption where corruption issues are not actively addressed by the borrower country. It can therefore make financial support conditional on reform when necessary to meet the IMF programme objectives.

²³⁸ IMF Adopts Guidelines regarding Governance Issues, 4th August, 1997, available at www.imf.org/external/np/sec/nb1997/NB9715.HTM (date accessed 15 April 2007).

²³⁹ International Bank for Reconstruction and Development, Articles of Agreement article 111 5 (b)-(c). See also Ibrahim F.I. Shihata, 'Corruption—A General View with an Emphasis on the Role of the World Bank', (1995), 15 *DICK. J. INT'L*, 451-475.

applied²⁴⁰ to stem the problem of corruption. To demonstrate its commitment to fighting money laundering, in 1997 the IMF went as far as warning member countries that funding could be withdrawn unless they adopted measures against corruption. IMF issued policy guidelines highlighting the dangers of corruption such as diversion of public funds through misappropriation, tax evasion, fraud, money laundering, the misuse of foreign exchange reserves, abuse of power by bank supervisors' as well poor practices in regulating foreign direct investment.²⁴¹

However, there is a need for the World Bank to spearhead the fight against corruption by tightening conditions for lending to governments where corruption is rampant. It needs to learn a lesson from its past failures. For example, even though Mobutu Seseko—the president of Zaire (1965-1994) had been known by the World Bank to be stealing up to 50 percent of the money in development assistance, the World Bank did not stop lending to Mobutu's corrupt government until 1993.²⁴² The Articles of Agreement—the mandate for the World Bank's operations in member countries, requires it to ensure that the proceeds of its loans are spent only on the designated purposes and that due attention is given to economy and efficiency.²⁴³

²⁴⁰ In July 1996, the Executive Director added a new section to their procurement guidelines on "Fraud and Corruption." This section allows the World Bank to cancel financing when corrupt practices are discovered and not satisfactorily remedied by the borrower, declare ineligibility to bid in future contracts for a contract, consultant or supplier who engages in corrupt practices, require the inclusion of contract provisions that allow the world bank to inspect the accounts and records of contractors, suppliers and consultants and have them audited, require disclosure of any payments made to local agents, and conduct large scale audits of bank operations and a specific country by outside auditors.

²⁴¹ Margaret Beare, *A Critical Reflection on Organised Transnational Crime, MoneyLaundering and Corruption* (1998), 8-12..

²⁴² Norman Mugarura, *The Anti-Money Laundering Regulation Landscape in Less Developed Countries*, Ashgate Publishing Limited (2012) 138-140.

²⁴³ Mugarura, (n 242).

Corruption diverts the proceeds of the bank's loans from its designated purpose to private pockets. Corruption therefore undermines the development effort of the bank and reduces public interest in the reform process. The abuse of privatisation process has made the World Bank's work to be perceived in bad light in some countries. Suffice it to say, the World Bank and IMF are not mandated to deal with matters involving corruption as it was deemed to be an internal matter in the individual state's jurisdictions.²⁴⁴ But again it needs to be noted that corruption undermines the stability of domestic economies, which brings it within the World Bank and IMF's mandate.²⁴⁵ Bribes represent illegal use of fees, taxes, access charges paid to public agents. These payments represent economic decisions bringing it within the purview of the World Bank and IMF to address.²⁴⁶ If the level of corruption in a country²⁴⁷ is so high as to have an adverse impact on the effectiveness of the bank's assistance, and there is factual and objective analysis that the government is doing very little about it, the bank will often take that as a factor in its lending strategy towards that country.²⁴⁸ Given that corruption has always been viewed as a political matter, it was deemed to be an internal matter for which the bank did not have the mandate to deal with. Until 1990s, the bank's work in relation to corruption was literally curtailed but post 1990s; corruption was brought within the requirement of good governance to be

²⁴⁴ Due to the fact that the Bank does not have any mandate on corruption, the official of the bank who witnesses corruption is not allowed to inform the government or to talk to the press directly about it. If he does, he or she will risk being deported out of the country for political meddling.

²⁴⁵ Ibrahim F.I. Shihata, (n 239).

²⁴⁶ Susan George Ackerman, *Corruption and government: Causes, consequences and reform*, (Cambridge University Press, 1999), 20.

²⁴⁷ On a number of occasions, the Bank suspended funding on the development projects upon discovering evidence of corruption.

²⁴⁸ Shihata, (n 239).

addressed by a country as a condition for lending.²⁴⁹ The Articles of Agreement was the major obstacle which made corruption an internal matter outside the jurisdiction of the World Bank. But while corruption was deemed as an internal matter its prevalence is a sign of bad governance. In 1992, the World Bank issued a report on good governance highlighting that good governance was central to creating an environment for a strong, equitable development and good economic policies.²⁵⁰ This marked a change in attitude towards corruption and henceforth the bank would incorporate measures against corruption as a governance challenge to be addressed by countries seeking development assistance.²⁵¹

To ensure leadership by example on corruption, the World Bank enacted internal staff rules, requiring annual financial disclosure of all assets and financial transactions by senior staff, disclosure of adverse family interests that affect the World Bank's dealings, and provides guidelines how its employees are expected to behave in their dealings inside and outside of the World Bank.²⁵² The IMF provides countries with advice and technical assistance for promoting good governance in areas within the IMF mandate and expertise (mostly legal and institutional reforms), collaborating with other institutions particularly the World Bank, to co-ordinate their complementary areas of expertise.²⁵³ It does this by assisting member countries economic policies through building and strengthening policy institutions and improving

²⁴⁹ Ackerman, (n 246).

²⁵⁰ Shihata, (n 239).

²⁵¹ The fight on corruption was given more momentum with the appointment of James, D. Wolfensohn as the new President of World Bank in 1995.

²⁵² Shihata, (n 239).

²⁵³ Shihata, (n 239).

accountability of the public sector.²⁵⁴ Besides, the internal anti-corruption measures adopted by the World Bank and IMF; they have also required borrowing countries to implement requisite reforms especially in the public sector. This was deemed to be essential and to demonstrate their seriousness in fighting corruption across borrowing countries. In 1997, the international donor community cut funding to the government of Kenya, pending the implementation of requisite reforms. Aid was suspended to Kenya because there was rampant corruption and lack of progress on many aspects of law—as a harmonising instrument. Kenya was required to harmonise its laws in areas of de-monopolisation, deregulation, accountability, privatisation, prosecution and governance, protection of human rights and clarification of rules according WTO benchmarks.²⁵⁵

2.13 Conclusion

The current global AML framework is a patch work of complimentary measures of states and market oriented initiatives such as the Basle Committee supervisory guidelines, FATF forty plus nine recommendations and other institutions. This chapter has also provided insights into the complicated dynamics—processes, schemes and techniques money laundering offences and its predicate offences are manifested. The global AML/CFT framework provides a strong caution on money laundering and its

²⁵⁴IMF News Brief No. 97/15, The Role of the IMF in Governance Issues on <http://www.imf.org/external/np/sec/nb/1997/NB9715.HTM> (accessed in August 2008).

²⁵⁵ J.T.Gathi, 'Corruption and Donor Reforms: Expanding the promise and Possibilities of the Role of law in anti-corruption strategy in Kenya', *14 Comm. J. International Law*, (2000) 407-408.

predicate crimes. The role of the, the UN, the World Bank and IMF, FATF and regional initiatives such as the EU remain cornerstones of the global efforts to forestall money laundering and corruption globally.

CHAPTER THREE: THE ANALYSIS OF THE BACKGROUND LITERATURE

3.1 Introduction

To ensure this study was not duplicating other studies, a scoping review of the literature was undertaken. The purpose of conducting this literature review was to establish the discrepancies in the theory and practice of states in harnessing the global AML/CFT framework. The analysis span UN, AML/CFT treaties, the FATF forty plus nine recommendations and the Basle Committee regulatory standards were undertaken. In conclusion this chapter articulates the gaps and weaknesses that characterise the current global AML/CFT framework.

3.2 An overview of the global and other AML/CFT counter-measures

The regimes evolved under United Nations AML/CFT treaties are complimented by soft law instruments such as the FATF forty plus nine recommendations (2003). Soft law instruments are adopted as regulatory guidelines plug gaps in the law and foster cooperation of states on common interstate issues.²⁵⁶ Thus, the global AML framework is an amalgamation of collective interstate measures such as the UN AML treaty (1988) and soft law

²⁵⁶ This chapter substantially draws on one of my articles: Norman Mugarura, "The Institutional Framework against Money Laundering and Its Underlying Predicate Crimes", (2011), 19(2) *Journal of Financial Regulation and Compliance*, 174-194.

instruments.²⁵⁷ The United Nations Convention on Illicit Narcotic Drug Trafficking and Other Psychotropic Substances (1988) have created a wide range of AML regimes such as definition and characterization of money laundering offences; inter-state cooperation including mutual legal assistances and extradition arrangements; enforcement mechanisms, including stripping criminals of the profits realised from money laundering and other predicate crimes.²⁵⁸ In Article 3(1), state parties are mandated to enact legislation necessary to establish a modern code of criminal offences relating to illicit trafficking in all its different dimensions.²⁵⁹ The scope of criminalisation should cover a comprehensive list connected to drug trafficking-from production, cultivation and possession to the organisation, management and financing of trafficking operations.²⁶⁰ Article 3(1) also requires each party to the convention to establish money laundering as a criminal offence in its domestic law, when committed internationally.²⁶¹

In Article 3(1) (b) each state party is required to establish as a criminal offence “the conversion or transfer of property knowing that such a property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences, for purposes of concealing or disguising the illicit origin of the property or of

¹³¹ Other International Anti-Money Laundering initiatives include: the United Nations Convention on the Suppression of Financing of Terrorism (1999); International Organisation of Security Commission (IOSCO); The New Partnership for Africa’s Development (NEPAD) (1999) and many more in Asian countries and wide.

²⁵⁸ See, Articles 1-5 of this Convention.

²⁵⁹ W.C, Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures*, (Council of Europe publishing, 1999), 161.

²⁶⁰ D.P. Stewart, “Internalising the War on Drug: The UN Convention Against illicit Trafficking in Narcotic Drugs and Psychotropic Substances”, (1990), *18 Denv. J. International Law and Policy*, 387.

²⁶¹ This is further elaborated in Article 3(3) which says that “knowledge, intent or purpose required as an element of the offence may be inferred from objective factual circumstances.

assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his action. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.”

To foster a uniform global AML framework among contracting member states, Article 3(1) (c) requires that each state party render money laundering as a criminal offence. “The acquisition, possession or use of property, knowing at the time of the receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences.”²⁶² This Article clarifies the scope for criminalisation of money laundering as a serious offence and also ensuring that co-operation in respect of confiscation; mutual legal assistance and extradition would be forthcoming. The Convention has been hailed²⁶³ particularly in relation to extradition proceedings—a subject, which is addressed by articles 6 as thus: because all parties are obliged to establish Article 3(1) offences as criminal offences in the domestic law, any requirements of dual criminality, that is, the offence is criminal in both jurisdictions, in a party’s extradition should be met. At a practical level, an Article 3(1) provision signifies that states which have accepted to transpose the international legal instrument must similarly accept to fully comply with its

²⁶² Gilmore, (*n* 259).

²⁶³ The US delegates for example hailed the above anti-money laundering framework as being very robust.

treaty obligations and their attendant effects.²⁶⁴ Governments are obliged to comply with obligations created by the treaty because of the International law principle of *pacta sunt servanda*.²⁶⁵ This is a Latin maxim which means that interstate agreements must be respected and implemented. Governments comply with international treaty obligations because it is the right thing to do in order to uphold the ideals embodied in the treaty; but also to foster international co-operation. This notwithstanding, the implementation of treaties would still depend on the individual country's ability to harness it.

While there is a universal recognition that illicit drug trafficking offences should be extraditable offences, narcotics related money laundering is a new criminal offence for many states and has not been recognised as extraditable offence. The universal recognition of narcotics related money laundering as an extraditable offence is one of the most important provisions established by this Convention.²⁶⁶ The enforcement mechanisms under the convention are designed to impact on the financial aspect of drug trafficking such as confiscation of the profits derived from criminal activity. A number of states would subsequently enact legislation to implement their obligations under the treaty.²⁶⁷ The need for substantial international co-operation in this sphere was deemed a necessary mechanism to enhance co-operation of States in this area.²⁶⁸ Individual states are urged to enact domestic forfeiture legislation

²⁶⁴ D.W. Sproule and P. St-Denis, 'The UN Drug Trafficking Convention: An ambitious step', (*Canadian yearbook International Law*, 1989) 263-270.

²⁶⁵ See, Article 36 of the Vienna Convention on the Law of Treaties, 23 May 1969 (which entered into force on 27 January 1980).

²⁶⁶ Sproule and Denis, (n 264).

²⁶⁷ D.McClean, 'Seizing the Proceeds of Crime: the State of the Art', (1998), 38 *International Criminal Law Quarterly*, 334.

²⁶⁸ Article 5(1) of the treaty mandates state parties to take all necessary means to allow their appropriate authorities, to identify, trace, seize or freeze property, proceeds, instrumentalities

enabling the state in question “to identify, trace, seize, freeze or forfeit property or proceeds located in the requested states, where property was allegedly derived from or used in drug trafficking and drug money laundering in violation of laws of the requesting state.” In so doing, the Convention creates a framework to undermine the efforts of those who are moving money internationally within the financial system particularly to jurisdictions where there is customer confidentiality or bank secrecy laws in place as deterrence. The existing bank secrecy laws are being used in many instances to obstruct co-operation and the provision of information needed for the investigation of allegations of drug related offences.²⁶⁹ The Convention acknowledges the indispensability of domestic courts in fostering the fight against money laundering and its predicate crimes. Thus, Article 5(3) empowers each state party’s, courts or relevant authorities to order that a bank, financial or commercial records be made available before the local judge for examination. Similarly, no party shall decline to act under the provisions of this paragraph on the grounds of bank secrecy.²⁷⁰

Parties to the Convention are encouraged to enter into detailed bilateral and multilateral confiscation agreements in order “to enhance the effectiveness of international co-operation pursuant to the above Article.”²⁷¹ However in the absence of such an international instrument, Article 5(4) (f) stipulates that where a party/a treaty nexus with the requesting state in order to provide such

or any other object, or take preliminary steps towards the eventual confiscation of that property.

²⁶⁹ This is identified as one of the biggest problems to fighting crimes by the United Nations Conference on drug abuse in 1987.

²⁷⁰ McLean, (n 267).

²⁷¹ W.C.Gilmore, ‘International Action against Drug Trafficking: Trends in United Kingdom Law and Practice’, (1990) 24 *The International Lawyer*, 388-390.

assistance “that party shall consider the convention as the necessary and sufficient treaty basis.” Article 5(6) addresses the need to ensure that proceeds derived from and instrumentalities used in illegal trafficking couldn’t escape forfeiture simply because their form had been changed or they had been co-mingled with other property.²⁷² At the same time it was deemed necessary to provide that Article 5 shall not be construed as prejudicing the rights of bonafide third parties.²⁷³ The extradition procedures shall be expedited as much as possible by simplifying rules of evidentiality relating to the offence and other requisite extradition procedures.²⁷⁴

The UN AML Convention (1988) is imbued with a mechanism for extradition of alleged money laundering offenders to jurisdictions which have made formal request, and to have them arraigned before the respective jurisdiction’s courts of law. According to Article 6(5) extradition shall be subject to the laws of the requested state party. The extradition procedure, the standard of proof, and the defences to extradition are to be defined exclusively by the domestic law of the requested party. Article 6(5) must be read together with Article 3(1) and article 10 which amends bilateral extradition treaties to preclude the denial of extradition on the grounds of Article 3(1) offence: “fiscal, political or politically motivated offences”.²⁷⁵ If the party makes extradition conditional on the existence of a treaty and it receives a request for extradition from another with which it has no extradition treaty, it may consider this convention as the legal

²⁷² W.C. Gilmore, (n 271).

²⁷³ Articles 5(8); 7(2) of the UN Convention on Narcotic Drugs and Psychotropic Substances, (1988).

²⁷⁴ Article 6(7), of the UN Convention on Narcotic Drugs and Psychotropic Substances, (1988).

²⁷⁵ Gilmore, (n 271).

basis for extradition in respect of any offences to which this provision applies. On the other hand, parties which do not make extradition conditional on existence of a treaty shall recognise offences to which this Article applies as extraditable offences between themselves.²⁷⁶ The state from which the request has been lodged may refuse to comply if to do so substantially, leads its judicial or other competent authorities to facilitate the prosecution or punishment of any person on account of his race, religion, nationality, or political opinion or would cause prejudice for any of those reasons with any person whom the request applies.²⁷⁷ In some countries like Uganda where money laundering is not a distinct offence, it might be difficult to get the alleged money laundering offenders extradited to the requesting state.²⁷⁸ Technically, for a state to accept extradition request from another, both states must have transposed the treaty which makes money laundering as an extraditable offence.²⁷⁹ The foregoing UN anti-narcotic treaty provides the basis for extradition as set out in Article 6(1). States may choose to circumvent this provision by alluding to exceptions in the treaty such as race, sex nationality and alleged offences being an exclusive matter of domestic jurisdictions. However, unlike other international crimes such as crimes against humanity, money laundering does not have to be constituted as a prosecutable offence under the municipal laws of both countries (double criminality). Under the principle of double criminality, a state cannot extradite someone to another state for a particular offence, which does not satisfy the

²⁷⁶ Articles 6(4) and 6(5) regarding conditions for extradition of fugitive offenders under Article 3(1) offences of Vienna anti-Narcotic Convention (1988).

²⁷⁷ Article 6(6) of the UN Convention on 'Drug Trafficking and Other Psychotropic Substances' (1988).

²⁷⁸ In 2009, the Uganda Parliament passed an AML bill but three years on, it has not yet been operationalised into Law nationally.

²⁷⁹ Dominique Poncet & Paul Gully-Hart, Extradition: *The European Model*, in International Criminal Law (M. Cherrif Bassiouni 1987).

double criminality requirement, and then proceed to try the alleged offender for an offence that does not satisfy the foregoing requirement.²⁸⁰ The biggest challenge for the prosecution is that extradition might be unavailable or unavailing if the person the state seeks to extradite is not the person the law enforcement authorities are after—to satisfy the technicalities of a criminal trial.

The Convention also creates modalities for mutual legal assistance in relation to serious drug trafficking offences. For instances, Article 7(1) provides that “the parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecution and judicial proceedings in relation to criminal offences established in accordance with article 3 paragraph 1: The provision is an invitation to states to examine the possibility of doing so.”²⁸¹ The assistance, which may be requested in this mutual legal assistance treaty, includes: the taking of evidence or statements; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing relevant documents and records including bank, corporate or business records; and identifying, or tracing proceeds and instrumentalities of evidentiary purposes, providing information and evidentiary items.²⁸² Similarly in order to enhance the fight against money laundering, Article 7(5) imposes duties on states: “it is an obligation for state parties to enact an implementing legislation, if necessary, to modify domestic bank secrecy laws to permit

²⁸⁰ Poncet & Gully-Hart, (n 279).

²⁸¹ Article 7(2) of UN Convention on Illicit Drug Trafficking and Other Psychotropic Substances 1988.

²⁸² Article 7 (2), of Vienna Narcotic Convention (1988).

execution of the request for bank records under the convention.” Secondly, with respect to individual request for bank records to be produced as stipulated by the Convention, this provision obliges the requested party to grant the request, if the only basis would be bank secrecy laws.²⁸³ The state parties may afford one another any other form of mutual legal assistance allowed by the domestic law of the requested party. Article 7(4) stipulates that parties shall facilitate, encourage to the extent consistent with their domestic law and practice, the presence of availability of a person in custody, who consents to assist in the investigations or participate in the proceedings. It is therefore imperative for states to criminalise participation in organised criminal groups within AML framework that takes into account the worldwide context in which criminals operate.

3.3 United Nation’s Convention on Organised Transnational Crimes (Palermo)

In order to strengthen the earlier efforts of states against organised transnational crimes, the United Nations General Assembly adopted, ‘a Convention on Transnational Organised Crimes (UNCOTOC) ²⁸⁴(otherwise known as Palermo Convention) of December 2000.²⁸⁵This Convention

²⁸³ ‘United Nations Convention Against illicit Traffic in Narcotic Drugs and Psychotropic Substances’ 10 1st Session, Senate, Executive Report 101-105 (2006) p. 185.

²⁸⁴ This Convention came into force on 29th of September 2003, having been signed by 147 countries and ratified by 82 countries. For details on the adoption of Palermo Convention, see, http://www.undoc.org.undoc/crime_cicp_signatures_convention.html, (date accessed 12 September 2007).The above Convention was adopted pursuant to an inter-governmental ad hoc Committee, whose mandate was to discuss the elaboration, as appropriate as possible an international instrument addressing trafficking in women and children, combating the illicit manufacturing and Trafficking in firearm, their parts and components and ammunition, illegal trafficking in and transporting of migrants including by sea.

²⁸⁵ See, The United Nations Convention for the prevention of Transnational Organised Crimes, available at: [http:// www.uncjin.org/Documents/Conventions/...2/convention_eng.pdf](http://www.uncjin.org/Documents/Conventions/...2/convention_eng.pdf) (accessed 20 December 2011).

underscores a range of provisions designed specifically to reinforce the fight against transnational organised crimes; and committing countries that ratify it to implement its provisions into their municipal laws.

Palermo convention obligates each state subject to a treaty to implement and criminalise money laundering, including all serious predicate crimes of money laundering, whether committed in or outside of the country, and permit the required criminal knowledge or intent to be inferred from objective facts;²⁸⁶ In Article 2(1) an offence is transnational in nature if: “it is committed in more than one state; it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; it is committed in one State but involves an organised criminal group that engages in criminal activities in more than one state; and lastly, it is committed in one state but causes substantial effects in another state.”

Contracting states are required to enact AML mechanisms, including customer identification, record keeping and reporting of suspicious transactions;²⁸⁷ States are also required to authorise the co-operation and exchange of information among administrative, regulatory, law enforcement and other authorities, both nationally and internationally, and consider the establishment of financial intelligence unit to collect, analyse, and disseminate information;²⁸⁸ and the convention also creates provisions to enhance

²⁸⁶ See, in particular Articles 5, 6, and 7 of the United Convention against Transnational organized Crimes (Palermo): (n 185).

²⁸⁷ Article 7, (n 285).

²⁸⁸ Article 7(1) (b), (n 285).

international co-operation.²⁸⁹ Palermo Convention creates modalities on matters such as extradition, mutual legal assistance on civil and criminal matters, transfer of proceedings and conducting joint investigations. State parties are required to provide necessary technical assistance to developing countries so that they are able to take measures to deal with transnational organised crimes.²⁹⁰ Palermo Convention subsumes and extends the AML framework under its predecessor. State parties are obliged to undertake measures transposing their international obligations.

While sovereign states have the right to self-determination and the attendant discretion to determine their political and economic destiny, they also owe certain obligations and responsibilities to act in a normative way towards other states. The example which underscores the interplay of rights and obligations of a state is the skirmishes of Seychelles and the FATF in (2001). The government of Seychelles enacted an investment law—‘Economic Development Act (hereinafter EDA) in 2001. This law granted immunity to anyone, who would invest into the country \$10 million or more in investment schemes from prosecution; and protected their assets from compulsory acquisition or sequestration.²⁹¹ The law in question offered immunity to anybody regardless of whether the source of money was either money laundering or drug trafficking. The exception to stay the proposed immunity under EDA was only when the source of money was through violence or drug

²⁸⁹ Article 7(3) and (4) (n 285).

²⁹⁰ Article 16-30 of Palermo Convention (n 285).

²⁹¹ FATF on Money Laundering condemns New Investment law in the Seychelles, O.E.C.D press release December 12, 1996, available on the OECD website at www.oecd.org/fatf/page131.htm (date accessed 10 July 2007)

trafficking committed in Seychelles itself.²⁹² Seychelles was admonished and asked to withdraw EDA, which was effectively designed to facilitate violence, drug trafficking and money laundering. The ensuing international pressure forced the government of Seychelles to enact another legislation effectively rescinding 'the EDA'.²⁹³ Much as states have the sovereign right to pass laws as they see fit, laws capable of undermining international peace and security cannot be tolerated under customary international law. It is therefore important to examine the role of treaties and customs in fostering an effective global AML/CFT ethos across states. Customary international law (as demonstrated in condemnation of EDA in Seychelles), provides mechanisms to condemn behaviors that do not reflect the consensus of nations.²⁹⁴ The FATF admonition of Seychelles attracted a lot of media attention, prompting some governments to issue statements of their own condemning the same law. The ensuing international pressure forced the government of Seychelles to enact another legislation effectively rescinding EDA.²⁹⁵

3.4 The legal status of treaties and CIL

Treaties as legal instruments are essential to foster interstate co-operation on a range of overlapping issues across individual states. It needs to be remembered that in dualist states, ratified treaties cannot generate the desired effect, unless they have been transposed through national

²⁹² George Graham quoted in Kern Alexander, "Seychelles condemned over Money laundering Charter", Financial Times, February 2, 1996.

²⁹³ FATF, (n 291).

²⁹⁴ FATF on Money Laundering condemns New Investment law in the Seychelles, O.E.C.D press release December 12, 1996, available on the OECD website at www.oecd.org/fatf/page131.htm (date accessed 10 July 2007)

²⁹⁵ FATF, (n 294).

parliament.²⁹⁶ By ratifying the convention, the state signifies that it is contemplating its adoption and can only generate a binding effect once it has been transposed nationally. The foregoing analysis implies that international law is only applicable subject to individual state's consent. As a result, the state is the law maker and the enforcer, which potentially means that there is conflict of interest. Also, international treaties cannot be binding on states they have been ratified. The only exception are norms of customary law (*jus cogens*) from which no state can derogate. Once a custom has been validly established on things such as money laundering crimes, it will have a normative force in all states regardless of treaty obligations.²⁹⁷

While ratified treaties signify consensus of states to implement the respective provisions of the treaty nationally, they cannot provide an effective framework for interstate cooperation on overlapping challenges. First of all, there is an issue of domestic politics dynamics which dictates the ease of implementing treaties as legal instruments. On many occasions, states tend to circumvent obligations created under ratified treaties by narrowing the scope of their application nationally. This is so because even though states may have ratified treaties, they have the discretion to determine the level of their applicability nationally. For instance, EU treaties are transposed into domestic

²⁹⁶ In these states ratified treaties are binding after they have been transposed through national Parliament while in monist States ratified treaties become part and parcel of national law after they have been ratified without recourse to further measures through national Parliaments.

²⁹⁷ Sanctions can be imposed on the state in breach of international law pursuant to Chapter 7 of United Nations 1945. Chapter 7 mandates that "Action may be taken to stem threats to peace, breaches of peace and acts of aggression."

law subject to the principle of subsidiarity.²⁹⁸ Subsidiarity means that treaties can only be effective if they have been ratified by a member states on specific aspects they have been internalised; and binding as to the result to be achieved.²⁹⁹ This presupposes that much as EU member states ceded their sovereign powers to foster the interests of an integrated European Union; some long outstanding legal traditions in a member state would be maintained. This model is based on the principle of home country control and minimum harmonisation—a recognition that it would not be possible to ignore certain definitive legal traditions and cultures of member states. Therefore individual member states are given the discretion to determine the mode of implementing their EU treaty obligations. They are three ways of internalising EU law into contracting member states: directives, regulations and decision of the European Court of Justice (ECJ). Regulations have a normative force given that they are directly applicable in all Member state without recourse to further measures irrespective of national interests. Directives on the other hand are transposed in a member state in a stipulated timescale usually taking into account national considerations.³⁰⁰ Directives are legislative measures binding member states as to the result to be achieved. They determine certain targets usually relating to certain economic and regulatory matters.³⁰¹ As regards the character of the decisions of ECJ, they are binding

²⁹⁸ Subsidiarity is a fundamental concept designed to achieve an appropriate balance between the institutions of Europe and the interests of member states. Where the community has exclusive competence in a legislative area, the principle of subsidiarity has no application; and (ii) where the community gives concurrent powers to member to act in certain respects, it will act so long as the community has not exercised that power anywhere. It has to be said that where there is conflict, EEC law has primacy over national law.

²⁹⁹ See, Article 249/EEC of the Treaty of Rome (1957), (as amended).

³⁰⁰ Norman Mugarura, "The subdued giant: the predicament of the law in harnessing global markets", (2009), 17(2) *African Journal of Comparative International Law*, 302-352

³⁰¹ P. Craig and G. DeBurca, *EU Law: Text, Cases, Materials*, (Oxford University Press, 3rd edition 2002), 127. Also pursuant to article 226 EC, the Commission has to deliver a

on the state parties they have been issued to. The decisions of ECJ have a both vertical (state v state) and horizontal (state v citizens) application.

3.5 CIL as a source of AML/CFT obligations

As a source of international obligations, customary international law is the product of state practice and *opinio juris*, as opposed to legislation, which is the product of ideas. Customary law is the presentation of its conditions of social ordering in form of law whereby societies set the terms of the future coexistence of the society members in their legal relations.³⁰² The space of consent in making customary international law is subtle, not made by any specific act of will (such as a treaty) on the part of the subject. Their consent or *opinio juris* is manifested in their participation in day to day struggle of social ordering, knowing that some aspect of that social ordering may come to be universalised as law.³⁰³ Customary law is based on both practice and *opinio juris*—which literally translates as the opinion of lawyers. The two tests on which customary international law is predicated demonstrate that there is regularity in the way in which states behave and that there is consensus among lawyers that such behaviour is itself lawful.³⁰⁴ It might be worth asking the following rhetoric questions.

reasoned opinion to a member state which it considers to have failed to implement a Directive.

³⁰² Philip Alliot, 'The Concept of International Law' (1999), 3 *European Journal of Economic Law*, 10

³⁰³ Alliot, (n 302).

³⁰⁴ Alliot, (n 302).

What if a state decides to engage in money laundering activities or in other subversive acts such as sponsoring of terrorism because it is a sovereign state, can the international community simply look away in the face of those blatant violations of international law? Prior to September 2001 terrorist attacks on USA, Afghanistan had decided to provide sanctuary and training facilities—camps, funds and military supplies to Osama Bin Laden and his cadres; and to use it as a base for planning and launching terrorist acts whenever they chose. One can only presume that Afghanistan must have decided to act in the way it did, in the knowledge that it was a sovereign state having the right to self-determination on matters of internal polity. Technically, the right to self determination allows a state to take independent decisions without seeking approval from another State. However, the question the foregoing analysis juxtaposes is whether a State can be allowed to act in breach international law and allude to the right to self determination? In relations to money laundering, if the international practice of states does not condone it as a legitimate activity because of its adverse effects, the state engaging in acts of money laundering can be sanctioned under international customary law. Customary international law generates obligations on the state regardless of whether it has enacted a law on an issue or not. Legal obligations will be imposed on the state regardless of whether it has legislated on the matter or not. As long as the international community does not approve of the actions of the respective state, those actions are presumed illegal and in breach of international law. Customary law is a way of alluding to activities—whether of a state or of individuals, generally disapproved of,

whereby the method used to perpetuate such actions are unlawful or targets protected interests or both.³⁰⁵

In the case of *United States v Nicaragua (1986)*, the international court of justice relied on international customary law to declare unlawful paramilitary activities sponsored by United States against the contras.³⁰⁶ This case was important in demystifying the myth that international custom as a source of law supports the powerful against the weak because it was the actions of United State that was under the spotlight.³⁰⁷ It can therefore be inferred that any actions deemed inconsistent with established customs of the land will be overwhelmingly disapproved of by the community of nations using any international forum.

In relation to Seychelles' enactment of EDA, it had a legitimate right as a sovereign state to pass any law it desired. However, this right was delimited by the fact that as sovereign state, it also had an obligation to respect the norms of customary international law. In addition to the practice of states is the opinion of lawyers in the international legal fraternity. If the opinion of lawyers (opinio juris) condemns the actions of the state, the respective state action is deemed in contravention of international norms. The case of Seychelles demonstrates that notwithstanding the sovereign right of states, the state can't be allowed to behave irresponsibly. In *Buvot v. Barbut*³⁰⁸, Lord Talbot unambiguously declared that the law of nations in its full context was

³⁰⁵ R. Higgins, 'The General International Law of terrorism' *International Law and Terrorism*, (London Routledge 1997), 28

³⁰⁶ Higgins, (n 305).

³⁰⁷ Higgins, (n 305).

³⁰⁸ 1764 3 Burr. 1478.

part of the law of England so that the Prussian commercial agent could not be rendered liable for failing to perform a decree.³⁰⁹ Customary international law is integral to common law of England tampered by the principle of *stare decisis* or judicial precedent and upheld by British courts in ensuring that decisions of the higher court are influential on lower courts.³¹⁰ It needs to be noted that established customs of the land which reflect general consensus in the community have a profound impact on shaping the international legal system. There is no State or entity of the State that can afford to ignore the customs and traditions of the international community.

3.6 The European AML Directives

The EU, AML/CFT framework is underscored by the three EU AML Directives issued especially by the commission and the Council. The EU has long been at the forefront of fighting money laundering manifested in its early initiatives by the Council of Europe (1990).³¹¹ The Council of Europe Convention in 1990 was the first to adopt a framework for harmonization of practice and policy on money laundering, tracing, seizure and confiscation of the proceeds of crimes within European member states.³¹² The EU subsequently issued three AML Directives (1991, 2001, 2005), to bring about a certain degree of harmonization of money laundering laws within its member countries. There are several discerning trends in the European Union AML drive: (i) the linkage with FATF standards and discussions is both strong and in many ways,

³⁰⁹ Malcolm N. Shaw, *International Law*, (Cambridge University Press, 5th Edition (2005),131.

³¹⁰ Shaw, (n 309).

³¹¹ Eleni Tsingou "Global governance and transnational crimes: Opportunities and tensions in global AML regimes", CSGR Working Paper No. 161/05, May 2005.

³¹² Tsingou, (n 311).

binding; (ii) G7 members such as the United Kingdom and France are at the forefront of proposals and more eager to push for comprehensive regional standards; (iii) countries with long established offshore status, most notably Luxembourg, are experiencing intense pressure to address the potential weaknesses in its AML/CFT regulatory framework.³¹³ It has to be noted that the European AML Directives are also adopted in order to align EU law to desired international standards. The European Union has been very robust in the implementation of its AML obligations. The relationship between EU Directives and FATF recommendations is underscored by the fact that every time FATF adopts new recommendations, the EU responds by adopting measures to transpose those obligations within EU member states. For example, when FATF issued its first forty recommendations, the European Council adopted its first AML directive in June 1991.³¹⁴ When FATF revised its recommendations in 1996 to extend their scope to “designated non-financial businesses and professions”, the EU Council issued the second AML directive in December 2001.

The Second European AML Directive (91/308/EEC) was adopted in the form of Amendments of the first directive, inserting a new provision which required member states to ensure that obligations laid down in the first directive were imposed on, among other bodies, notaries, and other independent legal professionals when they assist in planning or execution of any of activities which effectively constitute money laundering.³¹⁵

³¹³ Tsingou, (n 311).

³¹⁴ Official Journal L 166 of 28 June 1991.

³¹⁵ FATF Recommendation 12 (h).

The Directive was adopted in response to fears among EU member states that an integrated financial system could fuel drug trafficking and money laundering, thereby undermining the integrity of the financial system and disrupting the market.³¹⁶ They were also troubled by the prospect of *ad hoc* efforts to curb money laundering by individual nations, which they perceived would have a negative effect on a unified system. Thus the Directive prescribes a series of measures to be adopted by all member states in their approach to money laundering.

The Directive prohibits the 'knowing acceptance' and disposition by financial institutions and non-bank finance companies of the proceeds of non-drug related crimes, as well as the proceeds of narcotic trafficking.³¹⁷ It thus requires member states to criminalise the laundering of the proceeds of drug offences as set out in the UN Convention and "any other criminal activity designated as such for the purpose of this Directive by each member state."³¹⁸ The Directive primarily focuses on the prevention and detection of money laundering by proposing the adoption of prevention and detection mechanisms within financial institutions.³¹⁹ It applies to all financial institutions because of their potential vulnerability to money laundering schemes. Financial institutions are defined in the directive as "undertakings whose

³¹⁶ The EC Directive adopts the definition of credit institution from the first banking directive 77/780/EEC as amended by the Directive 89/646/EEC (hereinafter the Second Banking Directive).

³¹⁷ The EU Leaders voiced their fear that "when credit and financial institutions are used to launder proceeds from criminal activities, the soundness and stability of the institutions concerned and confidence in the financial system would be jeopardised.

³¹⁸ Kern Alexander, Multi-national Efforts to Combat Financial crimes and the Financial Action Task Force, (2000), 2(5) Journal of International Financial Markets, 178-190.

³¹⁹ Alexander, (n 318).

business is to receive deposits or other repayable funds from the public and to grant credit for their own account”.³²⁰

The Directive defines financial institutions as “an undertaking other than credit institutions whose main activity is to carry out one or more of the functions listed in the Second Banking Directive.”³²¹ These functions include lending (consumer and mortgage credit), financial leasing, money transmission service, guarantees and commitments, trading for own account or for customers account, money broking, portfolio management and advice.³²² Financial institutions also include insurance companies authorised in accordance with the insurance Directive (79/267/EEC) as amended.³²³ Credit and financial institutions include branches located in European states whose home offices are based outside Europe.³²⁴ Article 12 of the directive provides that member states must extend either all or part of the directive...professional categories, other credit and financial institutions referred to in article 1, which engage in activities likely to involve handling money and hence the potential for being exploited for money laundering purposes. This would include Casinos and the proliferating money changing or lending businesses spurred as a response of the current dynamics of the global market.³²⁵

³²⁰ The EC Directive adopts the definition of credit institution from the first banking directive 77/780/EEC as amended by the Directive 89/646/EEC (hereinafter the Second Banking Directive)

³²¹ Article 1 of the Directive, (n 325).

³²² Directive 89/646/EEC, in particular numbers 2 to 12 and 14 of the list attached to the Directive.

³²³ Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: International Regulation of Systemic Risk*, (Oxford University Press, 2006), 276.

³²⁴ Alexander, (n 323).

³²⁵ EC Directive 91/308/EEC.

The third AML Directive was adopted with broad mandate which extends its remit to lawyers and other professionals such as accountants. The European Council directive³²⁶ on money laundering has articulated the basic principles on the prevention of money laundering in Europe.³²⁷ The third AML Directive also introduced a risk based approach to 'customers due diligence' creating a two-way reporting regime for low risk clients (Article 9); and 'enhanced due diligence' in situation regarded as high risk of money laundering.³²⁸ The latter is caught by situations where there is no face to face interactions with the client, for example where the transaction is made on line, over the telephone etc; the second category relates to cross-border banking relationships; and a new category of politically exposed persons residing abroad (Article 10). The broad mandate introduced by anti-money laundering directives is transposed by EU member states through national anti- money laundering measures.

3.7 Sanctions mechanisms under the Directive

There are two types of sanctions mechanisms operated in the European Union. Firstly, there are specific sanctions designed to implement the United Nations Resolutions pursuant to Chapter seven (such as economic sanctions and the use of force) of the Charter of United Nations 1945.³²⁹ Secondly, there are EU autonomous sanctions regimes which include arms embargo, trade sanctions, flight bans, restriction on admission to the EU for countries aspiring to join the European Union. The foregoing EU Directive prescribes a

³²⁶ Third Banking Directive 60/2005/EEC.

³²⁷ Council Directive 91/308, 1991 O.J. (L 166) 77. This Directives was to be implemented by all EU Member States.

³²⁸ Official Journal L 309 of (25 November 2005): p. 15

³²⁹ Under Chapter seven, in particular Articles 40 and 41.

range of duties on credit and financial institutions to take appropriate measures to ensure full application of its provisions, and in particular the penalties to be imposed for infringement of the measures adopted.³³⁰ The European Commission brought its first action to enforce the money laundering directive in May 2000, when it instituted proceedings against Austria for failing to enact the necessary laws to implement the foregoing directive. In pursuit of Article 226 of the European Community Treaty (1957), the Commission alleged that Austrian legislation did not comply with the European AML Directive. Precisely it alleged that Article 40 of the Austrian Banking Act (1959) wrongly provided for exemption to identify customers when opening passbook account. This had the effect of allowing persons to open as many passbook accounts as they desired without declaring their identity.³³¹ Such a provision is clearly inconsistent with the directive, which requires member states to enact laws prohibiting financial institutions from keeping anonymous accounts and requiring them to take appropriate measures to identify customers.³³² Austria responded to this action and to pressure from other international bodies (for example FATF) by amending Article 40 to prohibit the issuance of anonymous passbook accounts after November 1, 2000, as well as imposing an obligation to identify all depositors after this date (with the exception of transfer securities deposits).³³³

The Directive demonstrates that the European Union has adopted the strictest AML standards than many jurisdictions. It perpetuates “KYC”, the

³³⁰ Article 14 (n 327).

³³¹ European Council Directive: 91/308/EEC.

³³² Alexander, (n 323).

³³³ See the FATF Press release on money laundering, Press release, O.E.C.D (15 June, 2000) available from its website at www.fatf.org (last visited on 15th October 2010).

concept first introduced by the Basle committee on supervisory standards and later broadened in the FATF Recommendations. It adds teeth to the suspicious transaction reporting standards advanced by the FATF by making such reporting mandatory.³³⁴

To broaden the extraterritoriality effect of the Directive, the EC AML legislation is not only confined to candidate countries or offshore jurisdictions, but continuously seeks to incorporate agreements to bind non-member states.³³⁵ According to the Commission, the standard clause refers to efforts and co-operation to avoid money laundering and the establishment of suitable standards against money laundering equivalent to those adopted in the EU and in other International bodies such as the FATF.³³⁶

The Second AML Directive extends the scope of money laundering to include a wide range of criminal activities. This was largely a reflection of the policy agenda from the 'war on drugs', which had served the justification for the initial money laundering counter-measures against the multifaceted threat of organised crime.³³⁷ It also reflects the views of experts who advised that the limitation of money laundering only to drug trafficking would render the directive ineffective. This was provided for in the United Nations report as follows: "The time may have come to end the artificial division of criminal money into categories depending on the nature of the crime."

³³⁴ FATF, (n 333) above.

³³⁵ EC Directive 91/308/EEC.

³³⁶ This is underscored by the EU Common Strategy on Russia; and the European Council Common strategy on the Ukraine. See, also Common Action Plan on Drugs between EU and Central Asian republics (Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan)-council doc.12353/02. Brussels, 25.9.2002.

³³⁷ Alexander, (n 323).

As far as the European Union AML framework is concerned, the issue of money laundering predicate offences has been partly addressed in the specific context of third pillar measures on fraud³³⁸ and confiscation.³³⁹ According to recommendation 26 (b) of the action plan on organised crime, criminalisation of laundering of the proceeds of crime should be created as broad as possible to ensure a range of powers of investigations into these offences.³⁴⁰ In its report on the first Commission Implementation report, the European parliament adopted a motion, whose resolution point 5 calls on all member states, in so far as they have already not done so, to extend their legislation on combating money laundering, not only to money derived from drug trafficking but also professional practice and organised crime.³⁴¹

The link between drug trafficking and money laundering is clearly established in the adopted text of the directive which states that, “member states shall ensure that obligations laid down in this directive are imposed on the following institutions: credit institutions (as defined previously); financial institutions (also as defined previously); and on the following legal or natural persons acting in exercise of their professional activities: auditors, external

³³⁸ The second Protocol of the Convention on the Protection of the European Communities financial Interests (OJL 221 19.7. 1997, p. 11) criminalises the laundering of proceeds of fraud, at least in serious cases, and active and passive corruption (Article 1 (e) and 2).

³³⁹ The Joint Action on Money Laundering, the identification, tracing, freezing and confiscation of the instrumentalities and the proceeds from crime (OJ L 333, 9.12.1998, p. 1) calls at Member states to ensure that no reservations are made to Article 6 of the Council of Europe money laundering in so far as serious offences are concerned. See in particular (Article 1(b) of the above instrument.

³⁴⁰ Valsamis Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles*, (Kluwer Law, International, 2003): Chapter 4.

³⁴¹ W.C Gilmore, ‘European Parliament Committee on Legal Affairs and Citizens rights: Report on the first Commission’s report submitted to the European Parliament and to the Council on the implementation of the Directive on the Prevention of the use of the financial system for the purpose of money laundering’ (91/308/EEC) (CM (95) 0054-C4-0137/95).

accountants and tax advisors, real estate agents, notaries and other independent legal professionals, when they participate, whether: by assisting in the planning or execution of transactions for their clients concerning, (i) buying and selling of real property or business entities; (ii) managing of clients money, securities or other assets; (iii) opening of management of bank, savings or securities accounts; (iv) organisation of contribution necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; (b) or by acting on behalf of and for their client in any financial or real estate transaction, dealers in high value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash and in amount of EUR 15,000 or more.”

The quest to expand the scope of money laundering predicate offences was also reiterated in the Tampere European Council conclusions, which called for a ‘uniform and sufficiently broad scope’ of predicate offences (paragraph 55). This position was also reflected by the European Union on the proposed United Nations Convention of Transnational Organised Crimes.³⁴² Article 1(5) states that, “in the money-laundering field, the convention should extend a broad range of offences, and in particular should be consistent with the 40 Recommendations of the FATF.” This particular provision was incorporated as an acknowledgement to the international trends of money laundering, such as the revision of the FATF recommendations, justified by the need to facilitate

³⁴² Joint Position of 29.3.1999 defined by the Council on the basis of Article k.3 of the treaty of the European Union, on the proposed United Nations Convention against Organized Crime, OJ L87, 31.3.1999 at P. 1.

suspicious transaction reporting and international co-operation in this area.³⁴³ Rather than following the all-crime prohibition, the Commission opted for an extension to cover, along with the drug offences of the 1991 text, the following conduct: participation in the activities linked to organised crime; and fraud, corruption or any other illegal activity damaging or likely to damage the European Communities financial interests.³⁴⁴ The adoption of the EU Directive (91/308/EEC) was influenced by the increasing use of financial and non-financial institutions for money laundering purposes. This was considered to result from money laundering counter-measures and the increased level of compliance by credit and financial institutions—prompting launderers to shift to non-regulated professions for their activities.³⁴⁵ This trend was also associated with the sophistication in money laundering activities, which involve a wide range of intermediary professions of varied expertise.³⁴⁶

The growing role of professionals such as accountants, solicitors, and company formation agents was emphasised since they were frequently mentioned in money laundering cases.³⁴⁷ In establishing sophisticated businesses that conceal money laundering, it is the professionals that provide advice and extra layer of respectability to money laundering operations.³⁴⁸ FATF addressed the foregoing concerns by revising the 40 plus recommendations in 1996. Recommendation 8 (formerly 9) was revised to ensure that Member states equally apply anti-money laundering standards to

³⁴³Recital 12 and 13, (n 304).

³⁴⁴ United Nations Convention against Organized Crime, OJ L87, 31.3.1999.

³⁴⁵The FATF, Annual Report 1996-97, para. 16.

³⁴⁶ Mitsilegas, (n 340).

³⁴⁷The Second Banking Directive brought lawyers within the scope of money laundering reporting regime, now subsumed in the third AML Directive.

³⁴⁸ FATF 1998/1999. Para. 47.

non-financial institutions which are not subject to formal prudential supervisory regime in all countries such as *Bureaux De Change*.³⁴⁹ Recommendation 9 (formerly 10) on the other hand requires national authorities to consider extension of the recommendations' duties to 'the conduct of financial activities as a commercial undertaking by businesses or the professions, which are not financial institutions, where such conduct is not allowed or not prohibited'. In the same context, the Parliament proposed the extension of the *ratione personae* scope of the Directive³⁵⁰ to cover a wide range of the professions at the risk of being involved in money laundering or abused by money launderers.³⁵¹ The indicative list includes both the financial and non-financial professions such as estate agents, art dealers, auctioneers, casinos, *bureaux de change*, transporters of funds, notaries, accountants, advocates, tax advisor and auditors.³⁵²

The European Union AML counter-measures have been strengthened by the third AML Directive which consolidates the earlier directives on the same issue.³⁵³ The third AML Directive reflects the changed regulatory market environment and typologies of money laundering as per the revised FATF 40 recommendations. The revision was aimed at, in particular to extend the scope of predicate offences, providing guidance on customer identification

³⁴⁹ FATF, (n 348).

³⁵⁰ Gilmore, (n 341).

³⁵¹ Gilmore, (n 341).

³⁵² Underscored by Resolution point 1 (a) of FATF (1997).

³⁵³ The Second Banking Directive (2001/97/EC) expanded the scope of predicate offences and introduced more compliance obligations on professionals such as lawyers, accountants, notaries and estate agents.

requirements, which now take place on the basis of a risk based approach,³⁵⁴ taking into account categories of individuals such as politically exposed persons (peps) and misuse of corporate vehicles.³⁵⁵ As a strategy to undercut terrorist funding, which is largely fuelled by money laundering, the third AML Directive signalled a concerted effort in the EU to link money laundering and the threat of terrorism.³⁵⁶ In relation to enhanced reporting requirements, member states are asked to establish Financial Intelligence Units (FIUs) with the specific mandate to access national databases of countries. This would help to overcome the issue of data protection provisions under national law that impede organisations from accessing individual persons file.³⁵⁷

3.8 The Financial Action Task Force (FATF)

The most prominent inter-governmental agency on money laundering and its predicate crimes is the FATF.³⁵⁸ The FATF is a free standing specialist body concerned with multilateral enhancement of AML/CFT capacity of countries globally.³⁵⁹ This body is composed of twenty-nine member states or territories and maintains a small secretariat housed at the Offices of the Organisation for Economic Co-operation and Development (OECD) in

³⁵⁴ It enshrines the risk based approach currently used by the regulated sector in the UK and equally it sets out professional guidance issued by, among others, the British Bankers Association's Joint Money Laundering Steering Group (JMLSG).

³⁵⁵ Mitsilegas, (n 340).

³⁵⁶ After 9/11, the FATF extended its mandate to cover not only money laundering but also terrorist financing. Some of the new measures reflect monitoring of wire transfers the regulation of alternative remittance systems and enhanced measures in reporting standards.

³⁵⁷ Article 21, para. 3, Member States must ensure that FIUs have full access, directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that they may require to properly execute their duties.

³⁵⁸ J.W.E Sheptycki, *Issues in Transnational Policing*, (Routledge, 2006), 136-150.

³⁵⁹ It was established by the G7 nations in July 1989 and its membership extends to 31 member countries, representing the advanced capitalist countries.

Paris.³⁶⁰ Prior to 1989, few countries had explicit anti-money laundering laws. The creation of FATF was influenced by United States and France at Paris economic summit of the group of seven (G-7) in 1989.³⁶¹ As far as United States was concerned, the FATF would create another front to enhance the war on drugs. For other countries, it would provide a multilateral front on money laundering and indeed FATF has established itself as a global AML institution with the mandate to create global AML/CFT standards. Today, many countries are required by the World Bank and IMF to apply the FATF revised forty plus nine recommendations to demonstrate their preparedness to fight money laundering and its related predicate threats. Similarly, the FATF recommendations provide a framework of rules and procedures for States to counter money laundering and financing of terrorism.³⁶² In 1997, the FATF *ad hoc* group estimated the magnitude of money laundering by focusing its efforts on gathering data in relation to drug consumption, production and pricing.³⁶³ Using an indirect approach in 1987, the UN had estimated drug trafficking worldwide at US\$300 billion, much of which would be laundered. Other estimates have been made at US\$300-US\$500 billion of 'dirty money' that is poured into the financial system each year, or roughly 2 percent of global GDP.³⁶⁴

³⁶⁰ Detailed information can be accessed on FATF website, available at <http://www.oecd.org/fatf>, accessed on 17th November 2009.

³⁶¹ Michael Levi and Peter Reuter, *Money Laundering*, (Chicago University Press, 2006), 289.

³⁶² FATF has gone through successive revisions in 1990, 1999, 2003 and 2004 and each revision addressing a new threat in the fight against money laundering and financing of terrorism.

³⁶³ W.C. Gilmore, *International Efforts to Combat Money Laundering*, (Cambridge Grotius Publications Ltd, 1992) 5-10.

³⁶⁴ L.P. Raine and F.J. Cilluffo (eds.), 'Global Organized Crime: The Empire of Evil', (Centre for Strategic and International Studies Washington, 1994), 12.

The preventive role of financial institutions against money laundering has been substantially enhanced through the work of FATF under the auspices of OECD.³⁶⁵ FATF has the composition of 31 member countries and two regional organisations from America, Europe and Asia, as well as 18 observers (including the Fund and the World Bank).³⁶⁶ Although located at the OECD headquarters in Paris, where it maintains a small secretariat, the FATF is independent of the OECD. It is the principal AML multilateral organisation. FATF is a voluntary task force and not a treaty organisation; its forty plus nine recommendations do not constitute a binding national convention but a guideline framework for states to combat money laundering.

Although the FATF forty plus nine recommendations are soft law instruments and non-binding, they have a subtle binding effect on states. For example all member countries must criminalise money laundering and require financial institutions to implement vigilant “KYC” and other necessary transparency procedures. FATF member countries take a political commitment to combat money laundering by implementing its recommendations. Besides self-assessment exercise and mutual evaluation, the FATF, in close collaboration with its members and other organisations conducts regular typology exercises to uncover new money laundering techniques and to develop strategies for countering them.³⁶⁷

³⁶⁵ It was basically designed to ensure that the financial system and institutions are not utilised for purposes of money laundering and to consider additional preventive measures in this field.

³⁶⁶ Argentina, Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece; Hong Kong; Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the kingdom of Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; the European Commission and the Gulf Co-operation Council.

³⁶⁷ Gilmore, (n 363).

The FATF's AML efforts set out in its forty recommendations plus nine relate to the enforcement of criminal laws and complementary measures in the financial sector to foster international co-operation.³⁶⁸ The recommendations that apply to law enforcement can be grouped under, (a) the criminalisation of money laundering; (b) the seizure and confiscation of money laundering proceeds; (c) the suspicious transaction reporting; and (d) international co-operation in the investigation, prosecution and extradition of crime suspects. Recommendations dealing with financial sector regulations relate primarily to customer identification and record-keeping requirements, which are commonly, referred to as "KYC" standards.³⁶⁹

The FATF, AML regimes can be analysed at three levels: (i) the recommendations sets out the general framework, justifying their adoption on the ground of the need for rapid tough action, and the need for practical measures.³⁷⁰ In this context, the recommendation refers to the growing dimension, and the increasing awareness of the problem of money laundering

³⁶⁸ The FATF has since assumed an active role in the implementation of the recommendations. W.C. Gilmore observes that this takes place in the following ways: extension of money laundering predicate offences from drug offences to serious offences determined as such by each country (Recommendation 4); application of appropriate measures to the conduct of financial activities by non-bank financial business or professions (Recommendation 9); application of appropriate measures to non-bank financial institutions even those which are not subject to a formal prudential supervisory regime in all countries (Recommendation 8); mandatory reporting of suspicious transactions (Recommendation 15); consideration of further measures in respect of shell corporations, acknowledging their abuse potential (Recommendation 25); expansion of the recommendations dealing with customer identification (in particular recommendation 10 and 13); in the same context proactive consideration of new technologies that might favour anonymity (Recommendation 13); strengthening of measures in respect of bureaux de change (Recommendation 8), introduction of measures relating to cross border movement of currency (Recommendation 22); the utilisation of controlled delivery operations in money laundering context (Recommendation 36).

³⁶⁹ Recommendation 36.

³⁷⁰ Recommendation 3.

which would justify a reinforcement of the Vienna Convention provisions in the field; furthermore, to avoid the risk of discrepancy between national measures, and a call to build upon and enhance the Basle statement of principles and to proceed towards harmonisation of practical aspects not covered.³⁷¹ Secondly, the recommendations are devoted to the general improvement of the national legal system to combat money laundering.³⁷² Article 5 attempts to extend the definition of money laundering by calling for an extension of the scope of the offence to ‘any other crimes for which there is a link to narcotics, or, alternatively, to criminalise money laundering based on all serious offences, and/or on all serious offences that generate proceeds of or on certain serious offences. The third part constitutes the corner stone of the FATF initiative, aims at the enhancement of the role of the financial system’,³⁷³ their scope extending to bank and non-bank financial institutions.³⁷⁴ The institutions concerned are called upon to comply with a series of duties relating to the following:

3.8.1 Customer Identification Requirements

Financial institutions³⁷⁵ are required to satisfy themselves as to the identity of ‘their customers’, whether they are dealing with occasional or usual customers. Identification must be established by official or any other

³⁷¹ Mitsilegas, (n 302).

³⁷² Recommendation 4-8.

³⁷³ Recommendation 9-29.

³⁷⁴ Recommendation 9.

³⁷⁵ These are persons or entities whose activities include: lending; financial leasing; transfer of money or value; trading in foreign exchange, derivatives, securities, commodities, futures and the like; life insurance and other investment related insurance.

satisfactory documents.³⁷⁶ This requirement aims to ensure that financial system is not used as a channel for criminal funds. As such they have to make reasonable efforts to determine the true identity of all customers requesting the institutions services. According to this requirement banks are no longer allowed to hold anonymous accounts. In this case, the bank needs to satisfy itself as to the independence and reliability of information relating to third persons. Particular care is taken in identifying the ownership of all accounts and those using safe custody facilities.³⁷⁷

Where an institution suspects that the customer is just a nominee account holder, for example, holding an account on behalf of another, or where the account holder is a company, the financial institutions must satisfy itself as to the identity of the principals on whose behalf the accounts are conducted.³⁷⁸ Likewise, on going due diligence should be conducted on the transactions undertaken at the behest of the customer to ensure that information submitted by the customer is consistent. It is imperative that the source of the funds is legitimate and checks should be made and evidence procured to make certain that that is the case.³⁷⁹ Enhanced due diligence and monitoring mechanisms are necessary to ensure that politically exposed persons (as these are prominent public figures) do not abuse their positions and commit money

³⁷⁶ Before opening accounts, the financial institutions should undertake customer due diligence to ensure that no anonymous or fictitious accounts are opened. Documents like passports, photo card driving licence and at least two recent utility bills should be obtained for purposes of ascertaining the identity of natural persons. In case of artificial persons, proof of incorporation or similar proof to establish legal status, the identity of directors or trustees or partners, and proof of authority from which they derive power to bind such persons.

³⁷⁷ Norman Mugarura, *The Global anti-money laundering regulatory landscape in a Less developed Countries*, Ashgate Publishing Limited (forthcoming), (2012): 60-87.

³⁷⁸ This is implemented in line with Recommendation 15 of FATF forty Recommendations 1989.

³⁷⁹ Rashmi Sharma, 'Due Diligence and Money laundering', (2005), *EMIS Professional Publishing Ltd* 4-6.

laundering. While dealing with cross border correspondent banks or other cross border firms, additional due diligence measures should be undertaken which include: (a) Understanding the business of the correspondent institution; (b) determining that it has rigorous money laundering checks and regulatory supervision in place and; (c) ascertaining if any money laundering investigation was carried out against it.³⁸⁰ Records on the customers and the transaction should be maintained for the minimum of five years. This is necessary to provide a paper trail to the authorities in case they need to take legal action against the customer for any criminal activity.³⁸¹ The transaction should be examined in detail especially those which are complex for no apparent reason. The requirement of CDD and record keeping are also applicable to designated non-financial businesses and professional in the following situations: casinos-when the transactions are equal to or above the applicable designated threshold; real estate agents-transaction involving buying and selling of real estate; dealers in precious metals and dealers in precious stones-cash transactions with equal to or above the designated threshold; lawyers notaries or other independent legal professionals and accountants as with respect to transactions involving buying and selling of real estate; management of client money securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies.³⁸²

3.8.2 Compliance with the Law

³⁸⁰ Sharma, (n 379).

³⁸¹ Sharma, (n 379).

³⁸² Anu Arora, 'Money Laundering Regulation', Finance and Credit Law, (2005) (C) *Informa Professional*, 1-13.

The FATF mandates the bank's management to ensure that business is conducted in conformity with high ethical standards ensuring that laws and regulations pertaining to financial transactions are adhered to. As regards transactions executed on behalf of customers, it is accepted that banks may have no means of knowing whether the transaction stems from or forms part of the criminal activity. In an international context, it may be difficult to ensure that cross-border transactions are in compliance with the regulations of another country. Nevertheless, banks should not set out to offer a service or provide active assistance in transactions which they have good reason to suspect being associated with money laundering activities. Banks should co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality. Care should be taken to avoid providing support or assistance to customers seeking to deceive law enforcement agencies through the provision of altered, incomplete or misleading information.

3.8.3 Financial Transaction Reporting (FTR)

Most jurisdictions, which have money-laundering regulations in place, require financial institutions, designated non-financial institutions and professionals to have a fully-fledged AML officer.³⁸³ The employees are required to report suspicious activities to the money-laundering officer who will then take it up

³⁸³ Section 340 of POCA (2002), one of the UK anti-money laundering regimes requires financial institutions to make disclosure to designated anti-money laundering persons (MILO) in a regulated sector.

with the FIU.³⁸⁴ Employees are required to receive appropriate training on anti-money laundering procedures on suspicious transactions and reporting lines.³⁸⁵ The foregoing FATF recommendation states that “Financial Institutions should pay special attention to all complex, unusual or large transactions, and unusual patterns of transactions, which have no apparent economic or visible lawful purpose.” Banks should examine the background and the intentions behind such transactions to the fullest extent possible, and they should record their findings in writing in order to assist the relevant authorities.³⁸⁶ If financial institutions suspect that the funds are connected to criminal activity, “they should be permitted or required to report promptly their suspicions to the competent authorities.”³⁸⁷ To promote this reporting duty, the recommendation suggests that financial institutions should be immune from civil and criminal liability when they make such reports in good faith.³⁸⁸ For example recommendation 14 states that: “financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amount and type

³⁸⁴ Section 340 (n 383).

³⁸⁵ It is a defence for an employee who fails to report any suspicious transaction due to not knowing that the transaction was actually suspicious. On the converse, employers who fail to train their employees on money laundering may be prosecuted.

³⁸⁶ Directorate for Financial, Fiscal and Enterprise Affairs, O.E.C.D (FATF Money Laundering Report 11 (B) (1990), available at www.fatf.org (last visited 3rd October 2010).

³⁸⁷ Ingo Walter, *The Secret Money Market: Inside the Dark World of Tax Evasion, Financial Fraud, Insider Trading, Money Laundering and Capital Flight* (1990) at 157.

³⁸⁸ Walter, (n 387).

of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour.³⁸⁹

3.8.4 Mechanisms for sanctioning NCCs

In 1996, FATF adopted a formalised policy of sanctioning members that fail to translate its 40 recommendations into practice.³⁹⁰ The FATF sanction policy consists of a series of graduated steps designed to pressurise member countries into enacting reforms necessary to achieve compliance. The initial steps include the issuance of a letter from the FATF President to the non-complying governments, and the dispatch of a special delegation led by the FATF President to the country concerned. More serious measures include urging financial institutions world wide to scrutinise all business relations and transactions with persons, companies, and financial institutions domiciled in the relevant country under the provisions of recommendation 21³⁹¹ and ultimately to suspend the respective country from the FATF membership.³⁹² FATF has invoked the most severe sanctions underpinned by its rules, in particular recommendation 21 on two occasions. The first case involved the government of Turkey-in 1996, after exhausting all other means to encourage the government of Turkey to enact a legislation criminalising money laundering and to take other measures necessary to adhere to the 40 recommendations. FATF issued a press release cautioning Financial

³⁸⁹ Valsamis Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles*, Kluwer Law Publishing International (2003): pp 23-30.

³⁹⁰ Directorate for Financial, Fiscal and Enterprise affair, 'O.E.C.D, Financial Action Task Force on Money Laundering' 1996-7.

³⁹¹ Recommendation 21 of FATF (2004).

³⁹² FATF Report VII, (n 391).

Institutions in respect of transactions with persons or businesses domiciled in Turkey.³⁹³ The public shame that was created by the statement and the Turkish governments' political objectives for becoming a member of the European Union led Turkey to enact a law making money laundering a criminal offence and to implement other mandatory FATF recommendations.³⁹⁴ (ii) The second time FATF invoked its sanctions was in June 2002 against Austria. Austria was already under investigation by the European Commission when in 1999; FATF began to investigate Austrian bank secrecy laws. The FATF investigations exposed Austria to negative publicity in a period when it was under international scrutiny because of the investigation of the right wing freedom party in its governing coalition. On February 3, 2000, FATF threatened the ultimate sanctions against a member state—including the threat of suspension from the group—unless it fulfilled two conditions.³⁹⁵ It asked Austria to make a clear statement that all necessary steps to eliminate the system of anonymous passbook accounts in accordance with the 40 recommendations would be taken by June 2002. FATF also required Austria to introduce a bill prohibiting opening of anonymous passbook accounts; and to eliminate existing anonymous accounts. The Austrian Government responded in June 2000 by stating that it would conform completely to FATF demands.³⁹⁶ On June 7, 2000, the first Chamber of the Australian Parliament adopted an Amendment to the Banking Act, which would lead to the elimination of anonymous passbook saving

³⁹³ 'FATF Issued a Statement about lack of AML in Turkey', O.E.C.D, press release of Sept. 19, 1996.

³⁹⁴ 'FATF on Money Laundering welcomes new AML laws in Turkey', O.E.C.D. Press release, Feb 1, 1996.

³⁹⁵ Mugarura (n 377).

³⁹⁶ 'FATF Money Laundering welcomes proposed Austrian Legislation to Eliminate Anonymous Passbook', O.E.C.D. press release, 15 June 2000.

accounts. The measure adopted by the Austrian government addressed the concerns of FATF and significantly enhanced the Austrian anti-money laundering programmes.³⁹⁷ Another clash between FATF and Seychelles concerned the enactment and an investment law. The law in question Economic Development Act (“EDA”), granted immunity from criminal prosecution to investors who placed \$10 million or more in approved Investment schemes, and protected their assets from compulsory acquisition or sequestration. An exception to this immunity existed only for acts involving violence or drug trafficking in the Seychelles.³⁹⁸

The FATF has taken the work of the Basle committee much farther by stressing the importance of requiring Member States to implement its standards. In 1991 FATF issued a statement indicating that its members had agreed to a process of mutual assessment to ensure that the 40 recommendations were being put into practice.³⁹⁹ The members also agreed to expand the membership of the Task Force and to influence non-member jurisdictions to follow the 40 recommendations.⁴⁰⁰ Thus the significant work of FATF is devoted to promoting compliance with the 40 recommendations and promoting a requisite AML infrastructure.⁴⁰¹ Therefore as part of its mandate, the FATF conducts on site, peer evaluation of member’s adherence to the 40 recommendations.⁴⁰² An evaluation team is composed of legal, regulatory and law enforcement experts from member states visits to relevant countries; and

³⁹⁷ Mitsilegas, (n 389).

³⁹⁸ Mitsilegas, (n 389).

³⁹⁹ FATF Report V11, (n 358).

⁴⁰⁰ At the 1990 Summit in Houston, all member countries were invited to participate in the fight against Money Laundering and to implement the Recommendations of FATF as prescribed. See FATF 1990 Report: *note* 258, p. 110.

⁴⁰¹ See the FATF Summit (1990), (n 358).

⁴⁰² See the FATF Summit (1990), (n 358).

conducts a thorough review of their anti-money laundering infrastructure. The findings are published in the report, which is reviewed internally to later be reviewed by the FATF membership.⁴⁰³ FATF also provides guidelines for identification of those jurisdictions that were not co-operating in taking measures against money laundering so as to encourage them to implement international AML standards adopted by FATF.⁴⁰⁴ This process involves the use of 25 criteria against which to identify detrimental rules and practices that impede international co-operation in the fight against money laundering. They include: (i) loopholes in financial regulations that allow no, or inadequate supervision of, financial institutions, weak licensing or customer identification requirements, excessive financial secrecy provisions, or lack of suspicious transaction reporting systems. There is also the issue of weak commercial regulations in relation to identification of beneficial ownership and registration of business entities; obstacles to international co-operation, both in administrative and judicial items; inadequate resources for preventing, detecting and repressing money laundering.⁴⁰⁵

As part of the review process, ⁴⁰⁶FATF established four regional groups to begin the process of considering the position in a number of jurisdictions, both within and outside FATF membership.⁴⁰⁷ The review involve the gathering of all the relevant information, including relevant laws and regulations, as well as

⁴⁰³ Mitsilegas, (n 351).

⁴⁰⁴ FAFT Report, February 2000, available from its website at: www.fatf.org (last visited 10 October 2010).

⁴⁰⁵ FATF Report on 'Non Co-operative Countries and Territories' 14, February (2000), pp. 4-7.

⁴⁰⁶ FATF agenda has proved a powerful instrument of reform because within 10 years of its inception, its membership has grown to 26 countries, three observer countries and two international organisations.

⁴⁰⁷ There is one in Africa, the Caribbean, in the Middle East and Asia. These regional FATF groups are meant to co-ordinate efforts on money laundering within the context of their respective regions.

any information derived from these reviews will be analysed with respect to the 25 criteria, and a draft report prepared and sent to the jurisdiction concerned for comment.⁴⁰⁸ In June 2000, FATF established the names of all non-co-operative countries. They include: Andorra, Anguilla, Aruba, the Bahamas, Barbados, the British Virgin Islands, Manaco, Maldives, Marshal Islands, Montserrat, Nauru, Samoa, St. Lucia, St. Kitts and Nevis, St. Vincent, Turks and Caicos Island, Vanuatu.⁴⁰⁹ The sanctions mechanisms established by FATF are further strengthened by the Nine United Nations Security Council Resolutions adopted in 2001.⁴¹⁰

3.9 The UNSCR on Money Laundering and Financing of Terrorism

The terms “terrorism” connotes the use of terror as a means of achieving political objectives. It can therefore be argued that terrorism and money laundering are distinct offences. However, this distinction is submerged by the fact that narcotic drug dealers, money launderers and terrorists have forged partnerships to use terror as a means of achieving their varied objectives.⁴¹¹ Terrorists are known to use the traditional money laundering techniques to move money about and to integrate it into the mainstream financial economy. The International Convention on the suppression of financing of terrorism, adopted by the UN General Assembly in December 1999 defines the primary purpose of terrorism as “to intimidate a population, or to compel a government or an international organization to do or abstain

⁴⁰⁸ FATF Report, (n 261).

⁴⁰⁹ Mitsilegas (n 389).

⁴¹⁰ Mugarura (n 377).

⁴¹¹ The foregoing challenges were clearly highlighted by the Terrorists attacks on the USA in September 2001.

from doing an act.”⁴¹² For terrorists to operate, they need unfettered supply of money to facilitate training, travel and secure supplies. They therefore exploit the international flow of money to operate wherever their intended target is.⁴¹³

After the simultaneous bombing of United States embassies in Kenya and Tanzania by terrorists in 1998, the United Nations Security Council adopted two Special Resolutions—1267 and 1373 (1999), as provisional measures taken under Article 40 of the Charter of United Nations 1945.⁴¹⁴ These Resolutions were specifically adopted to undermine the efforts of terrorists through the financial sector. Resolution 1267 imposes a wide range of sanctions against the Taliban regime in Afghanistan for providing sanctuary and training of international terrorists’ related activities.⁴¹⁵ Specifically, Resolution 1267 required UN member countries to freeze funds and other financial resources (including property owned or controlled by the Taliban) as designated by a Committee established under resolution 1267.⁴¹⁶ UN Resolution 1333 (2000) relates to asset freezing of the Taliban regime, Osama Bin Laden and any persons associated with him including Al-Qaeda as designated by 1267 committee. The term “associated” is used to denote acts or activities indicating that an individual, undertaking or entity associated with Osama Bin Laden, Al-Qaeda and the Taliban. This includes although not limited to the following:

⁴¹² Doug Hopton, *Money Laundering: A concise Guide for all Business*, (Ahgate Publishing Limited, Second Edition, 2006), 2-5.

⁴¹³ Doug Hopton, (n 412).

⁴¹⁴ Mugarura (n 377).

⁴¹⁵ William Blair and Richard Brent, *Banks and Financial Crimes: The International Law of tainted Money*, (Oxford University Press 2008) 63-70

⁴¹⁶ S/RES/1999, Para. 4(b).

- “Participating in the financing, planning, facilitating, preparing or perpetuating acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;”⁴¹⁷
- Supplying, selling or transferring arms or related materials to;
- Recruiting for or
- Otherwise supporting the acts or activities of Osama Bin Laden, the Al-Qaida organisation and the Taliban or any cells, affiliate sprinter group or derivative thereof.”⁴¹⁸

In order to make the foregoing Resolutions easily enforceable within member countries, the UN Security Council adopted Resolution 1363 (2001) on 30 July 2001. This Resolution creates mechanisms for implementing Resolutions 1267 and 1333, including establishing a monitoring group of five experts, reporting to 1267 Committee; and the sanctions enforcement support team of fifteen experts under the monitoring group. In order for the above Resolutions to function properly, UN Resolution 1363 required member countries to enforce and strengthen through legislative or administrative measures to prevent violations of the requirements under Resolutions 1267 and 1333.⁴¹⁹ UN Security Council Resolution 1390 (2002) adopted on 16th January 2002 required member countries to *interlia* freeze without delay any funds and financial assets of Osama bin Laden, members of Al-Qaida organisation and the Taliban regime; and other persons and entities associated with them, as designated in the list by 1267 Committee pursuant to the earlier resolutions 1267 and 1333.⁴²⁰ It was however noted that the wholesale application of the

⁴¹⁷ Mugarura (n 377).

⁴¹⁸ S/Res/1999, Para 1.

⁴¹⁹ Mugarura (n 377).

⁴²⁰ Mugarura (n 377).

foregoing regulatory measures might have negative effect on innocent parties. Thus, it necessitated the need to allow exemptions to state authorities in certain exceptional situations. The UN adopted Resolution 1452 (2002) on 20th December 2002, creating provisions for member countries to exempt certain funds and other financial assets or economic resources, notably those necessary for basic expenses (such as payment for food, mortgage, medicine, and medical treatment etc).⁴²¹ This would be undertaken by notifying the 1267 Committee and for extraordinary expenses to be approved by 1267 Committee. The United Nation General Assembly Resolution 1455 (2003) adopted on 17th January 2003, calls upon to *interlia* take urgent measures— both legislative and administrative against their nations, other individuals or entities operating in their territory to prevent and punish violations of the asset freezing provisions under 1267, 1333 and 1390.⁴²² These would have far reaching consequences for banks failing to honour their obligations under in particular Resolution 1267. Furthermore, under UN Resolution 1526 (2004) adopted on 30 January 2004, member countries were required to cut the flow of funds and other financial assets or economic resources to persons and entities associated with Osama Bin Laden, the Al-Qaeda organisation and the Taliban, taking into account appropriate international codes and standards for combating the financing of terrorism. This would include those designed to prevent the abuse of non-profit or charitable organisations and alternative remittance systems. Member countries are urged to implement comprehensive international AML standards embodied in the FATF 40+9 recommendations. This requirement is provided

⁴²¹ Mugarura (n 377).

⁴²² Mugarura (n 377).

for under the UN General Assembly Resolution 1617 of 29th July 2005. To a large extent, the foregoing Resolution reiterates the obligations of member countries relating to persons and entities associated with Osama Bin Laden, the Al-Qaida organization and the Taliban regime in Afghanistan.⁴²³ On 19th December 2006, the UN General Assembly adopted the Resolution 1730 to further streamline the sanctions regimes against designated persons. This Resolution was passed after a request from the UN Secretary General and requires member countries to establish Security Council subsidiary Organs as focal points to coordinate operations of different committees.⁴²⁴ These focal points would receive delisting requests from persons and entities listed by various sanctions committees of the United Nations Security Council, including 1267 Committee, and delisting request to be incorporated by sanctions committee in their own procedures. Finally, Resolution 1735 (2006) was adopted on 22 December 2006, providing clarification on the following:

- Information to be provided for proposing persons and entities for inclusion in the consolidated list, including identifying those parts of the information that can be publically published;⁴²⁵
- Setting out requirements in relation to delisting from the consolidated list, specifically as to whether there was a mistake in the original inclusion of the person or entities or whether the person or entity continues to meet the criteria for inclusion—as set out under Resolution 1617.⁴²⁶
- Also providing mechanisms for delisting those people or entity that had severed links with the Taliban regimes, Osama bin Laden and the Al-

⁴²³ Mugarura (n 377).

⁴²⁴ Mugarura (n 377).

⁴²⁵ Mugarura (n 377).

⁴²⁶ Mugarura (n 377).

Qaida organization.⁴²⁷ These regimes are based on the respective provisions of the treaties of United Nations on prevention of money laundering and its predicate crimes. The global anti-money laundering framework is also based on soft law instruments enunciated by various market domains such as FATF and the Basle Committee regulatory regimes. While UN, AML treaties are legally binding on states which have transposed them, soft law regimes are market oriented regulatory guidelines. International AML/CFT regimes based UN treaties are legally binding subject to transposition.⁴²⁸ These treaties include but are not limited to the following: the Vienna Convention on Illicit Drugs Trafficking and other Psychotropic substances (1988); the treaty against organised trans-national crimes adopted in Palermo (Italy) in December 2000; and the European Union AML Directives.⁴²⁹ In part, the foregoing regimes constitute the global framework on money laundering and its predicate threats. As regards the FATF and Basle Committee regimes on supervisory standards are market oriented regimes evolved in response to exigencies of globalisation of financial markets especially in the G-12 Countries. These regimes are said to be *ad hoc* because they have been adopted by G12 member countries in response to an unusual exigencies and the need to adopt more pro-active measures in their jurisdictions. As a matter of fact, market oriented regimes have been criticized as

⁴²⁷ Mugarura (n 377).

⁴²⁸ It is worthy of mention that the distinction market oriented and those evolved by the international treaty sometimes overlap.

⁴²⁹ Mugarura (n 377).

undemocratic because of the nature in which they are evolved and subsequently applied across States.⁴³⁰

3.10 Conclusion

The literature review has revealed that the current global AML/CFT framework is not robust enough to caution states against the threat of money laundering. The UN AML treaties cannot be enforced on the state unless they have been ratified. Even if they have been ratified, the state has the discretion to determine the scope of the applicability of the treaty inside its borders. States can also refuse (as in the case of Iran and Afghanistan) to ratify UN AML treaties. As for market oriented regimes, they are *ad hoc* in character, often adopted in response to global exigencies. Every time there is a crisis, FATF and Basle Committee adopt new regimes but only to be superseded by other unforeseeable challenges. It is a wrong approach to cluster states together and subject them to the same regulatory framework without taking into account their individual dynamics of development. Similarly, globalisation paradigm (context of this study) is a misnomer because it is manifested in sovereign states, which are often vested with strategic state interests. This presupposes that states can dictate the manner engendered global regimes can be implemented. The literature has also revealed the inherent weaknesses of the global AML framework. There is no global government, parliament and what is often called 'global' is manifested locally. Therefore, there is a possibility that proponent of global AML

⁴³⁰ Mugarura (n 377).

framework to make false assumptions in championing its adoption. More often than not, global prohibition regimes are adopted based on the local regulatory conditions in developed financial centres disregarding what could be happening globally. This is particularly the case with regard to the FATF AML regimes. Some of the AML regimes such as the Basle Committee core principles on banking supervision; and the forty plus nine recommendations of FATF are not meant to be legally binding. Soft laws guidelines such as the forty plus nine recommendations of FATF and the World Bank financial sector reforms are implemented on goodwill of states.⁴³¹ The FATF and the Basle Committee supervisory standards are now co-opted into the World Bank and IMF structural adjustment programmes. Normative global AML/CFT regimes should be implemented pragmatically across countries to reflect the realities of development between different countries and regions. To fully qualify as global regimes, the prevailing development conditions across LDCs should be factor in evolution of global AML regimes. There is likelihood that countries which are marginalised in the adoption of the global AML laws will be less inclined to lend their support to global regimes.

⁴³¹ These regimes are traditionally legally binding on states and other entities.

CHAPTER FOUR: THE SCOPE OF FINANCIAL MARKETS REGULATORY FAILURE IN LDCS⁴³²

4.1. Introduction

The success or failure of the global AML/CFT framework to a great extent depends on individual jurisdiction's capacity to harness it. Thus, this chapter explores the regulatory environment across LDCs and how it constrains the individual states ability to harness global AML/CFT regimes. The majority of LDCs are saddled with the absence of robust local institutions, lack of requisite skills, poverty and its constraining social-economic effects and the new typological challenge of HIV/AIDS. These economies are also saddled with wide spread corruption, lack of robust education systems, the absence of robust oversight institutions and weak political leadership, for instance in some African countries. I use the acronym "LDCs" to denote a group of countries which are characterised by general systemic failure, lack of a requisite infrastructure and capacity to harness a robust global AML/CFT framework. This chapter in the rubric of (H1 and H2 of the study) support the thesis that lack of a robust environment in LDCs constrains their capacity to harness the global AML framework.

⁴³²This chapter substantially draws on my book: Norman Mugarura, *The Global AML Regulatory Landscape in Less Developed Countries* (Ashgate, Farnham 2012):pp. 145-173.

4.2 Disparities in AML infrastructure between countries

The majority of LDCs are deficient in requisite infrastructure—a prerequisite to domesticate the global AML/CFT framework. For instance, things which are taken for granted in developed countries such as electricity, internet, telephones, TVs, cars, roads, hospitals, schools, universities are limited, if not non-existent in the majority of LDCs . These deficiencies have translated into the inability of some countries to harness normative global AML/CFT regimes. The FATF requires international financial institutions to continuously monitor customers' accounts in order to counter money laundering and its predicate crimes.⁴³³ A corollary of the duty to report suspicious transactions is the obligation of credit and financial institutions to demonstrate due diligence in their transactions. Credit and financial institutions are under a duty to examine with special attention any transactions which they regard as particularly likely, by their nature to be related to money laundering. This duty extends the scope of cooperation beyond suspicious transaction reporting. According to EU Commission, co-operation is a necessary condition of reporting to be demonstrated by banks even when there is not yet specific suspicion of money laundering.⁴³⁴ Banks are under a duty to foster an environment where it is easy to implement the “Know Your Customer” identification paradigm. The bank’s CDD mandate is highlighted by recommendations 15 (now 14) and 21 of the FATF (2001).⁴³⁵ Recommendation 14 of FATF requires financial institutions to pay special attention to all complex or unusually large transactions, or unusual patterns of transactions, which have no apparent

⁴³³ See, FATF recommendations 3 and 4 of (2001).

⁴³⁴ The EEC Commission Report (1995).

⁴³⁵ See Appendix 1

economic or visible lawful purpose. Recommendation 21, on the other hand, requires special attention to be paid to business relations and transactions involving countries which do not or sufficiently apply the FATF, AML/CFT standards.⁴³⁶ The wording of these recommendations was reiterated in Article 4 of the Directive,⁴³⁷ which places credit and financial institutions under a duty to “examine with special attention any unusual transactions not having an apparent economic or visible lawful purpose”.⁴³⁸ In this respect, an attempt was made to establish the objective model of due diligence through the introduction of the concept of “an unusual transaction”.⁴³⁹ However, what constitutes unusual transactions prompted a series of reactions related to the absence of legal certainty and the potential of the provision to impose a heavy burden on the institutions concerned.⁴⁴⁰

In fact, the FATF requires banks to keep account books and records of transactions for prudential supervision, statistics and tax records purposes for five years.⁴⁴¹ Lack of requisite infrastructure in some countries has translated into failure to harness the global AML/CFT regimes such as “KYC”. In LDCs such as Uganda, the regulatory system is either rudimentary to provide ‘just-in-time’ results; or information profiles generated on customers are too patchy and unreliable for regulators to make instant strategic and policy decisions. In

⁴³⁶ W.C. Gilmore, *International Action against Drug Trafficking: Trends in United Kingdom*, 24 *The International Lawyer* (1990), pp.388-390.

⁴³⁷ 91/308/EEC.

⁴³⁸ EEC Commission, (n 434).

⁴³⁹ EEC Commission, (n 434).

⁴⁴⁰ In this context, the EU Economic and Social Committee called on the banking industry to resolve the issues created by the Article, while Parliament changed the wording slightly to include “any unusual transaction and/or any transaction not having an apparent economic or visible lawful purpose”.

⁴⁴¹ Recommendation 12 of FATF forty recommendations (1996), available on its website at www.fatf.org.

many developing countries, ⁴⁴²there is not only scanty data on different crime typologies, but there is also a limited access to a centralised database of cases on crimes. Lack of requisite data has constrained regulatory agencies to adopt requisite AML standards. Unless there is sufficient data on different crime typologies, the AML/CFT enforcement agencies will not be able to respond robustly to money laundering threats. In some countries, the AML laws are still in their infancy, including their legislative component. Low salaries for government officials, the need or desire to supplement modest salaries of public sector officials, and the use of clever business practices to mask the receipt of illicit payments are all among the many problems that affect the proper functioning of global AML laws in many countries.

The requirement for banks to continuously monitor their customers' accounts and cash flows so as to determine with reasonable certainty the source of their income and to use it in countering money laundering is impeded by the environment of systemic failure in LDCs. In these countries, regulators are not able to access records on customer profiles because of structural bottlenecks. For instance, in Uganda, it is difficult for forex bureaux to verify or generate the required customers' profiles because forex bureaux are used on a one-off transactional basis with no established customer verification mechanism. The transaction takes place at the counter where scanty data or the identity of the

⁴⁴² This problem has been voiced by AML Committee in East Africa, which works under the auspices of the East Africa and Southern African Anti-Money Laundering Group (EASAMLG). However because of international pressure to harmonise local laws, there is some improvement as regards record keeping.

customer is kept or is generated.⁴⁴³ Similarly, drawing on the Ugandan experience, the majority of Ugandans do not hold bank accounts and for small businesses operate on a cash-only basis. This environment has rendered prevention of money laundering crimes an insurmountable challenge. When people sell their produce (whatever these may happen to be) on an open market, they are paid cash, which they carry around in briefcases until it is disposed of on another purpose. In the interim, some may prefer to keep the money 'under their beds' since, for a large section of people in the society, the concept of opening a bank account is still remote and inconceivable.⁴⁴⁴ In so doing, they miss out on the attendant benefits of harnessing innovative facilities such as letters of credit, bonds and other financial instruments in securely effecting business transactions since these products are limited to bank account holders. The foregoing challenge underscores the difficulties of fighting money laundering in a jurisdiction where there is no mechanism to distinguish between 'tainted' and 'clean' money in the financial system. The public needs to be sensitised not only about the threat of money laundering but also on its impact with regard to fuelling other forms of crimes. As demonstrated in the table below, some SADC jurisdictions have not adopted measures to transpose the global AML framework.

⁴⁴³ Customers are simply asked to complete a foreign exchange transaction form which contains the amount of foreign currency that is being bought from or sold to a particular forex bureau. No other form of identity is required or asked.

⁴⁴⁴ This demonstrates the failure of government policy institutions to disseminate information on the importance of using banking services to the economy.

Table 1⁴⁴⁵

	Is money laundering a criminal offence?		Does the jurisdiction have client-profiling guidelines for financial services intermediaries and facilitators?		Are financial services intermediaries and facilitators required to report suspicious transactions?		Is the money laundering law extra-territorial in effect?	
	Yes	No	Yes	No	Yes	No	Yes	No
Botswana	X			X		X	X	
Lesotho		X		X		X		X
Malawi	X		X			X		X
Mauritius	X		X		X		X	
Mozambique		X		X		X		X
Namibia		X		X	X			X
Seychelles	X		X		X		X	
South Africa	X			X	X		X	
Swaziland	X			X	X		X	
Zambia		X		X		X		X
Zimbabwe	X			X		X	X	
Uganda		X		X	X			X

Table 1 provides insights into the capacity of a handful of jurisdictions in East and Southern African Countries to implement a requisite AML system nationally. It can be argued based on Table 1 that the government issued identification documents (such as passports, birth certificates and the least used Identity cards in countries like Uganda) should be appropriately utilised to facilitate banks in generating records on prospective bank clients in LDCs. However, in situations where this mechanism cannot be implemented, an

⁴⁴⁵ This table has been constructed based on a paper by Charles Goderema, "Money Laundering in Eastern and Southern Africa: An overview of the threat", *Institute for security Studies* (ISS) Pretoria, 2003.

equivalent pragmatic mechanism of should be devised in verifying customer profiles.⁴⁴⁶ For example in Uganda local leaders, working under the aegis of the local council system⁴⁴⁷ are used to provide an interface for verifying the identity of persons who wish to obtain Ugandan passports for purposes of travelling abroad.⁴⁴⁸ The possible advantage of using the foregoing regulatory model—based on the interplay between local councils and public officials is that local councils (LCs) are in close proximity with passport applicants and capable of vetting who they are than the passport issuing officer. Since LDCs lack the capacity to generate sufficient data, they need to devise their own distinctive regulatory approaches to plug information shortfalls. Public officials in countries where systems for customer verification are inadequate might not be in a position to authenticate information on a passport applicant. This regulatory model should be adopted in LDCs to enhance information exchange and foreclose deficiencies in the system. It is therefore essential for banks to forge a close working relationship with other agencies (such as the anti-fraud wing of the police) to ensure that the system of verification is streamlined and properly utilised in regulation of financial markets.

In the majority of LDCs, it is possible for banks to be susceptible to sophisticated money laundering schemes because of lack of sufficient data on

⁴⁴⁶ In some societies, the system is so rudimentary that that it might not be possible to generate necessary records on prospective bank clients.

⁴⁴⁷ Ugandan passports were found in the hands of Congolese rebels who were arrested in Belgium. If the system is streamlined by isolating regulatory anomalies, it has the potential to ease the deficiencies in passport application and issuing processes.

⁴⁴⁸ The logic is that members of every household are either registered or known by local councillors and in proximity with the applicant to know who they are. While this could be a good mechanism for use in verifying passport applicants, the fact that local council officials are not salaried, makes them easily corruptible.

present and prospective bank clients.⁴⁴⁹ It is evident that lack of sufficient data on potential bank customers in some countries undermines banks and other financial institutions in making important strategic and policy decisions. Banks cannot easily verify records on persons wishing to use the banking services such as borrowing money or even opening bank accounts. There is a possibility that a person, who borrows money and defaults in one bank, can simply walk across to the next bank and borrow money without ever being detected as the defaulter in the former bank. LDCs need to be given assistance so that they are able to develop requisite technological capacity and be able to cope with the speed and dynamics of a robust AML/CFT regulatory system.⁴⁵⁰

4.3 Disparities in ICT Development

Since the global system is technologically embedded, the space in which it is manifested no doubt favours technologically advanced economies as opposed to LDCs. The wide spread encryption technology undermines the capacity of fledging countries to harness the technologically oriented AML procedures and systems.⁴⁵¹ The ICT world is developing faster than LDCs can afford to adjust; and they are accordingly at “a back foot” and prone to criminal exploitation. Criminals have demonstrated the potential to manipulate markets, to undermine controls and to keep a step a head of detection. They have exploited enhanced technology to interact with their sponsors and other

⁴⁴⁹ Mugarura (n 432).

⁴⁵⁰ Mugarura (n 432).

⁴⁵¹ Morris-Cotterill Nigel, “The Use and abuse of the Internet in Fraud and Money laundering”, (1999), 13(2) *International Law Review*, 211-212.

syndicates in setting up schemes and in liaising with local criminal groups. The Internet technological environment has not only engendered new crime typologies but it has also changed the regulatory landscape in which modern crimes are regulated. Meanwhile, in most DCs, advances in technology often imply that many business operations are impersonalised (for example, the Internet and telephone banking), making the system prone to exploitation.⁴⁵² There is no longer the urge for the business and customer intermediation since the business is conducted either on line, by telephone or any other electronic means without knowing who the parties are. Criminals are known to exploit advances in communication technology to stay ahead of law enforcement authorities by circumventing state prudential controls. In theory, globalisation of markets has been applauded for transmitting technological benefits from developed to less developed countries, helping to bridge the digital divide between economies. On the negative note, the Internet has precipitated an ideal environment for those contemplating to perpetuate money laundering related crimes to do so with ease.

The administration of KYC, AML/CFT paradigm in LDCs has been derailed by the slow pace of technological development. Due to the radical changes in the regulatory environment as a result of innovations in advanced technology, criminals who, often would have been identified at the initial business stage have slipped through the impersonalised nature of the modern business technological landscape unnoticed. Thus, much as globalisation of markets

⁴⁵² Mugarura (n 432).

has generated economic synergies for the business community,⁴⁵³ the system is still slanted in favour of DCs as opposed to LDCs.⁴⁵⁴ No doubt the new technological environment has undermined the capacity of some countries to harness desired AML/CFT regimes. Asymmetries in information in some countries signify that important policy issues will be misjudged, resulting in increased transactional costs and reduced profit margins. Therefore, LDCs should put emphasis on developing and promoting technologically oriented education, to enhance fight against corruption and money laundering.⁴⁵⁵

4.4 The use of education to leverage the fight against money laundering offences

The early experiences of many DCs in achieving their development goals through education correlates the importance of education in stabilization of markets. For instance, Japan was able to modernise and to position its economy on the path to development by evolving a policy of educating its populace in Western knowledge and practices.⁴⁵⁶ To foster its development goals, the government would later launch an ambitious educational programme of all Japanese children, adopting systems principally from France, Great Britain and the US.⁴⁵⁷ Many Asian economies, such as South

⁴⁵³ Some of these synergies include augmentation of domestic savings, reduction in the cost of capital, transfer of technology from advanced countries to developing countries and the development of the financial sector. Indirect benefits include production specialisation due to better management and improvements in macro-economic policies.

⁴⁵⁴ LDCs have not garnered the capacity to harness the global system efficiently because they are deficient in technological capacity, the lever of the global system.

⁴⁵⁵ Mugarura (n 432).

⁴⁵⁶ B. Kinoue, "From individual dignity to respect for Jinkaku—continuity and change in the concept of the individual in modern Japan, quoted in Micheal Likosky, *Legal transnational processes: Globalisation, power and disparity* (Butterworth Lexis Nexus 2002), 295-6.

⁴⁵⁷ Kinoue, (n 456).

Korea, Taiwan, Hong Kong and Singapore, and later post reform China and Thailand and other countries in East and South Asia have done remarkably well in spreading economic opportunities through adequately supportive social background, including high levels of literacy, numeracy and basic education.⁴⁵⁸ The government of Japan integrated moral ethics within its education curriculum as a means to translate government's developments programmes at a later stage. It can be inferred that, if education is properly exploited, it has the potential to generate information and enhanced awareness on AML/CFT regimes and how they should be adapted nationally. If properly utilized education can enhance the globalization of markets by generating the desired skills requirements through training. There is overwhelming evidence that LDCs are deficient in requisite technical capacity to develop robust AML counter-measures. They are also marginalized on many aspects of global governance. Just one of the many examples, they are marginalized in the WTO trade policy negotiations and they have subsequently failed to gain substantially from engendered trade policy initiatives. LDCs are said to lack negotiators with sufficient knowledge and expertise on technical issues tabled for negotiation in the WTO. During the Uruguay trade round (1986-1994) many countries including South Africa made several commitments to the multilateral trading system without fully realising the implications of those commitments on their economies.⁴⁵⁹

Specific skills training especially in tertiary institutions should focus on developing appropriate models to offer solutions on a wide range of policy

⁴⁵⁸ Amartya Sen, *Development as Freedom*, Oxford University Press (2001), p. 91

⁴⁵⁹ Mugarura (n 432).

areas where the priorities of the economy are. Education should include a component of ethics training because cognitive skills alone have proved less robust in fostering the development needs of economies. At a national level, education should be integrated with ethics training to safeguard against money laundering and corruption.⁴⁶⁰ A good education can potentially foster desired changes and precipitating a development oriented outlook in the populace. In this same vein, all managers of enterprises or organisations should undergo specific and tailored ethics-training programmes as part of local strategic leadership initiative. In my view, lack of ethics training component in academic degree programmes is responsible for the raging corruption in the African continent. For instance in Uganda, corruption has become so widespread that it is perceived as a norm rather than an exception. The public should be sensitized (through educational platforms like universities, public seminars and government sponsored outreach programmes) on the ramifications of money laundering and corruption in the society. Owing to antiquated systems in countries like Uganda, record keeping is manual and of poor quality. In most financial institutions in less developed economies, there are no records at all that can help in monitoring transactions or tracking cases of money laundering because records are poorly kept. It is for this reason that education should be reformed to reflect pertinent changes and challenges in the society.⁴⁶¹

LDCs should be supported in grants and technical assistance so that they are able to develop requisite skills in the key policy areas such as regulation of

⁴⁶⁰ Mugarura (n 432).

⁴⁶¹ Mugarura (n 432).

markets, international trade and other exigencies. In relation to money laundering crimes, education institutions can essentially be utilised as a platform for promoting public consciousness campaign across different segments of the society. Similarly, education institutions can be utilised to disseminate information on policy, law and other development exigencies using seminars, public enlightenment campaigns, workshops, conferences, press release and training. Since many LDCs are faced with the challenges of skills shortages, government policy institutions make optimal use of academics in evaluating anticipated policy needs. There should be government supported public outreach campaigns to help members of the public to understand the problems of financial system abuse by unscrupulous persons engaged in various illicit activities such as money laundering and corruption. Information should be generated and consolidated on national databases and made readily available to agencies in adapting desired anti-money laundering regimes.⁴⁶² It needs to be noted that some crimes such as corruption are fuelled and sustained by ignorance. Thus, education institutions should be aided to train and sensitize grass root communities on changes and challenges in the society. If the public is sensitized, it can foster desired changes on policy and development in the society.⁴⁶³

Legal education in all globalising countries should be evolved with a component of ethics training so that it serves as the flagship of development in individual countries. Education institutions can provide opportunities to undertake research studies on crime typologies, financial markets regulation

⁴⁶²Kinoue, (n 456).

⁴⁶³Kinoue, (n 456).

and other challenges in the society.⁴⁶⁴ For instance, education institutions in England are utilised by the government in policy analysis and evaluation. I presume, there would be no problem for LDC's to replicate successful development models from other jurisdictions but to localize them to suit their local particularities of development. It is not only necessary for LDC's to implement the global AML framework but also to integrate into the wider global market system. However, there is a need for a trade off to ensure that the adoption of normative global AML/CFT standards by individual states is not undertaken in a careless manner to alienate individual countries.⁴⁶⁵ Emulating for example the USA and other DCs where national policy initiatives are fostered through academic institutions, fledging countries should replicate the foregoing model in internalising AML regimes. The use of academics in formulation and implementation of desired policies has the potential to leverage LDCs in overcoming requisite skills shortages. Banks and other financial institutions should spearhead training programmes on markets, corruption and policy related challenges in the society. In Uganda, financial market regulator (Bank of Uganda) has made sure that local stakeholders are enlightened on the complexities of the market economy. It does this through periodical press release trying to inform local stakeholders on their vulnerability to global factors (how the local market can be susceptible to remote events in other parts of the world).⁴⁶⁶ Equally, the FATF should forge partnership with national governments to undertake desired reform programmes where both domains can benefit. They should establish

⁴⁶⁴ This is well illustrated by the fact that many anti-money laundering initiatives are geared towards building a strong data base on both present and prospective bank clients.

⁴⁶⁵ Mugarura (n 432).

⁴⁶⁶ This can be achieved by disseminating information through National News papers, and market sensitisation seminars, hosting radio talk shows and television programmes.

mechanisms to ensure that engendered AML/CFT regimes are fostered through a local-global partnership. The local-global partnership should be encouraged using communication platforms such as local media (radios, televisions or local news papers), academic think tanks and academic institutions.

Education institutions should be brought in the mainstream in formulation of national crimes control and prevention strategies.⁴⁶⁷ They should be utilised as platforms to undertake desired research studies and to evaluate government policies. Governments should impose continuous skills and ethics training as an obligation on managers of corporations, regulators and policy makers so that they are adequately equipped to address the offshoot challenges to the global market system including money laundering. The global AML regimes can easily be harnessed in an environment where there is robust information so that regulators are able to implement effective policies. There is also a need for enhanced technological capacity to ensure that societies are able to cope adequately with the inherent challenges of globalization. Governments should make the development of requisite technological capacity a priority since it is a linchpin for proper functioning of modern markets. Similarly, the ICT factor is also a prerequisite for institutions to harness normative AML regimes. The education policy failure in many countries, in part explains why some countries have languished behind others in terms of development. Therefore, it does not matter whether the issues at stake is harnessing global AML regimes or any other policy issue, there is no

⁴⁶⁷ This is essential to enhance intelligence gathering to enhance the fight against money laundering crimes.

society that can afford to dispense with the need for robust education, if it wants to remain viable.

4.5 Economic structural Issues

The majority of AML/CFT regimes are largely focused on regulating the formal financial sector such as banks and financial institutions.⁴⁶⁸ This approach tends to overlook the fact that criminals operate informally and in a clandestine way. In order to close the void between the formal and informal sectors,⁴⁶⁹ there is a need for a well coordinated intelligence system designed to establish the level of criminal activity in individual societies. Therefore, there is a strong rationale for the state to remain in the loop in regulation of financial markets, because its withdrawal would undermine intelligence gathering by its security institutions such as the police.⁴⁷⁰ State interventionism is necessary to maintain and restore the stability of domestic markets.

As regards foreign bank establishments, their parent companies should act as the lender of last resort. This should ensure that there is a safety net for foreign banks in the event of financial distress and to avert its attendant spill over effect on countries. Supervision of foreign business establishments should be consolidated to make sure that neither branch nor subsidiary

⁴⁶⁸ It is largely the formal sector that is regulated, but for the work of the informal sector the authorities need to be more proactive, if this sector is not to be exploited for illicit activities such as money laundering.

⁴⁶⁹ The informal sectors should also be regulated such that those who operate in it are registered with identifiable offices and easy to police.

⁴⁷⁰ This partly explains why failed states, for example Somalia, Iraq, the Congo and Afghanistan have become havens for drug trafficking and small arms trafficking.

escapes supervision.⁴⁷¹ This should be adequate and comprehensive. An adequate supervision is one in which the host authorities are responsible for the supervision of the foreign bank establishments (subsidiaries)⁴⁷² operating in their territories as individual institutions, while the parent authorities are responsible for them as parts of the larger banking group.⁴⁷³ Parent authorities should be informed by the host authorities of any serious problems which arise in a parent bank's foreign establishment and similarly, parent authorities should inform host authorities when problems arise in the parent bank which is likely to affect the parent bank foreign operations.⁴⁷⁴ Bank supervisors should be competent to practise consolidated supervision, in which case the parent banks or banking groups should be responsible for the supervision, as well as the adequacy of their capital on the basis of the business wherever conducted.⁴⁷⁵

The implementation of desired AML/CFT regulations in the majority of LDC is derailed by the fact that the majority of these economies are cash-based. This means that cash is used in effecting almost every transaction, even when transactions involve millions of shillings in the case of Uganda.⁴⁷⁶ Buyers

⁴⁷¹ Following the collapse of the BCCI in July 1992, the Committee published the minimum standards for the supervision of the international banking group and their cross-border established subsidiaries. The full account of these principals can be found at <http://www.bis.org/publ/bcbssc004.htm> (date accessed 9 September 2010).

⁴⁷² Subsidiaries are independent legal entities operating under the laws of the country of incorporation (host country) while branches are legally dependent units controlled by the parent licensing authorities.

⁴⁷³ Rosa Maria Lastra, 'Cross-Border Bank Insolvency: Legal Implications in the Case of Banks Operating in Different Jurisdictions in Latin America', (2003), 6(79) *Journal of International Economic Law*, 9.

⁴⁷⁴ Lastra, (n 473).

⁴⁷⁵ Consolidated supervision is based on the assumption that financial groups form a single economic entity. This mandates the parent to control the activities of the branch and subsidiaries.

⁴⁷⁶ The Shilling is the Ugandan currency, but money laundering can always take place in any currency, say US Dollars, British Pound Sterling etc.

simply go to their banks, withdraw whatever amount of money they want and effect cash payments to their creditors. The use of cash transactions are the norm rather than an exception across African countries. Introducing threshold cash reporting requirements is often proposed, but difficult to implement in practice because of the structural problems within these societies. Then there is also the challenge of cross-border transportation of cash and other criminal proceeds across countries. In Africa, it is easy for criminals to move illicit proceeds of crime across national borders without drawing attention of the authorities, due to the porous nature of land borders.⁴⁷⁷

The challenges inherent in a cash economy curtail the financial institutions efforts to distinguish “dirty” from “clean” money.⁴⁷⁸ Distinguishing tainted and clean money underscores what money laundering is and what it is not. The FATF’s recommendation 1 imposes obligations on countries to take measures to stop terrorists and criminals from using cash carriers to finance their activities.⁴⁷⁹ Banks rely on the “verbal information” provided by the customer, which may be inaccurate, exaggerated or hard to corroborate. The absence of data registry centres to generate data profiles on customers in relation to things like bank loans has created serious market risks. For example, the absence of customer credit profiles implies that both defaulters and non-defaulters are treated in the same way and subjected to the same assessment benchmarks. This has made major banks in Uganda to embark

⁴⁷⁷ The Commonwealth Secretariat Paper, ‘A Model of Best Practice for Combating Money Laundering in the Financial Sector’, (2000) London, 9.

⁴⁷⁸ Rhys Bollen, ‘The International Financial System and Future Global Regulation’ (2008), 23(9) *Journal of International Banking and Financial Law Regulation*, 467.

⁴⁷⁹ Humphrey Moshi, ‘Fighting Money Laundering: Challenges in Africa’, (2007), *East African Human Rights Law Journal*, 1-7.

on a pilot study to reevaluate the system and test the possibility of introducing a credit reference bureau. This project was initiated to generate desired data profiles which would ease identifying customers when applying to access banking services. The information profiles generated would then be exchanged across banks to enhance identification of potential bank customers.⁴⁸⁰

The KYC mandate⁴⁸¹ requires institutions to identify and know who their customers are at the point of initiating a business relationship such as when opening bank accounts and continuously thereafter. The KYC applies to all cases involving entering into a business relationship, especially when opening a savings account or when offering a safe custody facility. The KYC requirement applies to any transactions to the tune of £10,000 or 15,000 Euros in case of United Kingdom and European member countries respectively. If it should transpire that the institution doesn't know the sum involved at the time of the transaction, it must proceed with the identification procedure as soon as it knows the sum and has established that the amount involved meets the threshold requirement. Even in cases where the amount of the transaction is less than 15,000 Euros, the institution must ask for identification if it suspects money laundering.⁴⁸² Identification procedures for personal customers when opening accounts may need to be varied

⁴⁸⁰ The Ugandan daily newspaper, *the New Vision*, of 11 August 2008.

⁴⁸¹ KYC presupposes that if the bank knows its customer, then they are likely to know when and where they are trying to launder money using financial institution services. The problem is that banks have millions of customers who benefit from banking services, making them stretched or short staffed and are virtually overwhelmed by the sheer scale of financial institution operations.

⁴⁸² Lastra, (n 473).

depending on whether the individual is resident or non-resident.⁴⁸³ Different considerations may apply in opening of 'trust accounts'. An even greater range of possibilities will need to be catered for in the opening of accounts for legal persons.⁴⁸⁴ The identification duty is complemented by the obligation of credit and financial institutions to keep records of the following, in order to be used as evidence in any money laundering investigation:

- (a) In the case of identification, a copy or the reference of the evidence required;
- (b) In the case of transactions, the supporting evidence and records (consisting of the original documents or copies) should be admissible in court proceedings under the applicable national legislation.

There are situations, however, where identification requirements have been relaxed, for example in cases involving insurance policies written by insurance undertakings within the meaning of the AML Directive,⁴⁸⁵ where the annual periodic premium amounts paid do not exceed 100,000 Euros. Member states may waive the identification requirement for insurance policies in respect of certain pension schemes.⁴⁸⁶ On the other hand, where there is doubt that the customer is operating on their own behalf, or where it is certain they are not, credit and financial institutions are required to take reasonable measures to obtain information so as to ascertain the true identity of the persons on whose behalf the customers are acting.⁴⁸⁷

⁴⁸³ Lastra, (n 473).

⁴⁸⁴ Lastra, (n 473).

⁴⁸⁵ Council Directive 79/267/EEC.

⁴⁸⁶ Council Directive 79/267/EEC.

⁴⁸⁷ Article 4 of the Directive (79/267/EEC).

Most LDCs are deficient in customer profiling mechanisms and capacity to verify present and potential bank customers. This is highlighted by the fact that very few residents would have their physical land addresses registered, let alone known by authorities. This is contrasted with DCs where customer identification mechanisms have been simplified to a matter of seconds because of advances in technology and availability of post code system.

Meanwhile, the administration of the KYC paradigm in the majority of the DCs financial institutions has either been misused or overused against certain groups who are disadvantaged in the society such as non-naturalised immigrants.⁴⁸⁸ It is within this cohort that many applicants are refused bank accounts either because they are unable to produce the required documents such as birth certificates⁴⁸⁹ or to satisfy residence requirements, and work profiles of the prospective customers who may want to open a bank account with a particular bank. This is one of the factors why alternative remittance systems (ARS)⁴⁹⁰ as a means of remitting money to immigrants' countries of origin have proliferated in many parts of the World.

The ARS operate in such away that the sending customer (the originator of the money/value transfer) pays or hands over funds to the ARS operator. The originator also specifies the recipient or beneficiary of the transaction along

⁴⁸⁸ I appreciate that the foregoing measures are necessary for the proper functioning of financial institutions, but the problem is that they have a tendency to sideline least developed economies disproportionately.

⁴⁸⁹ Many societies where immigrants originate do not have developed systems of recording births, deaths largely due to an antiquated system Countries operate it in.

⁴⁹⁰ This is the informal way used for transferring money from one location to another which operates outside the official banking channels. ARS includes either money or value transfer regardless of their legal status in particular jurisdictions and regardless of whether or not they are currently covered in part or total by national regulatory systems.

with his or her location. The funds can be paid in cash, cash equivalent, cheques, in other monetary instruments or in stored value cards. In certain situations, the originator can pay cash directly into a bank account operated by the ARS operator. In large ARS networks, the customers generally have access to the ARS through local agents (sub-agents). The originator usually receives a unique reference to identify the transaction, which is then passed on to the beneficiary. The originator's only role will be to follow up and relay the information to the ARS operator if there is any problem with regard to the receipt of the money.⁴⁹¹

These informal banking channels have grown in popularity across many parts of the world apparently because of favourable market conditions spurred by globalisation. However, in relation to money laundering, remittance channels are sometimes infiltrated or misused by those contemplating to launder illicit proceeds of crime.⁴⁹² The use of false identities and structuring are common techniques to which ARS are vulnerable. The risks associated with ARS will vary from country to country. For example a developing country relying heavily on domestic ARS, but without the infrastructure to verify the identity of the sender, faces different regulatory challenges compared to a country with a developed formal sector.⁴⁹³

⁴⁹¹ The aforementioned method is used for remitting money home among the Ugandans immigrant residents in London.

⁴⁹² See the Interpretative Note to FATF Special Recommendations VI: Alternative Remittance Systems issued in February 2003.

⁴⁹³ Financial Action Task Force, 'Money Laundering and Terrorist Financing Typologies' 10 June 2005.

While appreciating the importance for a global AML framework, some of the AML/CFT regimes are not yet compatible with the regulatory environment in LDCs. At a more specific level, recommendation 12 of FATF requires banks to know their customers prior to initiating a business relationship. It is evident that this recommendation is too onerous for many fledging countries to harness because they lack requisite capacity on many regulatory issues. There are no centralised registries where information on nationals of the country can be collated, verified and accessed by oversight institutions. This has rendered financial institutions susceptible to criminal exploitation due to lack of requisite data on business counterparties. To streamline the system such as identification of national residents and potential bank customer, it is essential for banks working closely with national governments to encourage and facilitate registration of land ownership. Land registries which would leverage economies in plugging information gaps in countries like Uganda are antiquated, disorganised, understaffed or staffed with underpaid corrupt public officials.⁴⁹⁴ Secondly, registration of land ownership is still in its infancy and not widespread in countries like Uganda. By contrast, it is possible for banks in DCs to verify a prospective bank account holder in a matter of seconds, by way of verifying registered addresses using the postcode system.

While the FATF requires countries to adopt its AML/CFT framework as caution against money laundering, it might not be feasible for some countries to implement it because of their local dynamics of development. In my view, the priority for countries should be to first eradicate poverty and corruption to

⁴⁹⁴ In any case, very few people bother to register their land titles; and as such land certificates cannot be used for verification purposes.

demonstrate their seriousness to internationalise their economies. In my view, LDCs are likely to remain sidelined, if they do not rethink their strategies in the global market system. With widespread poverty and the tenuous infrastructure, developing countries are predisposed to conditions of capability deprivation.⁴⁹⁵ It is evident that poverty has cultivated an environment for criminal exploitation such as money laundering and its underlying predicate crimes.

4.6 Lack of resources and its inhibitive effect in domesticating desired market reforms

The ability of a state to harness the global AML framework or not is dictated by availability of requisite human and physical resources capacity and vice versa. The availability of resources factor is essential to facilitate the creation of laws and procedures; and to ensure that requisite AML laws are integrated into national legal systems. Thus, resource constraint effect has inhibited individual countries ability to develop a comprehensive policy framework against corruption and its attendant social evils. The three East African countries of Uganda, Tanzania and Kenya have all contended that their efforts to participate fully in regional initiatives and to implement the UN Conventions on cross border crimes (such as Palermo, 2000)⁴⁹⁶ are often derailed or constrained by lack of sufficient resources. Lack of requisite resources has constrained the capacity national regulatory and policy institutions in harnessing desired policy initiatives. For example, in Kenya and Uganda,

⁴⁹⁵ Amartya Sen, *Development as Freedom*, (Oxford University Press, 1999), 87.

⁴⁹⁶ This is a place in Italy where the United Nations Convention Against Transnational Organised Crimes was convened on 15 December 2000.

national institutions such as the police—whose constitutional mandate includes keeping law and order by fighting crimes have fared badly in executing this mandate. On the majority of occasions, the police is either complicit to crimes, constrained in requisite capacity, antiquated in their operational methods and unable to respond astutely to imperatives of the dynamic global market economy. For instance, in undertaking this study, I was astonished to learn that some police officers in Uganda did not have a clue of what money laundering—as crime is. I presume this is to do with the fact that Uganda has not enacted a law which proscribes money laundering as a distinct offence. This could also be due to lack of resources to spearhead training of the police on the typologies of modern crimes they are dealing with. Lack of resources has derailed efforts towards fighting money laundering offences, not only in LDCs but also in DCs too. In United Kingdom for instance, money laundering laws (though laudable in theory) have been hamstrung in practice by the chronic lack of resources available for tackling money laundering, disjointed handling of suspicious activities and the low police priority given to money laundering prosecutions.⁴⁹⁷

Local capacity building in many African countries has been derailed by the following factors.⁴⁹⁸ Some of the internal problems in Africa vary, but include inherited colonial legacies and the transition from colonialism to undemocratic and often corrupt, militarised neo-colonial regimes.⁴⁹⁹ The foregoing predicament has undermined economies by diverting resources away from

⁴⁹⁷ *The Guardian Newspaper* 20th December 2008.

⁴⁹⁸ This is highlighted by the war which is currently taking place in the Democratic Republic of Congo.

⁴⁹⁹ This was true in the case of Uganda under the dreaded Ida Amin era (1971-1979).

areas such as education, industrialisation, and building a stable economic and social infrastructure to support development. Similarly, lack of civil liberties, gender discrimination, lack of freedom of expression, bad education and a failure to promote education have not helped to advance stability in the majority of LDCs. Lack of adequate professional expertise such as supervisors of oversight institutions, auditors, policy makers, legal experts in some countries has been manifested into a precarious environment in which to implement normative AML regimes.⁵⁰⁰

Many developing countries have been depleted of their human resource capacity through corruption, perpetual Wars, Malaria, HIV/AIDS and other economic and social vagaries. This has been compounded by the effect of negative globalisation where some countries have become marginal participants (losers) in the global economy.⁵⁰¹ LDCs have lost people of all ranks and ages to HIV/AIDS, many of whom would have been highly skilled and not easily replaceable by the standards of affected countries. This plight is vividly demonstrated by the fact that conditions across the whole of the Southern African region deteriorated in the 1990s to their worst ever recorded levels: under five year old mortality (140 per 1000 children); incidence of deadly diseases such as malaria (15-45 years of age), tuberculosis (149 per 100,000 people) and HIV/AIDS (30 AIDS cases per 100,000 people and 12

⁵⁰⁰ These concerns were raised by FATF East and Southern Africa region group—in policy paper of 30th December 2010, available on its website at www.fatf.org (date visited 12th December 2011).

⁵⁰¹ According to International Labour Organisation (ILO) estimates, Zimbabwe is said to have lost 100,000 of its skilled talent in the last two years and it is therefore estimated to be losing an average of 50,000 people per year. AIDS is also taking its toll due to poverty and limited access to retroviral drugs.

percent prevalence for adults under 49 years of age in 1995).⁵⁰² While social suffering in the majority of LDCs increased, their capacity to increase expenditure on health and education declined. Many developing countries have become resourcefully constrained and unable to implement normative AML standards, or any other normative global initiatives. It needs to be noted that poverty creates conditions of capacity deprivation, not to mention relegating a society to a life of suffering and misery.

The foregoing analysis presupposes the need for LDCS to undertake radical reforms so as to reverse economic and social trends that have marginalised them on many issues of global governance.⁵⁰³ There is a need for countries to facilitate police training in criminal and cross border jurisdictional matters because a well-trained police force can easily leverage the fight against crimes including corruption and money laundering. Similarly, police training with regard to professionalism and ethics can help to promote local consciousness about crimes and new crime typologies. States need to appreciate that every crime control strategy at a national level has got to involve the police whose constitutional mandate includes enforcing law and order. Therefore there are varied challenges across different jurisdictions which necessitate the need for flexibility in harnessing normative AML laws.

4.7 The Ugandan financial markets regulatory experiences

⁵⁰² Patrick Bond, *Against Global Apartheid: South Africa Meets the World Bank, IMF and International Finance* (University of Cape Town 2001), 26.

⁵⁰³ See Article 39 of the United Nations Charter 1945.

While crimes which generate criminal proceeds are proscribed under the Ugandan law, money laundering is still treated as a derivative offence.⁵⁰⁴ Through the World Bank financial sector reform programmes, Uganda was able to adopt the Financial Institutions Statute (FIS) 1993, which was intended to enhance the regulation of financial markets.⁵⁰⁵ This law was enacted following the financial sector reform programmes that started in 1991 with the support of the World Bank financial sector adjustment credit.⁵⁰⁶ The enactment of the FIS was meant to lay down a sound legal framework for the regulation of banking business in a newly liberalized market environment. This was meant to control the legislative deficiencies, the banking sector had experienced under the Banking Act 1969. To foreclose gaps in the financial markets regulatory system the Foreign Exchange Act (2004) was enacted.⁵⁰⁷ This Act contains provisions such as clause 8(3) which prohibits Forex Bureaux from dealing in money transfer to or from the country. It was envisaged that if foreign exchange bureaux were allowed to operate in a relaxed regime, it would undermine financial institutions in implementing the Basle⁵⁰⁸ guidelines on Banking supervision and regulatory practices. These guidelines were transposed in Uganda through the adoption of Financial Institution Statute (FIS) 1993. With the reduced regulatory oversight of the central bank of Uganda (regulator), criminals were able to counterfeit currencies and to introduce it into the financial economy. The integrity of

⁵⁰⁴Peter Edopu, 'Infrastructure to Detect and Control Money Laundering and Terrorist Funding in Uganda', available on the internet at http://uk.f524.mail.yahoo.com/ym/showLetter?Msgdid=5966_149 (date accessed 20th July 2007).

⁵⁰⁵Nyanduga Mukinya, 'Evolution of banking systems in East Africa: A comparative view', (2002) Central Bank of Kenya, 1-16.

⁵⁰⁶ Mukinya, (n 504).

⁵⁰⁷ *The Monitor*, Kampala, Thursday, (2004) 5 August, 4.

⁵⁰⁸ It should be noted that the "Basle guidelines" is not a treaty capable of producing a binding effect on states signatory to it, but just a "soft law" constituting a statement of good policy practices.

financial institutions in Uganda was tainted by the fact that banks and forex bureaux had been complicit to money laundering offences. Many foreign exchange bureaux were found to have been aiding and abetting money laundering.⁵⁰⁹

The economic structural problems in Uganda have translated into the failure of national financial institutions to harness the global AML framework. Banks are required by law to institute internal mechanisms so that they are able to know who their clients are at the point of initiating the bank/customer relationship and subsequently thereafter. In opening bank accounts with Ugandan banks, the prospective bank customers are introduced to the bank by someone who already holds a bank account with a particular bank of a customer's choice. In the interim, the prospective bank customer would have completed a form and furnished the bank with verifiable documents such as a passport or a driving licence.⁵¹⁰ At the moment, it is not easy to verify the identities of prospective bank customers using government issued identification documents such as passports in Uganda. In the first place, the process of obtaining Ugandan passports has in the past not been properly streamlined. This has resulted in Ugandan passports being issued to people who are not legally entitled to hold them. Secondly, information provided on passport application forms is confirmed through the chairmen of local councils, locally known as "LCs".⁵¹¹

The LCs are used as an essential interface for the government and local

⁵⁰⁹ One of these was 'give and take forex bureau.' But also in 1996 an employee of Oriental Forex Bureau was intercepted at Entebbe Airport trying to siphon one billion in Uganda Shillings in foreign currencies out of the country. On interrogation he admitted that he on many occasions laundered money out of the country by disguising it as casual merchandise.

⁵¹⁰ Norman Mugarura, 'Globalisation and Financial crimes Nexus: A perspective of Currency Counterfeits in Uganda', (2009), unpublished paper, 1-9.

⁵¹¹ The Local Councils are Local Government administrative structures at Local Parishes, Counties and the District levels.

communities in implementing government policies. The advantage of this model is that LCs are in close proximity with individual passport applicants and capable of verifying who they are.⁵¹² The down side however is that many village LCs are not properly educated to fully comprehend information provided on the forms, leave alone what the applicant has filled in. There are no government sponsored training programmes of LCs to ensure that they are knowledgeable in all core areas of their responsibilities. The government should spearhead mandatory training programmes of all village LCs in core functions and responsibilities such as filling forms, interviewing, security and more, so that they are able to provide an interface for proper regulation of financial markets. Secondly, the fact that “LCs” are not paid salaries, save for small allowances, has made susceptible to corruption especially from those who have money to buy their way. The Ugandan government should streamline the LC system and utilize it as a mechanism to plug essential information shortfall on potential customers. There is a need for LCs at various levels of local government to be paid salaries so that they are not exploited for criminal expediency.

In my view, the effect of corruption has sidelined LDC's far more than HIV/AIDS, considering the amount of public funds stolen by government officials. Millions of people's lives have either been put at risk or lost due to none payments of salaries of medical staff, stealing of drugs and other medical supplies by those charged with the responsibility of administering the system.

⁵¹² As a condition for processing passport application forms, the forms will need to be signed by the local area LC in the Zone where the applicant resides.

There is a need for sequencing of desired policy reforms, focusing attention on problem areas where the country is deficient in requisite capacity. As a result of corruption and its attendant vices, the global AML measures cannot be implemented in many LDCs easily as expected. The government issued documents have sometimes fallen in the hands of people not legally entitled to hold them. For many years, the passport issuing office in Kampala has been dogged with challenges of corruption, inefficiencies, poor work ethic of staff, the absence of a centralized database on passport applicants and thus the likelihood for Ugandan passports to be issued to people who are not legally entitled to hold them.⁵¹³

Therefore, much as government issued documents can be used to ease the verification of potential bank clients, it has not been easy to use this mechanism in harnessing the system. This is due to many factors but the overriding one is poverty and its constraining social and economic effects. It needs to be noted that financial markets cannot function properly in an environment of poverty. For instance, the majority of Ugandans do not appreciate the importance of opening bank accounts⁵¹⁴ when they are virtually living on breadline with no money to deposit into those accounts. This has made the majority of Ugandans to keep money in their houses and perhaps under mattresses until they have what to dispose it on. Secondly, banks are

⁵¹³ In February 2006, genuine Ugandan passports and visas were issued, (in unknown circumstances), to suspected Congolese rebels who had been arrested in Belgium with forged Congolese passports.

⁵¹⁴ This is because by estimate, almost 70 percent of Ugandans live in peasantry life with no viable sources of income. When this is coupled by the fact that Uganda is a cash economy makes the need for opening banks accounts less urgent as opposed to other economies.

exposed to enormous regulatory risks in an environment devoid of the capacity to generate robust information. It is therefore difficult, if not impossible for institutions in some Countries to administer robust CDD measures based on the prescribed FATF standards as required.

4.8 An overview of the South African experience

In South Africa, when the AML/CFT legislation was adopted in (2000), the Minister of Finance negotiated and applied an exemption under the Financial Intelligence Centre Act 38 of 2001 (FICA).⁵¹⁵ This exemption was deemed essential to level the playing field as many potential bank customers would be excluded by lack of verifiable residential addresses; and lack of essential documents such as gas or telephone bills.⁵¹⁶ Currently, Exemption 17 of the above Act applies to all banks, mutual banks, post banks and other financial institutions such as Ithala development corporations.⁵¹⁷ However, for a person to qualify under the Exemption 17, he or she must be a natural person who is a citizen of, or resident in South Africa. The business relationship and single transactions must not allow the customer to withdraw, transfer or make payment of amount exceeding Rs 500,000 (US\$500) per day or exceeding Rs 2500,000 in a monthly circle.⁵¹⁸ As long as the foregoing conditions are met, the service provider does not need to request information to verify the customer's residential address. The South African pragmatic approach in the

⁵¹⁵ Louis de Koker, "The money laundering risk posed by low-risk financial products in South Africa: Findings and Guidelines", (2009), 12(4) *Journal of money Laundering Control*, 323.

⁵¹⁶ Koker, (n 515).

⁵¹⁷ Koker, (n 515).

⁵¹⁸ Koker, (n 515).

transposition of CDD demonstrates the practical challenges of harnessing this requirement in countries subject to different levels of development.

The experience of South Africa and Uganda corroborate the thesis that financial institutions in LDCs are susceptible to sophisticated money laundering schemes due to lack of requisite capacity for verifying present and prospective bank clients. The absence of centralised data registries on potential bank clients means that banks are not able to risk assess their clients; or that they are not able to adopt requisite AML counter-measures. Owing to the foregoing challenge, banks are not able to generate profiles of persons who may wish to access their services or products such as bank accounts, guarantees or even loans. It is possible that a person defaulting in one bank, can walk across to another bank next door; and borrow money without being detected as a high risk person due to lack of mechanisms for verifying and sharing data; and to risk assess clients between banks before they are sold services.⁵¹⁹

4.9 Money laundering offences in England and Wales

There are six distinct offences prescribed by the Proceeds of crime Act (POCA) 2002 in United Kingdom. The following offences apply in England and Wales:

1. concealing, disguising, converting, transferring or removing from the UK;

⁵¹⁹ Uganda has recently established the Credit Reference Bureau (CRB) to ease financial institutions in corroborating data on potential bank clients. However, in our view without a developed infrastructure, the introduced CRB might not function properly as envisaged.

2. entering into, or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property;
3. acquiring, using or having possession of criminal property;
4. failing to disclose knowledge or suspicion of money laundering, which came to his attention by virtue of his position as the nominated officer in the regulated sector;
5. failing to disclose knowledge or suspicion of money laundering where the offender is another nominated officer; and
6. the disclosure of information prejudicial to an investigation, i.e. 'tipping off'.

The Proceeds of Crime Act (2002) assimilates the money laundering offences introduced by Criminal Justice Act (CJA) 1988 as amended by the CJA 1993. Section 93A (1) (a) of the CJA 1988 focused on assistance when the retention or control by or on behalf of another (A) of A's proceeds of criminal conduct is facilitated whether by concealment, removal from the jurisdiction or transfer of nominees or otherwise. However, in order for the prosecution to secure a conviction against a money launderer, it must prove that he/she had a requisite mens rea of the alleged money laundering offence. POCA consolidates the earlier regimes on money laundering; but it also extends the scope of money laundering offences in United Kingdom.

4.9.1 Actus reus of Money Laundering Offences

In the context of the EU directive,⁵²⁰ the conduct that describes money laundering consists of: the conversion or transfer of property; the concealment or disguise of its origin; its acquisition or possession or use; and the participation or association to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the acts. This is a well-established offence in many EU member states,⁵²¹ except that as money laundering it would incur a higher penalty.⁵²² Section 329 of Proceeds of Crime Act (2002)⁵²³ criminalises the mere possession of criminal property. It can rightly be noted that the conduct that constitutes money laundering extends beyond the mere handling of stolen goods (as in the UK Theft Act 1968), because there is a need for action beyond mere possession (for example, assisting in retention or removal of property for the benefit of another person).⁵²⁴

4.9.2 The Mens rea of Money Laundering Offences

In criminal justice, most notably with regard to the presumption of innocence, the prosecution must prove that the launderer knew that the money was derived from an unlawful activity. The prosecution must also prove that by manipulating the funds, the accused intended to hide its origin, nature,

⁵²⁰ Council Directive of 10.6.1991 on prevention of the use of financial systems for the purposes of money laundering (91/308/EEC), OJL 166, 28.6.1991 at 77.

⁵²¹ Article 1(3) of the Second European Council AML Directive 91/308/EEC.

⁵²² Valsamis Mitsilegas, *Money Laundering Counter-measures in the European Union: A new Paradigm of Security Governance versus Fundamental Legal Principles*, (Kluwer Law International, 2003), 29.

⁵²³ This legislation is truly universal in nature, for not only does it encompass universal mandatory reporting, it also has the unique effect of drawing all the relevant offences of ML under a single, unifying statute. The previous increment system has been replaced, almost in its entirety, by a complete legislative framework aimed at reducing the ability of criminals to engage the financial system to launder their illicit gains.

⁵²⁴ P. Alldridge, *Money Laundering Law*, (Hart Oxford 2003), 92.

location, ownership or any other aspect thereof as described in the definition of the offence.⁵²⁵ This burden of proof can be very onerous, especially in view of the complexity of money laundering operations and extensive use of shell companies and bearer securities.⁵²⁶ To render this burden manageable, there is a growing consensus to allow for the reliance on inferential evidence. This is also set out in the Vienna Convention framework (1988), which provides that “knowledge, intent or purpose” required as an element of the offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.⁵²⁷ As noted in Harmer, the defendant’s knowledge may be inferred from factual circumstances where that inference is absolutely compelling.⁵²⁸ The prosecution needs to prove that the property in question constitutes the proceeds of crime or drug trafficking. Under s. 93C (1) of the Criminal Justice Act 1988⁵²⁹ and s. 49(1) of the Drug Trafficking Act 1994, there is an express reference to dealing with the proceeds of crime and, because of that, it is essential for the prosecution to prove the source of money so as to satisfy that the alleged property is a proceed of crime.⁵³⁰ It will also be incumbent on the prosecution to prove that the defendant knew of the foundation facts on which he ought to have formed the suspicion.⁵³¹ The requirement for the “reasonable grounds to suspect” is a subjective test that

⁵²⁵ Art. 3(1) of the Vienna Convention on Illicit Drug Trafficking and Psychotropic Substances 1988.

⁵²⁶ Article 3(1), (n 525).

⁵²⁷ Article 3(3) which reads that “knowledge, intent or purpose required as an element of the offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances”.

⁵²⁸ *Kwan Ping Bang* [1979] A.C. 609, 615.

⁵²⁹ Fundamentally, the CJA 1993 introduced the concept of mandatory reporting: where in the course of his trade, profession, business or employment, a person knows or suspects that another person is engaged in drug ML, he or she is under a legal duty to report his knowledge or suspicion to the constable. See s. 26B of DTOA 1986, as inserted by s. 18 CJA 1993.

⁵³⁰ For an exposition of the requisite mental element of money laundering offence, see the case of *R v Montila (Steven William)* [2004] UKHL 50; [2004] W.L.R. 3141 (HL)

⁵³¹ Mitsilegas, (n 522).

seems to oblige the prosecution to establish that the defendant himself had formed the suspicion and that it was based on reasonable grounds.⁵³²

Money laundering is thus established in cases where the defendant either knew or reasonably ought to have known that the money in question was the proceeds from crime.⁵³³ The efforts to adopt a broad anti-money laundering framework have led to the additional element of suspicion in the *mens rea* of a number of offences, constituting or related to money laundering. There are offences such as assisting another to retain the benefits of criminal conduct and tipping off.⁵³⁴ The *mens rea* requirement of concealing or transferring the proceeds of drug trafficking of a third person and of assisting another to retain the proceeds of terrorist related activities is more stringent. In both cases the knowledge element will have to be accompanied by the defendant having the reasonable grounds to suspect the origin of the property from drug trafficking in the first case and an engagement in terrorist activities in the second.⁵³⁵ Section 330(2) of the UK Proceeds of Crime Act (POCA) 2002⁵³⁶ further extends the *mens rea* requirement of the offence of failure to disclose to having reasonable ground for knowing or suspecting that the property in question constituted “the proceeds of crime”.⁵³⁷ This is particularly important for professionals dealing with the regulated sector. The failure to report their

⁵³² *R v Harmer (Roy Peter)* [2005] EWCA Crim 1; {2005} 2Cr. App. (CA Crim Div.).

⁵³³ R.E. Bell, ‘Prosecuting the Money Launderer: Who Acts for the Organised Crime’, (1999), 3(2) *Journal of Money Laundering Control*, 107.

⁵³⁴ See s. 93A and s. 93D of the CJA 1988 as amended by the CJA 1993.

⁵³⁵ Section 14(2) of the CJA 1993; and s. 53(l) (b) of Northern Ireland (Emergency Provisions Act (1991)).

⁵³⁶ POCA (2002) simplifies the law dispensing with the prosecutor’s need to prove that the defendant was aware of the type (drugs or other criminality) of illicit provenance of the property.

⁵³⁷ In a situation where a person intended to make a necessary disclosure, but failed to do so, he will not be guilty of the offence under the provisions provided that he has a reasonable excuse for his failure to report.

suspicious or knowledge of money laundering is punishable in accordance with s. 334(2) (b), on indictment by a maximum of five years imprisonment or an unlimited fine. It is important to note that the offence of failing to disclose knowledge or suspicion of money laundering is strictly limited to knowledge or suspicion of money laundering and does not extend to cover “all-crime” money laundering.⁵³⁸ The facts or circumstances of the substantive offence that must be proved is that the proceeds are criminal as defined in s. 340 (3) (a) where the alleged offender must know or suspect that the property is criminal. Perhaps also worthy of mention is that Knowledge can also be inferred from objective factual circumstances. The scope of money laundering offences as set out in articles 5 and 6 of United Nations Convention against Organised Transnational Crimes (Palermo 2000) encompasses a wide range of activities that generate illicit proceeds of crime.

4.9.3 Acquisition, Use and Possession of Proceeds of Crime

This is a separate offence under section 22 of the Theft Act (1968) for a person to handle stolen goods or their proceeds, knowing or believing them to be stolen goods or to dishonestly assist in the retention, removal, disposal or realisation of such goods by or for the benefit of another person or if he arranges to do so.⁵³⁹ Section s329 of the POCA (2002) which replaces s51 of the DTA (1994) and s93B of the CJA (1988) creates a unified position on those who deal with, or those who come into possession of the proceeds of

⁵³⁸ Robert Stokes & Anu Arora, ‘The Duty to Report under the Money Laundering Legislation within the United Kingdom’, (2004), 5 *Journal of Banking Law*, 332-356.

⁵³⁹ C.M.V. Clarkson and H.M. Keating, *Criminal Law, Text and Materials*, (Sweet & Maxwell 1998), p. 836.

crime. This section catches all those who help directly or indirectly in the removal, disposition or retention of criminal property with requisite subjective knowledge or suspicion as provenance. It is therefore a defence for those who take possession of the proceeds of crime in the course of their official duties such as the police and law enforcement agencies. The onus is upon the defendant to prove innocence on this position, as illustrated by their Lordships decision in the case of in *R v Gibson [2000]*.⁵⁴⁰

4.9.4 The offence of concealing, disguising, converting, transferring or removing criminal property from the UK

This offence is provided for under s. 327 of the POCA 2002 and will be committed by any person who either conceals,⁵⁴¹ disguises, converts, transfers or removes from the UK criminal property.⁵⁴² For purposes of this provision, the prosecution must prove that the alleged offender knows or suspects that property constitutes a person's benefit from criminal conduct. What is noteworthy with regard to this offence is the vastly broad scope of the offence covered by the section and indeed the expansive definition of the offence.⁵⁴³ The section will catch those engaged in money laundering activities, that is, as per its definition but will also extend to standard banking practices, such as transfers, conversions and sending funds abroad through wire transfers. In effect, this section combines two offences from the earlier

⁵⁴⁰ Criminal Law Review 479.

⁵⁴¹ Section 327(1) (a) of POCA (2002).

⁵⁴² The other elements of the offences are covered by sections 327(1) (b), (1) (c) 1(d) and 327(2) (e) respectively.

⁵⁴³ See, for example, what constitutes concealing or disguising in the definition under section 327 (3) of POCA 2002.

legislation—those of concealing or disguising criminal proceeds and converting or removing from the jurisdiction criminal proceeds for the purposes of avoiding a prosecution for a ML offence or in order to avoid an enforcement order, and either concealing or disguising, converting or transferring criminal proceeds with the knowledge or reasonable grounds to suspect that the funds were criminally derived.⁵⁴⁴ The POCA (2002) abolishes the distinction between laundering the proceeds of drug trafficking activities and laundering the proceeds of other criminal activities, which was the chief characteristic of the previous regimes under the CJA 1988 and DTA 1994.⁵⁴⁵ It also abolishes any requirement that the conduct in question amounts to an indictable offence in the UK, as was previously the case under CJA 1988. Thus the laundering of any criminally derived property,⁵⁴⁶ whether or not the conduct in question would amount to an indictable offence, is now a criminal offence.⁵⁴⁷ The offence of concealing criminal property is now committed solely through concealing, disguising, converting, transferring or removing from the UK, criminal property provided that the person cannot avail himself of one of the statutory defences. However, to bring a successful prosecution, the necessary element of prosecution must be established, in order for the property to be criminal by virtue of s. 340 (3) but also the alleged offender must know or suspect that the property is criminal. The above section

⁵⁴⁴ Section 31 of CJA (1988).

⁵⁴⁵ Part 7 of POCA 2002 in relation to double criminality set out under s. 340 of the foregoing legislation.

⁵⁴⁶ 'Property' is criminal property if (a) it constitutes a personal benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly); (b) the alleged offender knows or suspects that it constitutes or represents such a benefit. Criminal conduct is conduct which constitutes an offence in any part of the UK or would constitute an offence in any part of the UK if it occurred there. It is immaterial who carried out the criminal conduct, who benefited from it and whether it occurred before or after passing of the Act: See s. 340 (3) POCA (2002).

⁵⁴⁷ S. 340 of POCA (2002).

provides that the definition of criminal property, which includes two components: that the property constitutes a benefit from criminal conduct [s.340 (3) (a)]; and that the alleged offender knows or suspects that it constitutes such a benefit [34 (3) (b)]. Interestingly, it is the suspicion element in the absence of specific criminality in relation to criminal proceeds allegedly laundered that has caused a lot of concern for practitioners in the interpretation of money laundering offences.⁵⁴⁸ The drafters of the Act intended to relax the onerous requirement for the prosecution having to prove underlying criminality—an issue that had in the past caused problems for courts to successfully prosecute alleged money laundering offences. In *R v Whitham [2008]*,⁵⁴⁹ the decision of the court demonstrates that suspicion alone could suffice in bringing a prosecution for money laundering against the defendant. For example, having a substantial and unexplained substantial sum of money or a sudden increase in ones assets could be seen as evidence of money laundering. The draconian confiscation of suspected assets could then follow. The defendant is then given the opportunity before the court to prove his/her innocence. It is an offence under section 327 of POCA 2002 for the defendant to conceal, disguise, convert, transfer or even remove criminal property from its jurisdiction.

4.9.5 Failure to Disclose in the Regulated Sector

⁵⁴⁸ David Bentley (eta al), *Criminal Property under POCA 2002—Time to clean up the Law?* Legal Reuter Limited 2009.

⁵⁴⁹ EWHC Crim 239; see also *Wilkinson v DPP [2006] EWHC*, 3012; and *Hogan v DPP [2007] EWHC* 978.

Under s. 330 of POCA (2002), a person commits an offence where through the course of his business in the regulated sector, he knows or suspects that another person is engaged in money laundering, and he fails to make the required disclosure as soon as practically possible.⁵⁵⁰ The failure to report suspicion or knowledge of money laundering is punishable in accordance with s. 334 (2) (b), on indictment, by a maximum of five years imprisonment or unlimited fine.⁵⁵¹ Suffice it to say that this offence creates a universal all crime duty to disclose knowledge or suspicion of money laundering, something which up until now has been limited to the laundering of drug trafficking or terrorist funds.⁵⁵² This offence is structured on a tripartite basis, and all requirements must be proved beyond reasonable doubt in order to secure a successful prosecution under this section. Firstly, the person must know or suspect or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering. Secondly, the information upon which his knowledge is based, or which gives him reasonable grounds for such knowledge or suspicion, must have come to him through the course of the business in the regulated sector.

⁵⁵⁰ There will be no offence where the person is a professional legal adviser, and the information or other matter which causes him either to know or suspect money laundering came to him in privileged circumstances. This defence is elaborated through s. 330(10) which provides that: information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him/her.

(a) By (or representative of) a client of his in connection with the giving by the adviser of legal advice to the client, (b) by (or representative of) a person seeking legal advice from the adviser, or (c) by a person in connection with legal proceedings or contemplated legal proceedings. However, this defence is restricted in s. 330(11), which provides that where the information or other matter is communicated or given with the intention of furthering a criminal purpose, the legal privilege defence is unavailable.

⁵⁵¹ If the offence is tried summarily, the maximum penalty under s. 334(2) (a) is that of six months imprisonment, and a fine not exceeding the statutory maximum. See for example, *R v. Central Criminal Court Ex p. Francis and Francis* [1989] A.C. 346.

⁵⁵² S. 340(3) (4) (POCA) (2002).

The scope of the regulated sector covers a wide range of professional businesses including for example bankers, accountants and members of the legal profession. These professionals are under a duty to disclose and failure to comply with this requirement will result in criminal and heavy penal consequences.⁵⁵³ Thirdly, is that he/she must not fail to make the necessary disclosure⁵⁵⁴ as soon as reasonably practicable after the information relating to possible money laundering offences has come to his/her attention.⁵⁵⁵ The meaning of 'required disclosure' is clarified through s. 330 (5), which defines the required disclosure in terms which essentially refer to 'reporting up the line', that is, the person must make a disclosure to a nominated officer (refined through section 330 (9) as referring to the person appointed to receive and handle money laundering disclosures in the disclosures company or alternatively to any person authorised to receive such disclosures by the Director General of SOCA).⁵⁵⁶

The jeopardy of the bank is further highlighted in the case of *Squirrel v National Westminster Bank Plc and HM Customs and Excise [2005]*.⁵⁵⁷ Squirrel held a bank account with NatWest Bank which was £200,000 in credit. Without any prior warning or explanation of its supposedly unusual actions to its customer, Natwest froze the Account. Squirrel applied to the court for an order that NatWest unfreeze the Account immediately and disclose the reason for its conduct. Meanwhile, it transpired that Squirrel was

⁵⁵³ S. 340(3) (4).

⁵⁵⁴ Under s. 334 of POCA [2002], failure to report is punishable by, where tried summarily, imprisonment for a term not exceeding six months. Where the offence is tried on indictment, the offence is punishable by imprisonment for a maximum of five years and an unlimited fine.

⁵⁵⁵ E. Radmore, 'Money Laundering Prevention: Effect of the New Law on Solicitors', (1995), 16(5) Comp. Law, 155.

⁵⁵⁶ J. Wadsley, 'Professionals as Policemen', (1994), 275 Conv. 281.

⁵⁵⁷ EWHC 664.

under investigation by HM Customs and Excise for VAT-related offences, and the bank had suspected that the funds in Squirrel's account to represent criminal property.⁵⁵⁸ There were two issues raised by this case: (i) unfreezing would amount to a breach of section 328 of POCA 2002 (entering into an arrangement to facilitate the use of criminal property); and (ii) disclosing to Squirrel the reason for its decision to freeze the account would cause the bank to breach section 333 (tipping off). The court ruled that the course of action adopted by the bank was unimpeachable even though there were no material facts before the court to justify that the funds in the respective bank account represented criminal property. The court expressed that even if Mr. Squirrel was entirely innocent; there was no question of the bank being required to compensate Squirrel for damages suffered. But the court found itself powerless to impeach the position of the bank, even though there was nothing material before the court to justify the conclusion that the funds in the bank (as alleged) was criminal property. Squirrel Ltd's predicament was compounded by the fact that it could not afford legal representation without being given access to its funds.

The analysis of this case (Squirrel) demonstrates that courts require financial institutions to comply with AML/CFT legislation, regardless of whether it undermines the relationship of the respective financial institution and its customers or not. This case also demonstrates that the AML reporting regimes are very onerous on banks. If the bank becomes suspicious of criminal activity, it should freeze the account instantly and without delay. It is so onerous that even if the bank processes a cheque to transfer the money

⁵⁵⁸ The bank did not want to be seen as if it was entering into an arrangement to facilitate the use of criminal property, contrary to section 328 of POCA 2002.

into the account of another person, without making due inquiry where it should have, it could be liable for facilitating the use or control of criminal property and hence committing an offence under section 328 of POCA 2002.⁵⁵⁹ With regard to professionals advising a client on the matter that might involve the legal advisor or the client being implicated in money laundering, steps should be taken to make authorised disclosure. This was highlighted by their Lordship's decision in the case of *P v P*.⁵⁶⁰ This case is of particular importance for legal advisers not to fall foul of section 328 of POCA (2002) in relation to having inadvertently participated in an arrangement that could potentially facilitate the acquisition, retention, use or control of criminal property contrary to section 328 of POCA 2002.

The case of *Bowman v Fel* (2005)⁵⁶¹ demonstrates how failure implement section 328 POCA (2002) could land the respective legal professional in problems. In this case, the relationship between the claimant and the defendant ended and the claimant asserted a right of a beneficial interest in the property that they had occupied together, but which was registered in the defendant's sole name. In preparing for trial, the claimant's solicitors suspected that the defendant had included in his business Accounts the cost of non-business related work carried out at the property, and notified the National Criminal Intelligence Service (NCIS now subsumed by SOCA) as required under section s 328.⁵⁶² The contentious issue to be determined was whether s 328 means that, as soon as a lawyer acting for a client in legal proceedings discovers or suspects anything in the proceedings that may

⁵⁵⁹ *K v National Westminster Bank*, HMRC, SOCA [2006] EWCA Civ 1039.

⁵⁶⁰ [2003] EWHC Fam 260.

⁵⁶¹ EWCR Civ 226

⁵⁶² The NCIS has now been replaced by the Serious Organised Crimes Agency (SOCA).

facilitate the acquisition, retention, use or control (usually by his own client or his client's opponent) of 'criminal property', he must immediately notify SOCA of his belief if he is to avoid being guilty of the criminal offence of being concerned in an arrangement which he knows or suspects facilitates money laundering.

The court decided that the proper interpretation of s 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals. This included any steps taken by professionals in litigation, from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. The court did not consider that either the European Union law; or the UK Legislation could have envisaged that any of these ordinary activities would fall within the concept of 'becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property'.

The Bank's duty to report suspicious transactions is further highlighted in the recent case of *Shah V HSBC Private Bank* (2009).⁵⁶³ In this case the High Court emphasised the need for HSBC bank or any other bank to observe its statutory obligations of reporting suspicious transactions. In this case, there was delayed payment of US \$ 4 million from the accounts of Mr and Mrs Shah to the intended recipient following a suspicious activity report. An intended recipient of the Money in Zimbabwe reported the matter to authorities, who then froze US \$ 300 million of Mr and Mrs Shah. The plaintiff challenged HSBC bank contending that it had breached its implied term in the contract to

⁵⁶³ EWHC 78.

take reasonable care, to comply with the instructions and had breached confidentiality. Where there is a conflict between common law and statutory law, the latter would always take precedence. The court held that the common law duty of confidentiality alleged by the plaintiff (Mr and Mrs Shah) had been overridden by the provisions of POCA (2002) and hence the bank had acted lawfully within the provisions of section 328 of POCA (2002). For the Bank to secure a successful prosecution, it needs to file the suspicious transaction activity report (SAR) as soon as practically possible. If the Bank delays in filing SAR, it could jeopardise the trial on grounds of Article 6 of Human Rights Act (1998). This issue was raised in the case of *RCPO v C (2010)*⁵⁶⁴ where a solicitor had fraudulently laundered money through the firm's Accounts. Due to delays in bringing prosecution, the defendant was cleared of all six counts of money laundering after the Judge ruled that a fair trial would not be possible. Had the Judge proceeded with the trial, the court would have been in breach of Article 6 of ECHR (1950) regarding the right to a fair trial.

Therefore the bank's duty to report suspicion transactions as in the case *Squirrel Ltd, v NatWest Bank Plc. & HM Customs and Excise [2005]* underscores the vulnerability of the UK to attack through recourse to human rights principles and jurisprudence.⁵⁶⁵ Confidentiality in financial dealings and status is an important facet of one's private life, and as such ought to be protected as reasonably as possible by law. Confidentiality is also a matter of the bank-customer relationship, and indeed any professional relationship,

⁵⁶⁴ EWCA crim 97

⁵⁶⁵ The application of article 8(1) of the Human Rights Act 1998 has a negative effect on the disclosure requirements under s. 330, since it prohibits a public body (for example, Courts) from interfering with an individual's right to privacy.

based on trust, loyalty, fair dealing and not to mention contract law.⁵⁶⁶ A person who fails to disclose may argue that he or she was justified under Article 8(1) of the Human Rights Act 1998.⁵⁶⁷ The only exceptions to the public body are set out in Article 8(2) where the following can be established. The six legitimate justifications are: where national security is at stake, there is the need to protect national safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, and the protection of freedom of others.⁵⁶⁸ The traditional principle of banking confidentiality created by virtue of the contract between the customer and the bank (as a confidant) and Data Protection Act 1998 could be undermined under the provisions of Article 8(2). Any common law disclosure of confidential information held by a banker in respect of a customer must also be proportionate⁵⁶⁹ to the legitimate aim pursued. The case of *Sunderland v Barclays Bank Ltd*⁵⁷⁰ highlights the potential challenges regarding the critical nature which underpin the principle of proportionality. The doctrine of proportionality may require the review of a court decision to assess the balance which the court has struck, not merely whether it is within the range of rational or reasonable decisions. The proportionality test may go further than the traditional grounds of review, in as much as it may require attention

⁵⁶⁶ Robert Stokes, 'The Banker's Duty of Confidentiality, Money Laundering and the Human Rights Act', (2007), 3 *Journal of Banking Law*, 502-520.

⁵⁶⁷ Stokes, (n 566).

⁵⁶⁸ James Otty, 'Money Laundering and Human Rights', (2001), *New York Law Journal*, 634.

⁵⁶⁹ Proportionality seeks to establish the balance between democratic principles of tolerance, pluralism and broadmindedness and 'necessity'. Interference with the provisions of article 8(1) will only be necessary in a democratic society when it is proportionate to the legitimate aim being pursued.

⁵⁷⁰ (1938) 5 L.D.A.B 163.

to be directed to the relative weight accorded to other interests and considerations: *R v. Ministry of Defence, ex parte Smith*.⁵⁷¹

Recently, a Dutch bank has been fined \$619 million by the US Government for allegations that it violated US sanctions against Cuba, Iran and other Countries. ING is said to have moved \$1.6 billion illegally through Banks in the US from early 2007 by concealing the nature of the transactions.⁵⁷² It did this by eliminating payment data that would have revealed the involvement of sanctioned countries and entities. The bank also advised clients how to evade computer filters designed to prevent sanctioned entities from gaining access to the US banking system. It provided US finance services to sanctioned entities through shell companies and misuse of internal ING account.⁵⁷³ ING has become the fourth bank to be imposed on sanctions after Credit Suisse agreed to pay \$536 million in 2009 to settle charges of illegal transactions involving Iran, Cuba and Libya. Lloyd Bank TSB also agreed to pay \$ 350 million in this same year to settle charges of allegedly altering records for clients' from Iran, Sudan and other sanctioned countries. In 2010 Barclays Bank settled charges of £298 million for violating US rules in relation to sanctioned countries and entities.⁵⁷⁴

4.9.6 Tipping Off

The last offence to be created under POCA [2002] is that of tipping off, where a professional or those working in the regulated sector, make a disclosure that

⁵⁷¹ [1996] QB 517.

⁵⁷² City, A.M reporter, Business with personality Newspaper, 14th June, 2012

⁵⁷³ City (n 572).

⁵⁷⁴

is likely to prejudice a money laundering investigation being undertaken by law enforcement agencies.⁵⁷⁵ It is in fact worthy of mention that where the person does not know or suspect that the disclosure was likely to be prejudicial, he does not commit an offence.⁵⁷⁶ The offence of tipping off is highlighted by the case of *Governor and Company of the Bank of Scotland v A Ltd.*⁵⁷⁷ In this case, the bank made enquiries in respect of a number of accounts opened by A Ltd. into which substantial sums of money were transferred. The Police advised them that money laundering investigations were being carried out into the activities of the company and asked the bank not to reveal the information to A Ltd. The bank was fearful that it would risk being sued by the company if it failed to pay money held in the accounts or by third parties as constructive trustees if it did. The bank was rather in an invidious position of 'damned if you don't, damned if you do'. The Court of Appeal indicated that it was important in such a situation for the bank to file an interim declaration under CPR 25.1 (1) (b), naming the Serious Fraud Office as the defendant. In these circumstances, the bank would clearly be protected against criminal liability of 'tipping off'. In another case of *C v S*,⁵⁷⁸ a bank made a disclosure in action of documents, which might have revealed the existence of on-going enquiries by the NCIS as it then was.⁵⁷⁹ The purpose of the application was an attempt by the company, C; to trace the sums of money that it alleged had been misappropriated by others. A bank had earlier

⁵⁷⁵ s. 333 of POCA 2002, which replaces DTA 1994, ss. 53 and 58 and CJA 1988, s. 93D.

⁵⁷⁶ S. 333 (2) of POCA 2002.

⁵⁷⁷ [2001] 1 WLR 751.

⁵⁷⁸ [1991] 1 WLR 1551.

⁵⁷⁹ SOCA is specifically mandated to tackle serious organised crimes that affect the UK and its citizens. This includes Class A drugs, people smuggling and human trafficking, major gun crime, fraud, computer crime and money laundering.

made a disclosure to the NCIS of suspicious transactions and was fearful that disclosure of the documents might breach the tipping off provisions of s 93D. It was also in an invidious situation where the bank would either be criminally liable if it complied with the first instance order for disclosure; or it would be liable to contempt of court if it failed to do so. An *ex parte* application was made to the high court *in camera* in an attempt to resolve the dilemma and the original disclosure order was revoked allowing the bank not to disclose information to the NCIS (now been replaced by serious organised crimes agency (SOCA)) which was created in (2005).⁵⁸⁰

It is a defence in the UK that a person who should disclose neither knew nor suspected that another person was engaged in money laundering and had not been provided with the required training by his employer.⁵⁸¹ This defence is available where the person is charged with the section 330 (2) (b) offence, namely the situation whereby the professional has reasonable grounds for either knowledge or suspicion of money laundering by virtue of the omission of the training possible to detect money laundering vehicles, fails to disclose as required.⁵⁸² This provision serves as a reminder to those institutions within the regulated sector that the legislative framework under which they operate revolve around the disclosure of information concerning money laundering,

⁵⁸⁰ Edward Rees and Andrew Hall, *Proceeds of Crime Act*, (Oxford University Press 2002), 108-111.

⁵⁸¹ S. 330 (7) of POCA (2002).

⁵⁸² Indeed, this is the case of a junior employee facing criminal sanctions for negligently failing to disclose suspicion or knowledge that money laundering was about to be committed.

and this is something, in turn, dependent on the training that they provide to their employees to detect suspect transactions and clients.⁵⁸³

4.10 Conclusion

The challenges of harnessing global AML regimes such as CDD across countries vary and cannot be condensed into this chapter alone. While financial institutions are obligated under international law to implement robust AML measures such as CDD, implementing them is costly in poorly resourced banks. Since banking is a business, banks are concerned with controlling operational costs to maximise profits and stay in the business. In practice, financial institutions are required to assess the risks posed by their customers both before initiating a business relationship and continuously thereafter. This makes it necessary for banks to operate in a robust regulatory environment to counter the potential of being exploited for money laundering purposes. However, financial institutions should also ensure that the implementation of normative CDD and other core AML measures is done sustainably not to debase local economies. For LDCs based banks, it might not be practical to apply the robust CDD standards in the absence of a requisite infrastructure, even if these measures are necessary. In my view, less capitalised banks should apply CDD requirements flexibly as demonstrated in the example of South Africa with regard to “exemptions 17 of Financial Intelligence Centre Act (FICA) 2002”. Exemptions 17 (above) accorded to SA a special dispensation in application of desired CDD measures. The exemption 17,

⁵⁸³ D.P. Stewart, ‘Internalising the War on Drugs: The UN Convention Against illicit Trafficking in Narcotic Drugs and Psychotropic Substances’,(1990), 18 Denv, *Journal of International Law and Policy*, 387.

allows South African nationals to dispense with identification requirements in opening bank accounts. This dispensation was negotiated and agreed by banks in South Africa as a condition of implementing CDD measures. Without negotiating exemptions with FATF, the wholesale implementation of the AML/CFT framework would have alienated vulnerable groups in South Africa from accessing banking services. For instance, many residents in South Africa do not have verifiable residential addresses and other requisite documents such as driving licence to access banking services. The South African approach should be replicated in implementation of the normative AML regimes across LDCs. Desired AML regimes should be introduced flexibly to suit the varying dynamics of development across regions. In my view, for global AML/CFT regimes to work, they should reflect dynamics of local development where they are introduced. Normative global AML/CFT regimes should always be modified to suit local conditions.

CHAPTER FIVE: THE EFFECT OF CORRUPTION ON AML/CFT REGULATIONS

5.1 Introduction

This chapter demonstrates that in an environment of corruption the global AML/CFT framework cannot work. Corruption undermines the capacity of individual countries to harness normative AML/CFT regimes. Corruption has literally eviscerated the capacity of some countries to harness normative AML regimes such as CDD.⁵⁸⁴ CDD is a core AML standard, which requires banks to know their customers as a condition of initiating a business relationship with them. It needs to be noted that in an inherently corrupt system, the envisaged AML/CFT regimes such as CDD cannot be implemented easily.⁵⁸⁵ This is because normative AML/CFT systems will be compromised to perpetuate corruption. Corruption and money laundering crimes are embedded in each other, and should be accorded the same level of attention at an international level. Corruption either constitutes money laundering predicate offences or it is used as an instrument to commit money laundering offences. Therefore, an effective global AML/CFT framework should include measures against corruption since these two crimes are embedded in each other.

⁵⁸⁴ This chapter is substantially drawn on my article: Mugarura Norman “The Effect of Corruption Factor in harnessing global anti-money laundering regimes”, (2010), 13(3) *Journal of money Laundering Control*, Cambridge, 272-281.

⁵⁸⁵ The FATF revised 40+9 recommendations.

5.2 The effect of corruption on financial Markets

Corruption undermines markets through its attendant practices of kickbacks, commission, representation fees and other forms of financial malpractices such as money laundering. Corruption has eviscerated the capacity of countries to implement normative AML regulations and policies. Poor salary schemes in LDCs has helped to fuel incidences of corruption as people aspire to live a high life style of sky-sport TVs, mobiles phones and other innovative products without sufficient incomes to sustain it. Corruption has provided an alternative to supplementing meagre incomes the reason why it is becoming entrenched and a moral hazard in many parts of Africa. In Uganda, corruption has manifested itself in form of a resilient shadow economy such as tax evasion, goods and currency counterfeits, currency smuggling, security trading, property purchase, sale of counterfeit goods, and lack of investment safeguards of public funds, and swindling or embezzlement of public funds. These challenges have constrained the state in its efforts to deliver economic and social services to the public. Corruption therefore undermines governments' development programmes as funds are diverted into private accounts of public officials.⁵⁸⁶ Kickbacks, commissions, or representation fees are sought to rig bids and manipulate laws governing the transition to the market economy. Corruption undermines efforts towards the implementation of desired market reforms needed to pave way for globalisation of markets.⁵⁸⁷

⁵⁸⁶The on-going corruption case involving three Ex-Ministers of Health over the diversion of Gavi Fund extended to Uganda as a grant to facilitate the treatment of Malaria, HIV and Tuberculosis underscores this point.

⁵⁸⁷ Susan George Ackerman, *Corruption and Governments* (Cambridge University Press, 1998), P. 27.

Therefore, there is a correlation between corruption⁵⁸⁸ and the growth of financial crimes such as money laundering. This is particularly apparent in cases of grand corruption. Grand corruption involves misuse of power by heads of state, ministers and top officials for private pecuniary profit, and even noble cause corruption where the instruments of government such as intelligence services are used to provide finance and other support for criminal activity, such as assisting terrorism, providing secret arms supplies beyond the scrutiny of political process and laundering secret funds.⁵⁸⁹

Corruption has sidelined efforts of states to harness financial markets such as the stock exchange in many parts of Africa. The financial services markets such as the stock exchange in many countries across Africa are still in the nascent stages because investing in shares is misconceived as a preserve of the privileged class.⁵⁹⁰ This misconception is partly precipitated by the nature of the laid back society in which financial markets operate in many LDCs; but also there is the issue of poor dissemination of information. The interplay between corruption and its effects has mutated into an environment for financial market abuse. The stock market is still in its infancy in many parts of Africa—and efforts towards stabilising financial markets have been derailed by corruption perpetuated by public officials. For instance, in Kenya, a country that until recently managed to enjoy relative calm since independence, the stock market has been ridden by corruption.⁵⁹¹ In a society with a developed

⁵⁸⁸ Susan Rose- Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge University Press 1999), 13.

⁵⁸⁹ Barry Rider, *Corruption: the Enemy Within*, (Kluwer Law International, 1997), 8-34.

⁵⁹⁰ *The New Vision*, (the daily Newspaper) of 26th March 2008.

⁵⁹¹ Norman Mugarura, *the Global AML regulatory landscape in LDCs* (Ashgate Farnham, 2012) p. 159

stock market, there is a likelihood of discipline because regulators are aware of the fact that any laxity and poor oversight of financial institutions especially in a globalised market environment will trigger systemic failures.

For instance, corruption has been exploited to leverage in establishing their presence in the East African economies.⁵⁹² Either the illicit proceeds of crime are generated from corruption committed by state officials; or corruption is used as tool to deposit tainted money into the mainstream financial economy. In most corrupt countries in Africa, as in other parts of the world such as Russia, there is a likelihood of high presence of different criminals groups. The most rampant criminal syndicate operative in Africa is the Nigerian group—code-named 419. This group has dominated the illicit drugs market in Uganda and in other parts of Africa such as South Africa. Organised criminal groups have resorted to money laundering in different countries to cleanse the proceeds of crime.⁵⁹³ Money laundering techniques include smurfing, establishment of front companies, acquisition of commercial and non-commercial properties, remittance through non-official banking channels and foreign remittance. In some countries with tenuous infrastructure and poor salary schemes, public officials are easily bribed to turn a blind eye to the obvious providing an avenue for criminal exploitations including money laundering. Corruption is so ingrained that it would be unwise to reduce it being committed in a handful of sector areas. I presume it is because of weak laws coupled by a culture of corruption that Uganda has become an attractive destination for narcotic drug traffickers from West Africa, South America, Asia

⁵⁹²Mugarura, (n591).

⁵⁹³Rider, (n 589).

and Europe.⁵⁹⁴ Many national from these regions have been arrested trying to traffic drugs via Uganda. Unfortunately, the police whose mandate is to keep law and order has been accused of complicity —arresting criminals and confiscating drugs but failing to present exhibits in courts of law. This has raised suspicions that either confiscated drugs are used by police officers, exploiting weak anti-drugs laws or they themselves indulge in drug dealing in order to supplement their meagre incomes.⁵⁹⁵ The unfortunate outcome is that unless there is compelling evidence adduced on arrested person the tradition in criminal law is that the judge cannot convict them.

5.3 Grand experiences of corruption across countries

Corruption is manifested by the money stolen by public officials and siphoned out of the country into private bank accounts abroad. According to Nyang Declaration on recovery and repatriation of African stolen wealth: an estimated US \$ 20-40 billion has been illegally appropriated from the World's poorest countries, most of them in Africa by politicians, soldiers, and other state officials and secured abroad in the form of cash, stocks, bonds, real estate and other Assets.⁵⁹⁶ Suharto and his family are accused of having amassed a US\$45 billion of wealth during his 32 years in power.⁵⁹⁷ Ferdinand Marcos, while in power for 20 years in the Philippines is believed to have stolen an estimated US\$ 10 billion. Mubuto Seseko in his 30 years rule as the

⁵⁹⁴ The *New Vision* (the Ugandan daily Newspaper) of 22nd July 2011.

⁵⁹⁵ The *New Vision*, (n 558).

⁵⁹⁶ The Nyang Declaration was made by representatives of Transparency International in 11 African countries on 4th March 2001, available at http://www.transparency.org/pressrelease_archive/2001/nyang_declaration.html (last visited 10th July 2010).

⁵⁹⁷ Jackie Johnson, 'In Pursuit of Dirty Money: Identifying Weaknesses in the Global Financial System', (2001), 5(2) *Journal of Money Laundering Control*, 128.

president of Zaire is believed to have stolen over US\$30 billion, much of which was either money that had been given to Zaire in development aid or accrued from illegal mineral deals with international businesses.⁵⁹⁸ During the period 1995 to 2001, Haiti, Iran, Nigeria, Pakistan and Philippines claimed losses ranging from \$500 millions to \$35 billions due to corruption committed by former leaders or senior public officials.⁵⁹⁹ Much of this illicit money is said to have been siphoned out to friendly countries around the World through the international banking system. Mobutu was well known by the World Bank and the IMF to be appropriating 30-50 percent of funds for capital investment every year.⁶⁰⁰ Some critics have argued the World Bank should have stopped lending to the Mubutu regime. It did not stop lending to Mobutu and neither did it intervene in any other way until 1993.⁶⁰¹ This is because corruption was then viewed as a political matter outside the mandate of the World Bank and IMF, and deemed to be exclusively dealt with by individual countries.⁶⁰² To bypass obligations under international law, states, such as Switzerland have sold off state owned enterprises so that they become non-state entities. Investigations by the Swiss Federal Banking Commission (SFBC) found US\$660 millions belonging to the former president Sani Abacha of Nigeria in Swiss banks.⁶⁰³ In 1999, the Swiss government called upon five private banks in Switzerland to freeze accounts held in the name of Abacha's son—Mohammed, believed to contain millions of dollars plundered from the

⁵⁹⁸ Johnson, (n 597).

⁵⁹⁹ See, Transparency international website available at www.it.org (last visited 15th July 2011)

⁶⁰⁰ Susan Hawley, *Exporting Corruption, Privatisation, Multinationals and Bribery* (2000), available on the internet at <http://www.thecornerhouse.org.uk/item.shtml?51975>, (date visited on 16th December 2009).

⁶⁰¹ Hawley, (n 600).

⁶⁰² Article IV mandates Bank and the Fund to intervene only for economic reasons and not politics.

⁶⁰³ Johnson, (n 597).

Nigerian central bank and oil revenue.⁶⁰⁴ In January 2000, the Swiss bank froze £390 million in accounts belonging to Abacha and his associates.⁶⁰⁵ Recently, the Swiss central bank has revealed the stash of money allegedly stolen by different African politicians and deposited into Switzerland different bank accounts.⁶⁰⁶

Table 2

Countries whose nationals have stashed away wealth in Switzerland in billions	
Countries	Swiss francs
Seychelles	2,515m
Kenya	818m
Egypt	798m
South Africa	795m
Rwanda	29m
Sierra Leone	29m
Tanzania	183m
Sudan	179m
Uganda	154m
Senegal	150m
Zimbabwe	96m
Somalia	1m

A further amount of US\$540 million belonging to Sani Abacha was located in Luxembourg and Liechtenstein. Unspecified amount of money was allegedly deposited with Barclays bank and efforts to recover it by the Nigerian government, has seemingly faded on technicalities.⁶⁰⁷ The complexities of recovering stolen assets are many, not least the need for sustained efforts of

⁶⁰⁴ Hawley, (n 600).

⁶⁰⁵ Hawley, (n 600).

⁶⁰⁶ Table 2 was taken from the Ugandan newspaper: The New Vision (Ugandan Newspaper 23/06/2012)

⁶⁰⁷ Johnson, (n 597).

experts in forensic accounting, money laundering, civil and criminal laws of different countries as well expertise in international law.⁶⁰⁸ The second hurdle is that the process of repatriating assets abroad is highly expensive requiring judicial and tax experts, transporting evidence and witnesses, translating testimony and carrying out investigations and prosecutions. There is also the overlap of civil and criminal law—which involves different procedures, safeguards, burdens of proof and remedies.⁶⁰⁹ The introduction of a global AML court would ease the recovery of wealth stolen by political leaders such as Sani Abacha of Nigeria by providing a neutral judicial forum to adjudicate matters of money laundering, at least in relation to overcoming procedural differences between states. By estimate (since no body can impute an exact figure), Sani Abacha in his ten years rule as the president of Nigeria is believed to have stolen a total of US\$5billion.⁶¹⁰ He is believed to have stolen a whopping fortune of somewhere between US \$ 2.2 billions to US \$ 4 billions through a network of foreign banks. It has not proved easy for the Nigerian authorities to identify Sani Abacha's stolen assets and to repatriate them because of banking secrecy laws and the clandestine nature of money laundering operations. Similarly, no body not even the Nigerian government has been able to clearly identify which jurisdictions the assets stolen by Abacha are located.⁶¹¹ Implausibly, funds given to some countries in development aid; and to assist with the prevention and treatment of diseases such Malaria, TB, HIV/AIDS has vanished, courtesy of public officials in

⁶⁰⁸ Transparency International, (n 596).

⁶⁰⁹ Transparency International, (n 596).

⁶¹⁰ Johnson, (n 597).

⁶¹¹ Transparency International (n 596).

corrupt governments.⁶¹² The down side of siphoning money out of the country is that it undermines the economy by reducing foreign currency reserves, reducing foreign Aid, reducing the tax base, harming competition, free trade and accelerating poverty. Corruption creates laxity in application of laws, systems and procedures which have been enacted to govern markets. The foregoing challenge is not helped by lack of harmonisation of anti-corruption laws since different countries operate different laws and approaches in dealing with the scourge of corruption.

In the jurisprudence of English courts, money accrued in corruption is recoverable as it is deemed to be held on a constructive trust in the interest of the principal. The issue here is clearly illustrated by their Lordships decision in the case of *AG of Hong Kong v. Reid*.⁶¹³ The defendant (Mr Reid) had already successfully been prosecuted and serving a jail term but that notwithstanding, the government of Hong Kong decided to bring a civil law claim to recover the properties, which Reid had bought in New Zealand. The judgement was delivered in favour of the government of Hong Kong as the said properties were bought from the proceeds of crime and deemed to have been held on trust for the principal—the government of Hong Kong. According to Lord Templeman, “When a bribe is accepted by the fiduciary in breach of his duty then he holds that bribe on trust for the person to whom the duty was owed.”⁶¹⁴

⁶¹² The embezzlement of Gavi funds in Uganda—money that was meant for the above purpose, which disappeared at the hands of three government Ministers of Health, clearly supports the above point.

⁶¹³ [1994] 1 AC. 324; [1994] 1 All ER. 1

⁶¹⁴ Johnson, (597).

In situation where the property has appreciated in value, the defendant cannot be entitled to the surplus of the original value since he/she would have benefited from his illegal conduct—the breach of duty. If this was to be allowed, the defendant would benefit from his illegality contrary to the tenets of English law.⁶¹⁵ It is therefore vital as part of the wider anti-corruption measures that states co-operate in ensuring that assets accrued from stolen wealth are recovered by states where the money originally came from. However the assets in question will have to be identified before recovery proceedings can be initiated, under what in English Law is known as common law tracing. Where the asset has been used to purchase other assets then it might be advisable to identify the beneficial ownership in those new assets. For instance, money originally stolen from the government could have been used to purchase a house in England. This “house” would constitute “proceed of crime” and subjected to common law tracing. Where the original asset has dissipated, equity allows the plaintiff to identify in the hands of the defendant what remains of the original asset. If the trust asset has been mixed up, given the fact that money accrued from corruption is money deemed to be held on constructive trust in the interests of its rightful beneficiaries, the defendant is deemed to have used his own money first and whatever remains is deemed to be the trust fund.⁶¹⁶ Assuming that the defendant uses money, which was initially accrued from corruption to buy a house, he then sells the house and

⁶¹⁵ This concept is underpinned by the “Golden Rule” in the English Legal system. A key feature of the Golden Rule is that a person attempting to live by this rule treats all people with consideration, not just members of his or her in-group. The Golden Rule has its roots in a wide range of world cultures, and is a standard way that different cultures use to resolve conflicts.

⁶¹⁶ This position is underscored by the English case of *Re Hallet* [1879] 13 Ch. 696.

uses the proceeds to buy a car and deposits the balance into his account, the money in the account would be held on trust (constructive trust) in the interest of rightful beneficiaries. In other situations, where in a mixed fund the defendant spends all the money previously in the account and then buys shares to the value of the trust fund, the second withdrawal is deemed to be the trust money and the shares will be trust assets.⁶¹⁷ The foregoing analysis lays down the law on stolen assets held in various jurisdictions by corrupt government individuals. The beneficiary governments should file court proceedings in countries where those assets are held to recover them as their legitimate assets.

In my view, assets recovery is a vital component of the global anti-corruption strategy because it has the advantage of repatriating them to the rightful owners. Public sector corruption is seemingly more rampant in developing countries due to lack of robust democratic institutions—which undermines accountability of state officials. Secondly, political powers tend to be congregated around state officials and individuals, allowing them the latitude to commit corruption with impunity. Corrupt leaders have been allowed the latitude to literally do whatever they want. Political leaders have used their discretion to influence the creation of pernicious laws in parliament, and to exercise their enormous discretion in the interpretation of laws created by Parliament.⁶¹⁸ In many developing countries, corrupt state officials will be

⁶¹⁷ Push-Thomas: The Bank—An Attractive Deep Pocket Defendant, (1999), *Journal of International Banking Law*, 52.

⁶¹⁸ In many countries, presidents appoint Judges and other Judicial Officers such as the Attorney General. In a way, this prerogative provides advantage to the president to ensure that appointed Judges must do the Presidents bidding, otherwise they cannot guarantee to be in their positions in the next reshuffle.

easily elected to high political offices democratically. They would have accumulated wealth to “splash” on rigging votes and make sure they retain majority representation in parliament to push through desired programmes. Corrupt governments are sustained by making sure that they have majority representation in parliament not only to push through the desired programmes; but also to use their positions and protect their economic empires from crumbling.⁶¹⁹ In East Africa (particularly in Kenya and Uganda), honest public officials are resented by their corrupt governments because they are perceived as “a thorn in a foot.” On the other hand, in DCs, corruption can easily be checked through transparent and democratic national institutions. The democratic institutions would have generated democratic values and practices’, setting high standards every prospective and present leader aspires to live up to. While corruption is committed in both DCs and LDCs, the difference is that in DCs, it is rarely perpetuated through state institutions.⁶²⁰ In LDCs, corrupt leaders are estimated to steal up to 50 percent of the money meant to finance national budgets, but also 70 percent of the population is said to live on less than US\$1 a day.⁶²¹

Corruption impoverishes economies by diverting resources from development programmes. It undermines democratic institutions and the rule of law; and it also creates a palatable environment for those contemplating to commit money laundering and its predicate offences. It is worthy of mention that

⁶¹⁹ This would seem to explain why corrupt governments are never exposed until they have relinquished power and its attendant state protection. The case of Mubut Seseko of Zaire and Sani Abacha are the two cases underscoring this point.

⁶²⁰ This can only be the case of a few bad apples within government departments. In developed countries there are strong institutions to ensure checks and balances, which is not the case with less developed countries.

⁶²¹ Transparency International reports December 2007 available on its website at www.it.org (date accessed in October 2009).

money accrued in corruption constitutes the proceeds of crime within the extended definition of money laundering.⁶²² Corruption has also become a mechanism to facilitate the process of placing tainted money into the mainstream financial system and to get it wired out of the country as legitimate.⁶²³ As countries embrace the global AML money laundering framework, it will reduce the appetite for those contemplating to commit it by rendering it a potentially risky business to partake in.⁶²⁴

The rampant corruption across most African countries has precipitated a palatable environment for different criminal groups to operate in individual countries with ease.⁶²⁵ Organised criminal groups have resorted to money laundering to cleanse the proceeds of crime.⁶²⁶ In vulnerable societies with poor salary schemes, public officials can easily turn a blind eye to the obvious; creating an avenue for criminal exploitations such as money laundering. In Uganda, corruption and money laundering have been manifested not least by businesses colluding with tax officials to evade their levies on goods, to under-declare merchantable goods and swindling government funds by those in elevated public offices.⁶²⁷ There are two factors which underpin the issue of corruption in Uganda: the first is arbitrary

⁶²² Article 1(I) of Palermo Convention on the Suppression of Organised Transnational crimes in Italy (December 2000).

⁶²³ This is one of the many techniques tainted money finds its way out of the country where it has been looted to a safe haven somewhere else.

⁶²⁴ Johnson, (n 597).

⁶²⁵ Barry Rider, "Recovering the Proceeds of Corruption" (2007), 10(1) *Journal of Money Laundering Control*, 5-32.

⁶²⁶ Rider, (n 625).

⁶²⁷ The Leadership Code (2002): This law aims at combating corruption against public officials where they have to declare their assets every year. If there is a mismatch in the officials declared wealth, he or she may be asked to account. The Leadership code empowers the Inspector General of Government to freeze accounts pending investigation and to prosecute offenders allegedly in breach of this Statute.

enforcement of engendered laws; the second is an ingrained corruption culture at various layers of the society. As regards arbitrary enforcement of laws, enforcement agencies should demonstrate a uniform application of laws and procedures to ensure that laws are applied and enforced equally across the board. Laws should not be rigorously enforced on the powerless but should instead have applicability across the board. In any case, a good law should aim at protecting the vulnerable in society not the rich—who have wherewithal to wriggle themselves out of trouble with the law.

Poor salary schemes of working class coupled by ostentatious lifestyles—spurred on by advanced technology such as the use of mobile phones, TVs, Sky sports, expensive cars are traded across countries. This has fuelled corruption whereby public servants aspire to live ostentatious lifestyles on poor salary schemes.⁶²⁸ There is also the issue of disparities in incomes between the top executives of corporations (who are paid in US dollars); and the middle tier group of workers (who are paid dismal salaries or wages in Uganda Shillings for the case of Uganda). Corruption has flourished in an environment of poverty and ignorance because public goods and services and rights are perceived as generosity by the recipients. These are rights to citizens and should hold corrupt public officials to account. Even if the delivery of projects is shoddy, recipients see themselves as luckier to receive a shoddy service than not to have them. There is a need for ethical training of public servants to change a culture of corruption at multiple layers of the

⁶²⁸ In Uganda, the Inspector General of Government is paid a salary equivalent to £30,000 a year, while investigators who ensure that corrupt officials are investigated and arraigned for prosecution are paid a salary of £1000 a year. What criminals do is to bribe investigators, court officials and the police with huge sums of money so that they destroy any evidence that would help to incriminate them.

society. At a corporate management level, this study proposes the need for ethical training of managers and employees to demonstrate a high level of commitment to normative moral ethics, leadership and good corporate governance. Businesses should be encouraged to engage with employees and outside consultants to identify potential corruption areas and deal with them properly.⁶²⁹ Laws should not only be passed for purposes of appeasing the donor community; but should be enforced to facilitate good practices and good governance. There is a need for governments to institute robust research focusing on policy and development challenges facing the country; but also there is a need for requisite data on a forward looking basis. It is also important for LDCs to replicate success stories in developed countries.⁶³⁰

Corruption manifests itself differently in different societies. For instance, in Uganda, besides other typologies of corruption, there is employment related corruption whereby sometimes jobs are allocated as a token to loyalists of the government.⁶³¹ It can be argued that job allocation has been sublimated to political whims, sidelining the market mechanism of demand and supply for labour. In my contention, this factor has generated a counter-productive effect on the local markets' potential to compete favourably in the global market economy. Because of corruption, money which has been earmarked for development projects such as developing robust institutions is diverted into private bank accounts of corrupt public officials.

⁶²⁹ The biggest problem especially in developing countries is for managers to overlook employees and to impose policies without consulting those that will be affected. The rationale for this is that managers cannot effectively manage unless they have the good will of their employees.

⁶³⁰ David Hess and Cristie L. Ford, 'Corporate Corruption and reform Undertakings: A new approach to an Old Problem', (2008), *41 Cornell International Law Journal*, 322.

⁶³¹ In well established cases, jobs are awarded for electioneering purposes, apparently being traded in return for supporting particular candidates.

Corruption has helped to derail the concerted efforts of governments in the implementation of normative AML/CFT counter-measures globally.⁶³² In a corrupt system laws cannot work since they are manipulated to sustain corrupt governments. Corruption undermines national economies and is a threat to democratic institutions, fostering threats to human society such as transnational organised crimes and terrorism.⁶³³ Owing to corruption, 80 percent of privatised enterprises in emerging markets such as Russia are said to be controlled by criminals and their syndicates, and of these enterprises 40 percent are currently owned by the Russian mafia.⁶³⁴ While privatisation was initially intended to counter public sector corruption, it also created opportunities for corruption that did not exist previously under a state controlled system.⁶³⁵ The liberalisation process introduced foreign actors into the domestic economy, which was initially preserved for nationals. Thus, it can be argued that in an inherently corrupt system, privatisation creates avenues for criminal exploitation including money laundering. Criminals are known to thrive in an inherently corrupt environment where they can manipulate or corrupt the system. Similarly, criminals are always ready to exploit any weaknesses in macro-economic policies. They do this to infiltrate agencies responsible for prudential supervision of financial institutions.⁶³⁶ It is my contention that for AML programmes such as CDD to work effectively, the

⁶³² Money launderers or corrupt elements in the society tend to operate outside or on the fringes of the prescribed rules or laws.

⁶³³ Secretary General of the United Nations, Kofi Annan, 'Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity', 31 May 2003.

⁶³⁴ Binnendijk Hans (ed.), *Authoritarian Regimes in Transition*, (Washington DC, Foreign Service Institute, 1987), p. 8.

⁶³⁵ Hans, (n 634).

⁶³⁶ Walker A. George, *International Banking Regulation: Law Policy and Practice*, London, (The Hague, Kluwer Law International, 2001), 307-320.

system must be able to harness the skills of accountants, auditors, lawyers, supervisors, prosecutors and engineers. These people are needed to service and keep the system afloat with its regulatory and supervisory imperatives.⁶³⁷

Organised criminal groups have resorted to money laundering as a mechanism of cleansing illegally acquired assets and integrating them back into the mainstream financial economy. Money laundering techniques include smurfing, establishment of front companies, acquisition of commercial and non-commercial properties, remittance through non-official banking channels and foreign remittance. In sum, corruption destroys government institutions and renders many economies susceptible to financial abuse such as money laundering.

5.4 The effect of corruption on local Institutions

Corruption corrodes national institutions such as the police and the Judiciary. In an inherently corrupt system, the police, whose overriding mandate is to keep law and order by fighting crimes, becomes complicit to corruption. In some countries, fighting corruption has become intractable, either because of influence peddling or high profile public officials being implicated in corruption scandals. Similarly, in an inherently corrupt system, the cost of undertaking transactions is disproportionately high to what would ordinarily be normal costs. This undermines the quality of life because of corruption to increase high costs of living. To achieve his/her objective, the corrupt official employs

⁶³⁷ The UK, Canada, Australia and New Zealand have all adopted skills related immigration policies, for example they all operate a 'point's entry system' based on the immigrant's skills and education and whether those skills are requisite in the receiving country.

the most sophisticated means to disguise the nature of the transaction. When this is coupled by the time lost in prolonged negotiations, restructuring transactions, to avoid detection and illicit payment, has consequently put financial strains on business, reducing the time spent on official work, and reaping employers by being paid fully for doing no work.⁶³⁸ It can therefore be inferred that firms which engage or collude in corruption can readily fall victims of extortion by people who take bribes—politicians, state officials, business managers and many more. Corruption destroys the integrity of company managers and employees, if they collude in or keep a blind eye to corruption activities and criminality.⁶³⁹

In UK, money laundering laws have been hamstrung in practice by the chronic lack of resources. This has created another challenge of disjointed handling of suspicious activities and the low police priority being given to money laundering prosecutions.⁶⁴⁰ In Uganda, corruption is manifested by the culture of bribes in public offices⁶⁴¹, swindling government funds and the list goes on.⁶⁴² It also has to be noted that corruption is a global issue given that many foreign banks would have been involved in transmitting the illicit proceeds of corruption for safe custody abroad. There is another dimension that rapid privatisation encouraged through the financial sector reforms of the world bank was seen as an opportunity for corrupt leaders either to reward their cronies or to enrich themselves and members of their families.

⁶³⁸ If a corrupt official is meant to work 9:00 to 5:00, he or she will be paid officially for that time in full, regardless of whether he/she just spends five hours on the official business work.

⁶³⁹ This was the concern expressed by Transparency International on its website at <http://www.it.org> (date accessed 20th December 2009).

⁶⁴⁰ Taken from an article in *The Guardian Newspaper* (no date given).

⁶⁴¹ *The New Vision* (a daily newspaper) of 26th April 2008.

⁶⁴² *The New Vision* (a daily newspaper) of 27th March 2008.

Privatisation presented opportunities for corrupt governments to own formerly owned state assets and to reward their royalists. The transfer of assets from public to private ownership is technically known as privatisation. Since privatisation was initially designed to reduce the role of the state in market operations such as the use of subsidies, to relieve stretched government budgets and to instil discipline and to stimulate the economy, this objective was not achieved in some economies.⁶⁴³ It was evident in Kenya that from simple to sophisticated commercial contracts, privatisation process was abused to reward government cronies or associates of then ruling government officials.⁶⁴⁴ In view of this, in 1997, the World Bank imposed lending conditions on Kenya. It was asked to introduce reforms in the judiciary and concrete anti-corruption measures as a condition for borrowing from the IMF resources.⁶⁴⁵ This was done as part of the new guidelines issued by the IMF on Corruption in 1997.⁶⁴⁶ The guidelines specifically mention corruption as the cause of diversion of public funds through misappropriation, fraud, money laundering, cronyism and many more. Therefore fighting corruption was viewed as part and parcel of promoting good governance in borrowing countries. The abuse of privatisation process as demonstrated in our earlier Kenyan example has been replicated in other African countries. In many countries privatisation was no longer seen as serving any good purpose since it was exploited as a vehicle to divert benefits away from the public, often to the corrupt government officials. With the proliferating private sector, services that were

⁶⁴³ Privatisation was premised on the philosophy of the invisible hand of the market. This viewed the state as part of the problem rather than the solution and sought to minimise its influence by conjuring up this economic strategy.

⁶⁴⁴ C. Baylies, 'Political Conditionality and Democratisation, (1995), A Review of African Political Economy', 65, 321-d 334

⁶⁴⁵ Stevens, M. "The World Bank on Corruption", in *Governance*, January (1998), 8-12.

⁶⁴⁶ Margaret Beare, 'Critical Reflection on Organised Transnational Organised Crimes, Money Laundering and Corruption', (*University of Toronto*, 2005), 115.

initially affordable under the old regime became highly priced beyond the reach of the poor. This was demonstrated by privatisation of water in Kenya service provisions and hospitals in other parts of Africa putting essential services delivery exclusively beyond the reach of the poor and other socially disadvantaged groups. On the contrary, privatisation was responsible for accelerating high levels of unemployment, high child mortality rates and increased death rates from minor curable diseases in many third world countries.⁶⁴⁷ Besides the fact that restructuring of economies across countries was abused to perpetuate corruption, it also undermined the stability of some countries. In Uganda the haphazard way in which the SAPs reform programmes were implemented tilted the political landscape to unpopularity of initially venerated political leaders, created disenchantment; resurrected the antipathy and despondence reminiscent of the old turbulent past.⁶⁴⁸ Added to this was the demobilisation of civil servants in an attempt to shrink the size of the public sector. This created a palatable climate and a pool of resources to feed and reinforce many rebel groups in the country where the disengaged soldiers were easily enlisted.⁶⁴⁹ In my view, donors have been more interested in markets, exports and political influence than the long-term health of beneficiary countries.⁶⁵⁰ As such, the market economy has undermined the tenets of self-determination with regard to the sovereign people's rights to determine their own destiny. It has reduced the power of the individual nation

⁶⁴⁷ Norman Mugarura, 'The Subdued Giant: The Predicament of the Law in Harnessing Global Markets', (2009), 17(2) *African Journal of International and Comparative Law*, 354.

⁶⁴⁸ People started conceptualising Ugandan politics in terms of George Orwell, *The Animal Farm*, Penguin Books (1954) satire, where the author dismisses the hype that greeted the overthrow of Major by Napoleon as nothing but gimmick. Those who understand the history of Uganda will easily appreciate that coup has succeeded coup and dictatorship, dictatorship in Uganda's annals of political history.

⁶⁴⁹ This position is well supported by many Ugandans I have contacted to corroborate some aspects regarding the influence of the global market system in Uganda.

⁶⁵⁰ Mugarura, (n 647).

states to shape and determine their destinies through participation in the democratic process. The ability of governments to pursue development, full employment or other national economic goals has been impaired by the power of capital to pick and leave.⁶⁵¹ As for the third World Countries, they have been caught in a relentless downward spiral due to the SAPs and other economic vagaries.⁶⁵² While corruption is as old as mankind, corruption in countries like Uganda was fuelled by the poor sequencing of normative reform programmes under SAPs in the early 1980s.⁶⁵³ For those who had been sidelined by a liberalised market economy, corruption would be viewed literally as “a means to justify the end”; and for those in elevated official government positions, privatisation presented an opportunity to own one of the formerly government properties. On the positive note, the liberalisation of Uganda economy has accrued conspicuous benefits such as easy access to foreign currency, a robust private sector and other obvious benefits to the economy.⁶⁵⁴

Even though countries may share the same outlook on how to fight certain crimes, it needs to be noted that countries have different vested interests. They would embrace global the envisaged regimes if they expected to gain some synergies—pecuniary or non-pecuniary. Otherwise, some countries tend to always err on the side of caution and exhibit the kind of “I don’t care

⁶⁵¹ J. Brecher & T. Costello, *The Race to the Bottom*, (London Verso 1998), 1-45.

⁶⁵² Mugarura, (n 647).

⁶⁵³ Uganda was just recovering from the liberation war (as it was so-called) in (1979) which ousted the dictator Ida Amin Dada (president 1971-79), and the economy was literally in a state of tartars and not conducive to sustain any meaningful reform programmes.

⁶⁵⁴ It has encouraged competition in businesses improving quality of goods and services and some goods that were initially imported from outside countries are now manufactured in Uganda, which is a good thing for the economy.

attitude” towards global regimes.⁶⁵⁵ As such, the so called ‘global village’ has failed to constitute itself fully as a coherent single viable community subjected to the single set of rules.⁶⁵⁶ Besides inter-state alliances, some states would not want to be seen acting intrusively, paternalistically, imperialistically. The charges are often made whenever one state seeks to impose its discretionary values upon another.

The global AML/CFT regimes are by their very nature are inclined to favour DCs than LDCs. While I agree that well resourced countries should initiate normative regimes and to provide leadership, engendered regimes should be preceded by wide consultations in participating states. Corruption has stubbornly remained a serious issue for many countries despite the proliferation of anti-corruption regimes, both at an individual government and international levels. Corruption is the reason why dirty money continues to flow into many countries financial centres using the international banking system unhindered. Therefore there is need for affirmative action across countries to deny corrupt leaders opportunities to secure stolen assets in any country.⁶⁵⁷ Here globalisation can play a significant role by bringing some

⁶⁵⁵ This weakness (inherent in the global system) is capable of being exploited to foster opportunistic interests by different groups.

⁶⁵⁶ Steven R. Salbu, “Extraterritorial Restriction of Bribery: A premature evocation of a normative global village, (1999), *24 Yale Journal of international Law*, 226-269.

⁶⁵⁷ Globalization is information driven as a result of the innovations in Internet Communications Technology (ICT) but if this information is not properly harnessed, it can go either ways, that is, in much the same that it has helped to bring down transaction costs, it can also leverage criminals in a society permeated by corruption. This seems to be one of the flip sides of globalisation.

societies into the fold of prolific progressive societies,⁶⁵⁸ and leveraging poor countries by bringing transactional costs down.⁶⁵⁹

5.5 The liability of financial institutions in alleged corruption offences

Financial institutions such as banks which accept deposits realised from corruption could be liable for assisting an offender to transmit the proceeds of crime. The bank could also be liable for having committed an offence of dishonest assistance, if it is proved that the bank acted dishonestly in accepting deposits after it had suspected or known that the deposits in question is accrued from corruption. However, the prosecution will have to prove that the bank by so doing acted dishonestly. Bearing in mind, the Privy Council decision in *Royal Brunei Airlines v Tan*⁶⁶⁰, acting dishonestly means “not acting as an honest person would act in the circumstances.”⁶⁶¹ It is an objective standard in criminal law for the Jury to demonstrate that by accepting deposits accrued from corruption the bank fell below the ordinary standard of an ordinary honest man in those circumstances.⁶⁶² The bank’s action would have been dishonest according to the ordinary standards of a reasonable honest person. This means that it must realise that its action by accepting deposits accrued from corruption had by the standards of an ordinary honest person fallen below what was expected of it.⁶⁶³

⁶⁵⁸ It can share in the resources of other countries such intelligence and personnel—difficult to generate at national level or pull their limited resources on overlapping global challenges.

⁶⁵⁹ Norman Mugarura, “The Subdued Giant: The Predicament of the Law in Harnessing Global Markets, (2009), 17(2) *African Journal of International and Comparative law*, 355.

⁶⁶⁰ [1995] 2 AC 378.

⁶⁶¹ Pugh-Thomas: The Bank—An Attractive Deep Pocket defendant, (1999), *Journal of Internal Banking Law*, 50.

⁶⁶² R v Gosh [1982] AC.

⁶⁶³ The framework test on dishonest is delineated by the English case of R v Gosh [1982]

However, banks can only be held liable for knowing receipt where there is compelling evidence that it had knowledge of the underlying breach of trusteeship. The knowing receipt is not based upon the receipt by the defendant of any trustee property but on the participation in the trustee fraud.⁶⁶⁴ For example, where the bank knowingly issues cheques or letters of credit or any other financial products, to facilitate a person who is attempting to launder money generated from criminal activity, where established, the bank will be liable for knowing assistance. Likewise, where the bank accepts money knowingly from someone who has stolen government funds, the bank could be liable. The foregoing illustration explains how banks could be liable in cases of corruption; but it also provokes an important question worthy of asking. How is the bank deemed to have knowledge of the surrounding circumstances in relation to the money it receives from customers? Since banking is a business, one can argue that a bank should not be invidiously made to act as a policeman in apprehending criminals. Similarly, it can also be argued that while banking is a business and therefore profit driven, the bank is bound by regulatory guidelines in its operations.⁶⁶⁵ Therefore the bank should make necessary inquiries and satisfy itself that the money it is accepting as deposits is not tainted proceeds of crime. In *Development Pty Limited v DPC Estate Pty Limited*,⁶⁶⁶ knowledge is circumscribed by the following elements: (i) Actual Knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) Wilfully and recklessly failing to make such inquiries as an honest

⁶⁶⁴ *Barnes v Addy* (1874) Ch.App 214.

⁶⁶⁵ These guidelines are enunciated by a number of AML oversight institutions such as the Basle Committee, the FATF and World Bank and the IMF.

⁶⁶⁶ (1938) 60 CLR 336.

and reasonable person would make; (iv) Knowledge of the circumstances would indicate the facts to an honest and reasonable person. What if someone, whose account has always had persistent liquidity problems, and all of a sudden, just splashes millions of dollars into his/her bank account, the bank should follow the required reporting guidelines.⁶⁶⁷ But what if it takes a bribe and ignores the required AML guidelines such as CDD, then the bank will be liable for knowing assistance. This offence is committed where the bank knowingly assists or facilitates someone to commit a crime.

5.7 Conclusion

Finally, it needs to be reiterated that corruption is both a cause and effect of money laundering. As a cause, it provides an avenue for the commission of money laundering crimes by disabling legal systems and national institutions in discharging their AML obligations. As an effect, corruption generates a palatable environment for money laundering to flourish either within an individual country or to facilitate criminals to perpetuating money laundering. Corruption undermines democracy and the rule of law, creates an environment for violence, violation of human rights, and erodes markets and human rights. In the foregoing environment the system is disabled and susceptible to abuse by those contemplating to perpetuate money laundering and its predicate crimes across regions. Corruption is exploited as a means by criminals and their syndicates to establish firmly into some countries.

⁶⁶⁷ Banks are required to appoint a designated money laundering officer (MILO) should be notified when there is suspicion of money laundering. Where the transaction has been structured such that the deposits fall below reporting guidelines or thresholds, the bank must inform the MILO so that he in turn inform Financial Intelligence Units (FIUs).

Corruption has precipitated poverty by encouraging diversion of funds from development purposes into private bank accounts of its perpetrators. Some LDCs have enacted anti-corruption law without success because laws in a corruption ridden environment laws cannot work. This is not to mention that corruption creates poverty, eviscerating the capacity of individual states to fight its potential threats.

Money laundering and corruption are embedded within each other but the former supersedes the latter in terms of the damage it afflicts on societies. Since money laundering is integral to the underground criminal enterprise, one can argue that this typology of money laundering is not as lethal as corruption committed by public officials of corrupt governments across Africa. In my view, corruption should be elevated as a major human rights issue given its devastating impact on the lives of people especially in LDCs. By underestimating the negative effect of corruption on development underscores why it has been treated with soft hands in many countries. Therefore money laundering and corruption as serious financial crimes need to be taken more serious and to be accorded the same level of attention at an international level.

CHAPTER SIX: STRENGTHENING LOCAL AND GLOBAL INSTITUTIONS

6.1 Introduction

This chapter articulates the importance of global and local institutions in the domesticating global AML/CFT laws. Law as a set of formal written rules cannot be implemented effectively, unless it is internalised through robust national institutions. National institutions are critical components of the global AML framework and in enhancing the adoption of normative changes across countries. States are required to adopt appropriate institutional measures and to provide competent authorities such as courts and the police with necessary duties, powers and sanctions. The AML national institutions should develop measures to enable national governments respond effectively to cross-border and other overlapping policy challenges. The European Union has been successful in fostering policy changes across its member states through its four functional institutions—the Council, the Commission, the parliament and the European court of Justice (ECJ). Similarly, states subscribing to the global initiatives should do so through institutions of experts (modelled on the equivalent of the committee of wise men under Lamfalussy in the integration of financial markets in Europe) to filter through the proposed policy measures and expedite the implementation of normative reforms across countries. National institutional mechanisms should be designed with checks and balances to minimize abuse and withstand exigencies of globalization on the state.

6.2 The IGG as a specialist anti-corruption institution in Uganda

The IGG in Uganda was set up as an independent anti-corruption institution, primarily to champion the war against corruption in public offices. The institutionalisation of anti-corruption campaign in Uganda has registered some success in investigating corruption-related cases, gathering evidence and arraigning offenders for prosecution. Specifically the IGG's mandate was to co-ordinate and enforce the anti-corruption norms within the framework of the United Nation Convention Against Corruption (UNCAC,2005) and the African Union (AU, 2001) anti-corruption instruments in Uganda.

The UNCAC and AU require state parties to establish autonomous agencies to monitor and eliminate corruption in public offices.⁶⁶⁸ For instance, the African Union anti-corruption Convention requires state parties to set up autonomous national agencies to enforce the prosecution of corruption related offences.⁶⁶⁹ The UNCAC stipulates that where there is a significant increase in the Assets of a public official for which no reasonable explanation, in relation to his lawful income is given, an offence of illicit enrichment is committed.⁶⁷⁰ Illicit enrichment means that where there is significant increase in the assets of a public official or any other person which he or she cannot

⁶⁶⁸ Article 24 of UNCAC deals with the concealment of the proceeds of corruption. Where an individual who has not participated in the corrupt activity conceals or retains property, which he knows is the result of an offence committed under the UN Convention; he will have committed the offence of concealment.

⁶⁶⁹ These offences are set out in Article 4(1) of African Union (AU) Anti-corruption Convention (2001). For an illuminating reading on AU anti-corruption Convention, see, Indirra Carr, "Corruption in Africa: Is African Union Convention on Combating Corruption the Answer", (2007), *Journal of Business Law*, 111-136.

⁶⁷⁰ Article 28 of United Nation Convention against Corruption (2005).

reasonably explain in relation to his or her declared sources of income, then they have committed this offence.⁶⁷¹ The UN commitment to fighting corruption is underscored by Article 24 of UNCAC, which deals with the concealment of the proceeds of corruption.⁶⁷² Proceeds of corruption are defined as “Assets of any kind corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption.”⁶⁷³ The foregoing Article stipulates that where an individual who has not participated in corruption conceals or retains property, which he knows is a result of an offence of corruption; he or she will be committing an offence of concealment.⁶⁷⁴ The IGG has been applauded for its efforts in fighting corruption against public officials in Uganda. For instance, it has instituted investigations, generated information and evidence and arraigned corrupt public officials for prosecution. However, the IGG has encountered some challenges in carrying out investigations against some public officials as well. I presume this supposedly due to the manner in which its top officials are appointed—handpicked by the president and naturally subservient to the government.⁶⁷⁵ Because of these dynamics, corruption cases are selectively prosecuted focusing largely on mavericks in the ruling government. The juxtaposition of success and failure of the IGG as an anti-corruption institution in Uganda demonstrates that national institutions in LDCs cannot work independently of governments in executing their mandate; and in investigating

⁶⁷¹ The preamble of UNCAC (2005).

⁶⁷² UNCAC, (n 671).

⁶⁷³ UNAC, (n 671).

⁶⁷⁴ Article 24 relates to those who aid and abett the commissioning of corruption under Article 28.

⁶⁷⁵ This corruption typology is common in much of Africa; see “the Monitor Newspaper”, 15th July 2007.

alleged corruption cases. Like other oversight institutions across LDCs, the biggest challenge to the IGG is influence peddling which is partly precipitated by the manner of appointment of its top officials. Similarly, in many LDCs, the implementation of desired regimes is derailed by the weak law enforcement mechanisms and ignorance of the populace. Ignorance creates a situation where people are sidelined due to lack of knowledge and understanding of their rights and responsibilities. The issue of wide spread ignorance has been exploited as an avenue for political expediency in some societies. Political powers are congregated around state officials to afford them the latitude to literally do whatever they want. There is evidence that the IGG has been soft handed in implementation of its mandate on certain state officials. It has absolved some public officials of corruption by seemingly not fully carrying out adequate investigations against state officials—an irony because it was instituted to hold to account public officials.⁶⁷⁶

To avoid duplicity, officials who are appointed to lead national AML institutions should be vetted by non affiliated independent professional bodies such as International auditing firms. The issue of duplicity and conflict of interests have undermined national institutions in discharging their responsibilities. It is evident that in an environment of structural deficiencies, normative laws are often not implemented as expected. Laws which are not implemented cannot

⁶⁷⁶ Lack of the will to fight corruption through national institutions in Uganda is highlighted by the recent acquittal of three Ministers for abuse of office (stealing government's funds) in relation to the 2007 Commonwealth Heads of Government meeting (Chogm). In Uganda, many Judges are seconded for appointment to the bench because of their association or affiliation with the ruling government. In my view, this interferes with the independence of Courts and judges in dispensing Justice.

deter undesired behaviour; and neither can they be respected in ordering the system. It can therefore be inferred that the institutionalisation of AML/CFT initiatives is essential to promote checks and balances in harnessing AML laws. Independent institutions are indispensable to prevent duplicitous situations where the accused is the judge, the jury and the executioner. While corruption such as bribery and kicks backs is practiced in developed countries, the difference with LDCs is that it is never perpetuated openly in public offices.

The IGG in Uganda has helped to raise public awareness against corruption—and to focus the fight against it in the right direction.⁶⁷⁷ The IGG is premised on the United Nations Convention against corruption which provides that where there is a significant increase in the assets of a public official for which no reasonable explanation in relation to his lawful income is provided, an offence of illicit enrichment is committed.⁶⁷⁸ The United Nations commitment to fighting corruption is further exhibited by article 24, which deals with the concealment of the proceeds of corruption. It also states that where an individual who has not participated in corruption conceals or retains property, which he knows is a result of an offence of corruption; he or she will be committing an offence of concealment.⁶⁷⁹ Thus, the donor community should facilitate NGOs in their work (through funding) as they are independent

⁶⁷⁷ Article 19 of UNCAC, where there is a significant increase in the assets of a public official for which no reasonable explanation in relation to his lawful income is provided, an offence of illicit enrichment is committed.

⁶⁷⁸ Article 28 of UNAC (n 671) above.

⁶⁷⁹ Article 24 relates to those who aid and abett the commissioning of corruption under Article 28.

and essential to hold national governments to account on many issues of national importance.

International NGOs have contributed enormously to the enunciation of soft law instruments to regulate the global exigencies such as money laundering and corruption.⁶⁸⁰ NGOs have helped to fill the void in the regulatory system created by the shrinking role of the state.⁶⁸¹

Administratively, NGOs have provided a platform for citizenry participation to directly in the affairs of national self-interest, promoting issues of governance, government accountability, judicial reform, election reform and generally improving the institutional framework of governments. With regard to facilitating the fight against corruption and money laundering, the work of Transparency International (TI) cannot escape being mentioned. It has played a vital role, generating data on corruption and disseminating it to various stakeholders and often pressurising some governments to reform their policies. In United Kingdom for instance, TI published several articles in the press, echoing its working groups' assessment and putting pressure on the government to introduce some legislation changes. In France, just before the parliamentary election in 2007, Transparency International (TI) pinpointed the fact that a provision in the draft legislation expressly excluded ongoing corrupt

⁶⁸⁰ Pierre-Marie Dupuy, "Soft Law and International Law of the Environment", (1991), *Michigan Journal of International Law*, 422-423.

⁶⁸¹ The International Court of Justice decided in *Barcelona Traction* case has the nationality of the place of incorporation. See the case of *Belgium v Spain*, International Court of Justice (1970), pp, 42-43.

arrangements. The ensuing public pressure contributed in the deletion of the provision.⁶⁸²

While national anti-corruption institutions are created with internal mechanisms to investigate corruption cases; their capacity to prevent corruption is limited due to lack of independence in the way they are created. Technically, NGOs operate under the national law of a place where they are registered, and the law of the place where they are actively based. This means that they are controlled by national governments in terms of what they can and cannot do including some times being subjected to harsh licensing regimes. Thus, anti-corruption Institutions tend to be subservient to national governments—an issue which renders them either prone to manipulation, or inhibited in discharging their mandate independently. The IGG in Uganda has been criticised for its selective prosecution of alleged corruption offences. It has focused its attention on mavericks, leaving those who steal billions of public money either untouched or untouchable.⁶⁸³ There are very few prominent public officials who have been investigated or prosecuted by the IGG office.⁶⁸⁴ The discriminatory use of the IGG in Uganda has undermined the implementation of normative anti-corruption on “politically exposed persons (PEPS)” (such as Ministers, presidents, permanent secretaries, judges and many more in this category). The IGG has partly been opportunistically exploited to absolve prominent government officials from

⁶⁸² Transparency International, *Global Corruption Report* (Pluto Press, London 2004), 27-35.

⁶⁸³ This corruption typology is common in many African Countries: see “the Monitor Newspaper”, 15th July 2007.

⁶⁸⁴ The case of the Vice President of Uganda (Professor Gilbert Bukenya) who was prosecuted for misappropriating Chogm funds in 2011 and later acquitted is a vivid example to corroborate this claim.

alleged corruption charges—tactfully by suppressing investigations brought against them after lengthy investigative periods.⁶⁸⁵ In response to public outcry, the IGG has hastened to initiate investigations against some corrupt public officials but tactfully dropped them after public pressure has subsided.

On many occasions corrupt public officials have used their financial clout to evade prosecution after they have been arraigned before Courts. Another challenge is that the majority of LDCs are deficient in investigative capacity to fully investigate cases and secure a successful prosecution against alleged corruption offences.⁶⁸⁶ Many local institutions in Uganda such as the police are inefficient, deficient, understaffed, partisan, unprofessional, corrupt and unethical. The absence of requisite human resources capacity such as forensic scientists has constrained the efforts of national anti-corruption institutions in discharging their mandate efficiently. Within the police criminal investigations department in the Ugandan Police, 11.1 percent of the prominent corruption cases lodged in 2007 and 2008 were withdrawn; and 88.9 percent of the cases are ongoing with no determinate date to end; while 29.4 percent of cases were acquitted.⁶⁸⁷

The Director of Public Prosecution (DPP) in Uganda—a body responsible for ensuring that arraigned criminal cases are fully investigated is also affiliated to the ruling government. On many occasions, people appointed to head the above institution (DPP) are either affiliated to the ruling government or are the

⁶⁸⁵ Some national AML institutions are widely viewed in some countries as undemocratic because of the way officials in these institutions are appointed, and also because of the fact that they work under the direct influence of ruling governments.

⁶⁸⁶ See, *The Daily Monitor* (Ugandan local Newspaper) of 17th November 2011.

⁶⁸⁷ *The Daily Monitor*, (n 686).

close associates of the President. Therefore, there is a possibility of cases being prosecuted selectively or arbitrarily to protect the reputation of public officials or the government; and to use persecution as a means of silencing perceived opponents of the ruling government.⁶⁸⁸ These two factors have resulted in high rate of cases being dismissed after lengthy and costly investigations have been launched.⁶⁸⁹ It is thus essential that officials who are appointed to lead oversight regulatory institutions should be vetted by none affiliated independent professional bodies such as international accounting firms to avoid duplicity and conflict of interests. The manner in which top executives of oversight institutions are appointed in Uganda has potentially inhibited them from championing the mandate they were created for. There is need for enforcement of the envisaged AML/CFT standards to foster normative changes into countries. Otherwise laws which are not enforced cannot be taken seriously in fostering anticipated normative behavioural changes in the society. Local oversight institutions should be constituted with a monitoring mechanism such as on-site visits to ensure they are implemented properly as envisaged foster normative changes into the society.⁶⁹⁰ It would seem that some governments just create dysfunctional national institutions to appease the international donor community. The monitoring process should encourage continuous review assessments and civil society participation.⁶⁹¹ There should be a clear set of rules and

⁶⁸⁸ This institution has been more active in prosecuting members of the opposition like the Rubaga North MP than it has been in relation to members of the ruling NRM government.

⁶⁸⁹ These views were highlighted in the Report on Corruption by researchers from Makerere University economic policy Research Centre launched in Kampala (Ugandan capital city) on 15th November 2011.

⁶⁹⁰ This is precisely the reason why it is important to have bodies such as FATF. However, it can do much better by addressing some of its weaknesses such as lack of accountability.

⁶⁹¹ This is proposed based on the World Bank way but in a manner that is local society oriented.

procedures to monitor the responsiveness of the system with regard to anticipated normative changes.

6.3 Institutionalisation based on the European Union paradigm

The integration of the European member countries was fostered through its four functional institutions—the council, the commission, the court and parliament. In my view, the success of Europe as a regional market should provide a model for change in other regions. The integration of financial markets in Europe provides insights into the challenges inherent in global regimes⁶⁹² and global governance of international finance.⁶⁹³ While the EU is without doubt a successful integration model founded on four functional institutions to co-ordinate EU policy details nationally, the European single market is far from realistic and is still fragmented. Policy guidelines are co-ordinated through any of the four institutions of the EU: the Parliament, the Commission, the Council and the court constituting it as a quasi European super state. However, integration of financial markets in Europe is not without challenges given that member countries are allowed to maintain their national systems alongside the EU ones. Member states are only required to adopt a minimum level of harmonisation through the principles of home country control and minimum harmonisation.⁶⁹⁴ Thus the concept of global governance without fully-fledged global institutions such as a global

⁶⁹² Despite efforts at integration, financial markets are still divided highlighted by minimum harmonization initiatives and mutual recognition to achieve some level of convergences of markets.

⁶⁹³ This contention is further strengthened by the regulatory failure highlighted in the recent global financial crisis (2009).

⁶⁹⁴ Council Directive 91/308/EEC

parliament through which to govern and pursue envisaged policy details, on issues regarding member countries with varying backgrounds, has become a pertinent issue in the integration of world markets. This environment is capable of being exploited to cultivate conditions for criminality such as perpetuating money laundering and market abuse. The national financial institutions have played a normative role in fostering the implementation of the global AML/CFT standards across countries. However, local institutions should be created after wide consultations have been undertaken to ensure that the engendered institutional framework is appropriate and adaptable locally. The role of NGOs could be crucial in ensuring that public institutions such as those charged with fighting corruption and other forms of wider financial abuse such as money laundering are brought to book. The independence of NGOs gives the leverage to spearhead good governance and desired changes into the society.

6.4 The role of NGOs

International NGOs have enormously contributed to the enunciation of soft law instruments against money laundering and corruption crimes.⁶⁹⁵ Non-governmental organisations have spearheaded measures to plug weaknesses in a national regulatory system. This has been done through raising awareness and pressure governments to adopt desired laws.

⁶⁹⁵ Pierre-Marie Dupuy, "Soft Law and International Law of the Environment", (1991) Michigan Journal of International Law, 422-423.

It needs to be noted that NGOs⁶⁹⁶ are technically accorded the legal personality status, which means that they have the status of their own independent of their shareholders. They exist under national law of a state where they have been registered; and the law of a place where they are active, in case of international NGOs. They provide an essential interface for development in many respects. With globalisation, the state has either lost or ceded its traditional powers to non-state actors by reconstituting at a supranational level; or it has ceded its economic power to regional institutions.⁶⁹⁷ NGOs can provide an oversight function to ensure that government institutions are held to account. In many LDCs national institutions have been characterised by many challenges, not least being mismanaged, understaffed, poorly resourced and sometimes used wrongly to perpetuate and sustain corrupt governments in power. NGOs have helped to plug the weaknesses in some national governments with regard to human rights, policy, regulations and other development issues.

NGOs have also provided a platform for citizenry participation in the affairs of national self-interest, promoting issues of governance, government accountability, judicial reforms, and election reforms and improving the institutional framework of governments. With regard to fighting corruption and money laundering, TI has been one of the prominent organisations. It generates and disseminates data to various stakeholders; and often pressurising some governments to reform their policies. In United Kingdom for

⁶⁹⁶ The International Court of Justice decided in *Barcelona Traction* case has the nationality of the place of incorporation. See the case of *Belgium v Spain*, International Court of Justice (1970), pp, 42-43.

⁶⁹⁷ Dupuy, (n 695).

instance, several articles in the press echoed the Working Groups' assessment and put pressure on the Government to introduce Legislative changes. In France, just before the parliamentary election in 2007, TI highlighted that a provision in the draft legislation expressly excluded on-going corruption arrangements. The ensuing public pressure contributed in the deletion of the provision.⁶⁹⁸ Thus, NGOs have been instrumental in fostering normative changes across countries. They have made some organisations to change their internal policies, procedures and to adopt compliance mechanisms in accordance with OECD Conventions and recommendations.⁶⁹⁹ In addition, Transparency International as well as various business associations has assisted Companies with training in relation to successful model of codes of conduct and compliance programmes.⁷⁰⁰ NGOs have provided analyses, organised and spearheaded debates on corruption and political party funding as a way of fighting private sector corruption.⁷⁰¹ Therefore civil society organisations have been instrumental in enhancing the capacity of societies to fight money laundering and corruption. Some have been active in education and training, some in advocacy and other in fostering development initiatives. The independence of civil society organisations is based on the fact that they are not affiliated to governments or its public bodies and will not be inhibited to campaign against glaring corrupt practices and pointing out any malpractices. However, it has

⁶⁹⁸ Transparency International, *Global Corruption Report* Pluto Press, London (2004)

⁶⁹⁹ The OECD issues Guidelines for Multinational Enterprises operating in or from adhering countries. OECD provides voluntary principles and standards for responsible business conduct, including on combating corruption and bribery.

⁷⁰⁰ Transparency International, (n 681).

⁷⁰¹ In October 2000, 'Transparency International organized a seminar in La Pietra in Italy.' The meeting concluded with the issuance of recommendations to the OECD on how to extend the Convention to cover the bribery of foreign political parties and party officials, which they submitted to the OECD Working Group.

not been easy for CSOs to function independently because of harsh licensing laws. Some governments have used strict licensing laws to undercut the influence of CSOs especially those that are viewed to be critical of the government.⁷⁰²

6.5 The role of Civil Society Organisations (CSOs)

Likewise, CSOs have been instrumental in championing desired changes across jurisdictions. They have pressured some governments to change their laws and internal procedures; and to develop compliance mechanisms in accordance with OECD Convention and recommendations.⁷⁰³ In addition, TI, as well as various business associations, assists companies that want to learn more about successful models or codes of conduct and compliance programmes.⁷⁰⁴ CSOs have provided analyses and organised debates on corruption and political party funding as a way of fighting private sector corruption.⁷⁰⁵ Therefore CSOs have played an influential role in enhancing the capacity of societies in fighting money laundering and its attendant evils including corruption. CSOs are not affiliated to any government and will therefore not be inhibited in the campaign against any corrupt practices and money laundering for that matter. Some governments have adopted strict licensing laws to undercut the work of NGOs especially those organisations

⁷⁰² Some governments have sometimes used threats to interfere with the work of civil society organization especially those which are seen to be critical of the government.

⁷⁰³ The OECD issues Guidelines for Multinational Enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct, including on combating corruption and bribery.

⁷⁰⁴ See, Transparency International at: www.ti.org (last visited 10th October 2011).

⁷⁰⁵ In October 2000, 'Transparency International organized a seminar in La Pietra in Italy.' The meeting concluded with the issuance of recommendations to the OECD on how to extend the Convention to cover the bribery of foreign political parties and party officials, which they submitted to the OECD Working Group.

that are viewed to be critical of the government.⁷⁰⁶ All development minded societies should embrace and support the work of NGOs since the majority of them are constituted to serve national development interests.

The work of the CSOs such as transparency international (TI) has been essential in facilitating states with information gathering and in engaging with governments on issues such as corruption and other forms of market abuse. There is need for a global court based on the model of the ECJ in the European Union. The court through its influence can easily engender a change in social attitude to foster a positive development ethos for stability of markets. The court would also be used as a forum for dispute settlement (as the WTO), elaboration and enforcing compliance on emerging global AML norms. Although the majority of AML regimes are imbued with sanctions mechanism, the fact that sanctions are invoked in a coercive manner has not helped in fostering compliance among member states. What states do instead is to express their discontent by circumventing engendered regimes under the ratified treaties.⁷⁰⁷ The court through elaboration process would ease resentment against emerging AML regimes, thus causing the engendered norms to be internalised. Apparently, the issue of prosecuting money laundering cases in national courts signifies that the culprit (often well resourced) can exploit weaknesses in the national legal system to stay at large. The global court would help to fill gaps in the enforcement of AML regimes to ensure they are not exploited by the launderers to further his

⁷⁰⁶ Some governments have sometimes used threats to interfere with the work of civil society organization especially those which are seen to be critical of the government.

⁷⁰⁷ States entered into an arrangement (deals) to sign the treaty subject to certain reservations, which may constrain the implementation of the provisions of treaty in the state.

criminal enterprise. Short of that, money laundering is likely to remain a challenge for the international community for many years to come.

6.6 Judicial Institutions

There is a need for strengthening judicial institutions to foster the fight against money laundering and its predicate crimes across countries.⁷⁰⁸ These institutions will ensure that money laundering as a serious international crime is not pushed to the fringes of the law, as it seemingly is today.⁷⁰⁹ Firstly, money laundering crimes are not amenable within the realm of national law alone. It can be argued that the absence of a global court manifests the weakness of the current global AML framework. Secondly, the complexity of money laundering offences means that they can be jurisdictional problematic and beyond the reach of individual states. The proposed global court could potentially play a fundamental complimentary role to domestic courts in reinforcing international measures on money laundering. The weakest link in the current global AML framework is the absence of clear enforcement mechanisms of engendered supervisory or regulatory regimes. Apparently, because of the overlapping nature of money laundering offences, it is not easy to prosecute them in mainstream domestic courts. The current global AML laws though laudable in theory, do not go far enough in practice, with regard to forestalling threats posed by money laundering and its predicate offences.

⁷⁰⁸ Norman Mugarura, "The Global AML court as a judicial and institutional Imperative," (2011), *14(1) Journal of money Laundering control*, 60-78.

⁷⁰⁹ Mugarura, (n 708).

6.7 The Complexity of Money laundering Offences

The intricate money laundering process can involve sovereign states, state institutions, banks, state officials, criminals, criminal syndicates, complex legal systems, international treaties, different cultures and traditions and the list goes on and on. When the foregoing institutional challenges are compounded by differences and fragmentation of national AML legislation, it has facilitated the growth of illicit criminal activity around the globe.⁷¹⁰ Criminals have exploited the discrepancies between different legal systems of countries in different parts of the world to gain access in the new markets. The tendency of national legal systems is to give priority to the place of commission under the territoriality principle but as this situation envisages there may be other intricacies beyond the scope of the above principle.

6.8 The International Criminal Court (ICC)

With the introduction of the ICC in international arena, it has become apparent that culprits who commit heinous crimes against humanity as opposed to the traditional approach of only holding states accountable, are also brought to book, and if found guilty in respect of the alleged crimes, are punished accordingly. Article 13 (b) of the Statute, provides for jurisdiction in any case where a territory or nationality state has ratified the Statute, in which one or more of such crimes appears to have been committed. The ICC has a specific jurisdiction over offences committed by a state which has nationality or

⁷¹⁰ Norman Mugarura, 'Harmonisation of AML laws through domestic and international regulatory interfaces', (2008), unpublished paper, 1

territorial jurisdiction over the state party to the Statute.⁷¹¹ The ICC was created by the Rome Statute in 1998 with a limited specific mandate (which limits its capacity) to prosecute all international crimes. It has the mandate on crimes such as genocide, war crimes and crimes against humanity.⁷¹² These crimes include wide spread or systematic attacks against civilians, such as murder, torture and rape.⁷¹³ The inception of the ICC and the formation of a body of crimes against humanity, signified a new era in international law because individuals and groups as well as states would directly be held accountable under international criminal law.⁷¹⁴

However, the fact that the ICC was not constituted with a universal mandate on all aspects of international crimes, such as money laundering, supports the need for an AML court, to close the vacuum in the international criminal system. The inception of a global court would fill the void in the law of money laundering, apparently which capable of being exploited by money launderers to commit money laundering offences and stay at large. In my view, the drafters of the Rome Statute (1998) missed an opportune moment to bring money laundering within the jurisdiction of the ICC. The fact that the Rome Statute (1998) was constituted with a narrow mandate excluding money laundering was a cause for concern. It is on this issue that the whole argument gets misplaced of constituting wide spread violations of human rights without recognizing that money laundering and its predicate offences

⁷¹¹ States that are non-parties to the Statute will have to accept the jurisdiction of the court on an ad hoc basis; and notably a state in this situation will be obliged to cooperate with the ICC. This is set out in Article 12 (3) of the Rome Statute (1998).

⁷¹² George P. Fletcher, 'Against Universal Jurisdiction' (2003), 1 *Journal of International Criminal Justice*, 580

⁷¹³ Phillip Sands, *The Lawless World*, (Penguin Books 2006), 46-47.

⁷¹⁴ Sands, (n 713).

such as plunder, looting national wealth had an equivalent lethal effect on people and societies as other offences prescribed under the statute. This provokes the question—what are human rights, if millions of people dying from simple curable diseases such as Malaria, TB, HIV/AIDS and the list go on courtesy of money launderers through diversion of funds (earmarked for treatment of diseases), are not treated within the framework of human rights?

6.9 Time for a global AML court

There is the need for a global court to compliment national judicial institutions in fostering the adoption of global AML regimes nationally.⁷¹⁵ The proposed global court would serve as neutral judicial forum to adjudicate on overlapping money laundering cases. The court would help to circumvent the challenges posed by multiple jurisdictions, different legal cultures and shifting attitudes towards anticipated societal changes. Courts have the potential to change local attitudes by cultivating a rule based culture and fostering changes in social attitudes within states. Law dictates and articulates the societal future direction but law also defines the way of life of a society. The global AML court as an institution would engender an ethos based on changing needs of the society and in the long run foster a positive anti-money laundering global framework.⁷¹⁶ Law, including money laundering laws needs to reside in an institutional framework to function and it would equally make perfect sense for the proliferating AML/CFT to reside within a global institutional framework.

⁷¹⁵ This chapter has drawn on my earlier journal paper: Norman Mugarura, 'The Global Anti-money laundering court as a judicial and institutional imperative, (2011), 14(1) Journal of Money Laundering Control, 60-79.

⁷¹⁶ It is a mistake for any one to suppose that law is the preserve of bureaucrats, the learned lawyers or the executive.

With the AML court adjudicating cases and consolidating decisions, it will be easy to develop an information portfolio and enhance the envisaged AML standards across countries. It needs to be noted that the common law system has gradually developed through consolidation of norms by courts and using engendered decisions in deciding future cases. Cases adjudicated by judges in higher courts are recorded and consolidated for use in future cases but also this helps to transmit a rule based ethos within the society easily. While the ICC has jurisdiction on crimes against humanity such as genocide, money laundering remained subject to national criminal law and is justiable under national jurisdictions. Thus, money laundering is prosecuted in a state where the alleged offences were committed.

The individual state would only make formal request for the perpetrators of the alleged terrorist's acts to be extradited to the country the said crimes were committed. In passing the Rome Statute in 1998 and the subsequent creation of the ICC, member states limited its mandate to a list of specific crimes to make it robust and resourceful. Besides, it was argued⁷¹⁷ that the amount of investigations that would be involved in undertaking criminal trials of terrorist's acts coupled with the legal intricacies involved, acts of terrorism would remain in the realm of national government's jurisdiction.⁷¹⁸

⁷¹⁷ Dapo Akande, 'The Jurisdiction of International Criminal Court over nationals of non-parties: Legal Basis and Limits', (2003), *1 Journal of International criminal Justice*, 618-634.

⁷¹⁸ The 1937 League of Nations Conventions on the Prevention and Punishment of Terrorism—which addressed states directly, no any other international treaty had been adopted on terrorism until the Rome Convention 1998. It should also be said that even the Rome Convention did not primarily address terrorism—choosing instead to leave it within the jurisdiction of domestic states.

With regard to the mechanics of a global court, it should be based on the model some professions are in England and Wales are regulated. Professional oversight bodies in England and Wales are constituted with internal disciplinary mechanisms of admonishing their members who flout internal code of conduct. For example, disciplinary action may be taken against auditors who have not complied with regulatory or professional requirements.⁷¹⁹ In *R v. Institute of Chartered Accountants in England and Wales, ex parte Bridle*⁷²⁰, Price Water House faced civil action over the liability of its auditors of BCCI. The firm brought proceedings over its auditors but action was also brought in civil Courts. On appeal, the Court of Appeal found it inherently unfair that more than one tribunal could litigate the case at the same time. However, the exceptional nature of the case was appreciated and the decision reached that only small cases not accompanied by civil actions could proceed through the regulatory process.⁷²¹ The court can help to reinforce normative AML regimes by elaborating how norms should be domesticated.

The role of courts is *interlia* to settle disagreements or uncertainties about the scope and nature of problematic activity and achieving some semblance of order through judicial interpretation of statutory principles.⁷²² However, given the informality in which many AML regimes have emerged and the concomitant fact of being dominated by a handful of a few market players,

⁷¹⁹ Mads Andenas, "Courts and Regulation of Financial Markets, (1997), No.7, Essays in *International Financial & Economic Law*", 10.

⁷²⁰ [1993] B.C.C 736 D.C.; [1994] B.C.C. 297, (C.A).

⁷²¹ Andenas, (n 719).

⁷²² Joanne Scott, "Courts as Catalysts: Rethinking in New Governance", (2007) 13(3), *Columbia Journal of European Law*, 568-578.

tensions are likely to creep up and to derail the proliferating AML system. By informalism, i mean the manner in which regimes on money laundering are created by way of *ad hoc* arrangement often dominated by a handful of a few countries. Legal institutions are said to be informal when they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favour of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, *ad hoc* and particularistic.⁷²³

The proposed global court would diffuse tensions and help to foster harmonious interstate relations. It would also apply engendered judicial decisions as paradigms to settle contentious future cases. This would potentially ease the adoption of global regimes and co-existence of countries on issues of global governance. It must be appreciated that the apparent weakness in the international legal system today is the weak enforcement mechanisms of engendered regimes, which renders the evolved framework weak and susceptible to abuse. The court would add clarity on the consumption of rules by articulating paradigms on overlapping money laundering and related issues.⁷²⁴ In theory, soft law regimes are evolved as regulatory guidelines, but in practice states have got to transpose them. It is here that the proposed court would enhance the assimilation of AML standards by proffering definitions in the broadest terms possible, based on the anticipated policy objectives of different policy domains. Where rules/norms are arbitrarily applied or at variance with norms of international

⁷²³ Heba Shams, *LEGAL GLOBALISATION, Money Laundering law and Other Cases*, Sir Joseph Memorial series, (British Institute of International and Comparative Law 2004), 244.

⁷²⁴Shams, (n 723).

law, given the informal nature in which many AML regimes have evolved, the court would bring its weight to bear by rendering those anomalies incompatible with the law or referring them to the legislative authority for the defects to be removed. Courts could foster standards by evaluating informal agreements and articulating criteria by which agreements are to be internalized; generating information needed to enhance normative AML practices.⁷²⁵ In so doing, the court would potentially play a normative role in a two-fold way. It would ease relations in the same effective way the WTO dispute settlement mechanism has done in relation to member states which violate the WTO rules.⁷²⁶ Secondly, the court system would bring about enhanced market integrity and integration within and across regions. In my view the use of coercion as an instrument of securing compliance of non-co-operative states has been employed in default of a court to adjudicate matters of money laundering globally. There are two cases highlighting tensions between sovereign states and FATF in enforcement of anti-money laundering regimes. The first case was underscored by FATF and Austria with regard to anonymous passbook accounts; and the second, was Seychelles with regard to passing the highly condemned legislation EDA—seen to encourage money laundering.⁷²⁷ It can be inferred that FATF sanctions against NCCs are invoked in default of a fully-fledged global forum to adjudicate money laundering and its predicate crimes. It is possible that the introduction of judicial forum could create an institutional ethos to foster the internalization of engendered regulatory changes.

⁷²⁵ Scott, (n 722).

⁷²⁶ As long as societies are subjected to different development dynamics, it will not easy to bring them together under a common framework of purpose.

⁷²⁷ Scott, (n 722).

The proposed global AML court would obviate the need for coercive methods or dictating policies on sovereign states. States have stubbornly refused to transpose International treaties (the case with Iran Colombia, Afghanistan—major producers of Narcotic drug substances) where they perceive treaties to be targeted at them.⁷²⁸ Some countries may transpose treaties but narrow the scope of application of the treaty, not to mention that treaties have sometimes not been implemented as expected. The global court would add clarity, certainty and predictability on how the envisaged AML regimes or norms are to be translated, assimilated and harnessed domestically.⁷²⁹

With the court as an arbiter, it would help to add clarity where norms prove less certain, requiring entities to justify the conception of a norm, in terms of the process used to produce it.⁷³⁰ It has to be noted that courts as institutions have always provided mechanisms through which expected standards are made more transparent, public and precedential. The requisite transition from the local to a robust global system would be achieved through the process of elaboration and capacity building, consistent with the fundamentals of judicial practices, self-conception and institutional relations. For example, in integration of the European member countries, the ECJ has played a harmonization role whereby certain entities that are unhappy with the EU Directives are allowed to challenge aspects they are not happy with. Member

⁷²⁸ Keith Fisher “In Rem Alternatives to Extradition for Money Laundering”, (2003), *L.A. International & Comparative Law Review*, 403-455.

⁷²⁹ The World Bank has made it compulsory for every country seeking to use its resources to adopt financial discipline based on the Basle Committee and Supervisory and regulation of financial institutions. I am of the view that countries should be made to adopt regulatory guidelines selectively, taking into account their varied circumstances.

⁷³⁰ Scott, (n 722).

countries can seek the intervention of ECJ on EU matters they have been sidelined; and the court will offer its interpretation to articulate the clear position of EU law. In so doing it provides governance in the administration of EU law, helping to refocus member states to democracy and fundamental objectives on which the union is founded.⁷³¹

The global AML court should be structured to complement national courts, in situations where the latter cannot adjudicate overlapping money laundering cases. As such national courts could also use the global court as referral, where domestic remedies have been exhausted or have not been enough to dispose the case on technicalities. The structure of the global court should reflect the need to fully foreclose gaps in the global AML/CFT system. The court's jurisdiction should be exercised whenever domestic courts are deemed insufficient to dispose money laundering cases. The proposed global court could also be used where domestic courts are not able to prosecute money launderers. For instance, in situations where a state has not passed a law transposing its AML obligations under international law, prosecuting money laundering and its related offences might not be easy. The UN Convention on Prevention of Drugs Trafficking and Other Psychotropic Substances (1988) mandates member states to create institutions through which to deal with the threat of money laundering and its related offences.⁷³² It is in this respect that the proposed global AML court can be utilized to overcome the foregoing dilemma.

⁷³¹ Scott, (n 722).

⁷³² Article 3(1) of Vienna Convention on Prevention of Drugs Trafficking and Other Psychotropic Substances (1988).

The reciprocal relationship of the global and domestic courts should be structured to ensure where one court has already initiated proceedings on an issue of money laundering, the same matter should be stayed in another court to avoid duplicity.⁷³³ In the European Union law, where the defendant alleges that he/she has a defence and makes a complaint to the commission with respect to establishing that breach, English courts may order a stay of the English action pending the outcome of the alleged complaint.⁷³⁴ It is a customary rule of international law that a court may not institute proceedings against a person for a crime that is already the object of criminal proceedings.⁷³⁵ Therefore, the ECJ and its role in streamlining the application of EU law across member states could be used as a model in translating the roles of the proposed global court. There is a need for a neutral judicial organ to adjudicate money laundering related offences.

The need for a global court is proposed because sanctions mechanism⁷³⁶ under chapter seven of United Nations Charter (1945) has lately proven cumbersome to invoke. It has become all too predictable that Russia and China are going to veto any call for sanctions proposed by the other permanent member states on the United Nations Security Council.⁷³⁷ The creation of the global court presided by competent judges selected across states on the basis of their competence would change attitudes and generate

⁷³³ Mads Andenas, "The Court and Regulation of Financial Markets", (1997), 7 Essay in International Financial & Economic Law, 7.

⁷³⁴ *British Leyland Motor Corporation Ltd. v Wyatt Interpart Co. Ltd.* [1979] F.S.R 83; [1980] F.S.R 18.

⁷³⁵ Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003), 319

⁷³⁶ The sanctions mechanisms under the charter of the United Nations are spelt under articles 40 in relation to the use of economic sanctions; and article 41 which spells out circumstances in which force can be used against any member state.

⁷³⁷ This underscored by the failure of the UN Security Council to adopt a Resolution to Syria which was needed to address the violations of Human Rights by the Government in Syria.

support for global regulatory regimes. The court as an arbiter between different antagonistic blocs would lessen friction—which has lately polarized the United Nations Security Council in discharging its mandate. The UN system has been polarised by asymmetries of power—an issue which dictates the manner in which decisions are reached. The UN has been rendered inefficient on many issues because of this challenge.⁷³⁸ Secondly, the UN system is emasculated by the fact that it is manifested through another system—the state system. This means that when there is a conflict between national and international interests, vested strategic national interests are likely to take precedence.

In order to foster an orderly global anti-money laundering system, the role of the court in fostering desired changes cannot be dispensed with. In my view, it is the missing piece of the jigsaw in configuration of a robust institutional framework against money laundering and its predicate threats. Unfortunately, in some countries, courts are not independent either because of the way judicial officer are appointed or compromised by the dynamics of local development such as poverty. The poor relationship between courts and governments does not only undermine administration of justice to the populace but also the image of respective governments internationally. For example, in Uganda the poor relationship between courts and the government is sometimes manifested by ‘intermittent clashes’ between the two organs of the state. This tends to stifle the courts ability in discharging their duties to the public.

⁷³⁸ Norman Mugarura, “THE SUBDUED GIANT: THE PREDICAMENT OF THE LAW IN HARNESSING GLOBAL MARKETS”, (2009) 17(2) *African Journal of International and Comparative Law*, Edinburgh University Press, 302-352.

6.10 The Mechanics of the proposed global court

The contemporary interconnectedness of states has changed the context within which regulations are manifested. There is no contemporary state that can claim to be immune from or not to be influenced by globalisation. If the court system is properly utilized, given its centrality to development, it can foster a transnational legal order on money laundering and other proliferating global regimes. The court as an institution can help to streamline how engendered norms are to be harnessed and internalized into national legal jurisdictions.

There are two ways of internalizing international treaties into national legal systems—depending on whether a state is monist or dualist. In monist countries, international norms take effect nationally immediately after the treaties generating those norms have been ratified. This is particularly apparent in civil law jurisdictions such as France. In dualist countries, the process of domesticating international law will only take effect after treaties have been internalized within the national legal system by passing an enabling legislation in parliament.⁷³⁹ The more monist a country is, the more will international obligations whether arising under a treaty or customary law be treated simply as part of the law, to be given effect and directly applied within a state. The more dualist a country is, the more difficult it is to apply international norms. For example, it is easy to accommodate change in

⁷³⁹ Mugarura (n 738).

France, which is a monist country than it is in United Kingdom, which is a dualist country.⁷⁴⁰ Article 38 of the Statute of International court of Justice refers to the judicial decisions as source of international law. Decisions will underscore judgments of the International court of justice and its advisory opinion.⁷⁴¹ Although judicial decisions have a great influence on national courts, there is a need to streamline the envisaged measures so that they strengthen states against overlapping global exigencies. Parliament would have created guidelines for domesticating international norms and how they should be applied nationally.⁷⁴²

As regards prosecution of cross border crimes, the tradition is to prosecute them in a state where they were committed. This is predicated on the *lotus* principle, which proffers that a state has jurisdiction to try another states national provided the alleged crimes were committed on its territory.⁷⁴³ This means that if money laundering offences has been committed on the territory of another state, they can be prosecuted by the state on whose territory they were committed. This is predicated on the principle that if a crime is committed in country A, then the alleged crime is justiciable in country A.⁷⁴⁴ In the case of *United States v. Burns*⁷⁴⁵, the Canadian court stated that “an individual, who chooses to leave Canada, leaves behind Canadian law and

⁷⁴⁰ Rosalyn Higgins, *Problem & Process, International Law and How We Use it*, (Clarendon Press, Oxford, 1994), 208.

⁷⁴¹ Higgins, (n 740).

⁷⁴² Higgins, (n 740).

⁷⁴³ The contentious issue was whether Turkey had jurisdiction to try the French Officer on watch duty at the time of the collision. Since the collision occurred on the high seas, France claimed that only the state whose flag the vessel flew had exclusive jurisdiction over the matter.

⁷⁴⁴ Cassese, (n 735).

⁷⁴⁵ The Canadian supreme court judgement of 15 February, 2001, 2001 SCC 7, file No. 26129.

procedures and must generally accept the local law, procedures and punishment which the foreign State applies to its citizen.” The above position is augmented by *Rivard v. United States*⁷⁴⁶, where the court stated that “all systems of law recognise the principle that a man who outside of his country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done.”

On the other hand, the *territorial principle* gives legal authority for a state to have jurisdiction on the matter, due to location of the crime and also bars other states from exercising jurisdiction beyond their borders.⁷⁴⁷ This principle is fronted on the ideological and political reasons: the need to uphold the principle of sovereignty which is essential in consolidating the state as an entity of international law.⁷⁴⁸ The principle of national sovereignty has not made things easy to prosecute known criminals because of the unwillingness of some states to cooperate. This complexity is highlighted by the difficulties experienced by United States and United Kingdom in trying to secure extradition of the Libyan Citizen, Abdel Basset Ali al-Megrahi and Lamem Khalifa Fhimah over the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland (1988) due to lack of Libyan cooperation.⁷⁴⁹ Thus, individual state governments can decline extradition of its nationals to a requesting state to protect its political and economic self interests. Should the

⁷⁴⁶ US court of Appeal judgement of 375F 2d 88 (15th Cir. 1967)

⁷⁴⁷ There may be exceptions as we will demonstrate in regard to “passive and Active principles” and possibly also “the universal jurisdiction principle” in extreme cases of human right violations.

⁷⁴⁸ Randall Kenneth, “Recent Book on International Law: Book Review-Universal Jurisdiction: International and Municipal Legal Perspectives”, (2004) *American Journal of International Law*, 112.

⁷⁴⁹ William N. Gianaris “The New World order and the Need for International Criminal Court” (1992), 14(3) *Fordham International Law Journal*, 89.

territory of the state be under an occupation, the occupier state is responsible for the crimes committed there; but where the crimes are committed on a state's territorial waters or on its ships or aircraft on the high seas are considered committed on the territory of the state.⁷⁵⁰ This is in keeping with the fact that since states have different laws, a person should be punished in the place where one has infringed the law. Territoriality principle is also fronted on the reasoning that a crime which constitutes a violation of social contract should be punished in the place where the contract was breached.⁷⁵¹ The motive is to prosecute a crime in a state where it was committed as it is easy to collect evidence needed to secure prosecution against the defendant, and thus considered as *forum conveniens* or the appropriate place of trial.⁷⁵² The doctrine of *forum non conveniens* is sometimes pleaded to circumvent trial in foreign jurisdictions.⁷⁵³ Prosecuting crimes in a foreign jurisdiction may be deemed inappropriate where the court envisages that in the interest of the parties, and administration of justice, that such a trial may never properly dispose the case to deliver justice. The above principle was highlighted in case of *Bhopal* to deny the US jurisdiction over the Indian victims of the gas leak disaster in December 1984. The Indian plaintiff, with the Government of India, in favour of US jurisdiction against Union Carbide Company of India that the Indian legal system was inadequate to meet the demands associated with such a complex litigation.⁷⁵⁴ It was also argued that since the parent Union Carbide Company was registered and

⁷⁵⁰ Cassese, (n 735).

⁷⁵¹ Cassese, (n 735).

⁷⁵² Cassese, (n 735).

⁷⁵³ Peter T. Muchlinski 'Corporations in International Litigations: Problem of Jurisdiction and the United Kingdom Asbestos Case' 50 ICLQ 1 (2001).

⁷⁵⁴ Muchlinski, (n 753).

controlled in the US that it was the US courts which had jurisdiction over the trial of US foreign companies.⁷⁵⁵ The above contentions were dismissed by the court of first instance and upheld in an appeal on the grounds that *Bhopal* case was one of an accident whose *locus* was in India and therefore was an exception to the issues arising out of parent home country control. As such, India was deemed to be the preferred forum of the *Bhopal* case. While this case was in relation to the trial of a foreign based company, it is still relevant for us in developing a fundamental principle of international criminal law because technically speaking, companies as juristical persons can be punished in the same way as natural persons.

Prosecuting crimes in a place where they were committed is essential in safeguarding the rights of the victims. For instance, the Libyan—Ali al-Megrahi, allegedly responsible for the bombing of Pan Am Flight 103; and the death of all two hundred fifty occupants over Lockerbie in 1988 was sought and extradited in Scotland, the place of the commission of the alleged offences. If the foreigner is fleetingly residing in a territory, he/she is expected to know the law of the territory and the criminal law in force as well as the rights of the defendant in criminal trial.⁷⁵⁶ When a case is tried in a place where it was committed, it offers psychological relief to the society that a wrong committed against its people is finally disposed. Moreover judges, the jury and advocates being members of the same local community where the crime was committed are aware of the local sentiments and conscious of the public close scrutiny of the administration of justice; and thus accountable to

⁷⁵⁵ Muchlinski, (n 753).

⁷⁵⁶ C. Beccaria, *An essay on crime and punishment* translated from Italian to English 4th Edition (London: F. Newbury), 2000: p. 279.

the community to do justice.⁷⁵⁷ However, the converse is that the pressure generated by public sentiments could influence the jury and sway them to decide according to public sentiments denying justice to the defendant.⁷⁵⁸ Where money laundering has been committed by state officials or with the complicity or acquiescence of the state, for example officers in diplomatic missions abroad, the state may be reluctant to prosecute offenders because of diplomatic immunity, which puts them beyond the jurisdiction of the host society (*rationale personae*). Another challenge relates to *locus commissi delicti* in the complex case crimes. This is demonstrated in a situation where money laundering may be planned in one country and committed in another, which is not the territory where trial proceedings will be instituted. The last one is where the person who committed the alleged wrongs has state amnesty preventing other states from instituting legal proceedings against him. However this amnesty may not be respected where it appears to conflict with the principle of *jus cogen*, the peremptory norm of international law.⁷⁵⁹

Some states have passed countervailing laws to interfere in the sovereignty of other states—eliciting anger in the affected states. This is underscored by the supreme court of America’s decision in *Societe Internationale pour Participations industrielles et Commerciales v Rodgers (Societe Internationale)*.⁷⁶⁰ The foregoing case provided a basis for US courts to order production of documents from jurisdictions with banking secrecy laws. While

⁷⁵⁷ Beccaria, (n 756).

⁷⁵⁸ This would indeed be in contravention of article 6 of ECHR 1950, now replicated in other Human Rights Instruments in United Kingdom and in other jurisdictions.

⁷⁵⁹ In England, courts are under an obligation to recognize amnesty by another state, regardless of whether the alleged violations breach peremptory norms.

⁷⁶⁰ 357 USC 197.

Societe Internationale focused on considerations limiting sanctions when they conflicted with foreign secrecy laws, it did not erect an inflexible bar against such sanctions.⁷⁶¹ Likewise, *Westing-house Electric Corporation v. Rio Algom, Ltd.* ruled that where two jurisdictions' laws conflict, the person concerned has two options: to surrender one sovereign or the other the privilege received or alternatively a willingness to accept the consequences.⁷⁶² Non-compliance has been exacted with the imposition of severe penalties on the person requested (including financial institutions as juristic persons), giving priority for US to enforce its domestic laws on other jurisdictions.⁷⁶³ Section 319 of the PATRIOT Act exports the forfeiture of criminal assets to financial institutions otherwise beyond American control, with the intended effect of coercing such financial institutions into implementing acceptable anti-money laundering programmes and placing institutions against their customers.⁷⁶⁴ This section presents foreign banks with two stark choices: either they have to comply with the American investigations and police their customers to ensure that no assets subject to forfeiture are ever deposited with them, accept the possibility of disruption and loss of termination and forfeiture of correspondent accounts or cease to do business directly with domestic financial institutions.⁷⁶⁵

⁷⁶¹ 271 F.2d 616, 620 (2d. Cir.1959).

⁷⁶² 480. F Supp. 1138, 1156 (ND111. 1979) (compelling production of documents protected by blocking laws in Switzerland, Canada, Australia and South Africa).

⁷⁶³ Ethan Preston, "The Analysis of the USA PATRIOT Act: New Adventures in American Extraterritoriality", (2004), 10(4) *Journal of Financial Crimes*, 105.

⁷⁶⁴ Preston, (n 763).

⁷⁶⁵ Preston, (n 763).

6.11 The Principle of Active Nationality

In some states, national courts have jurisdiction for all criminal offences committed by their nationals abroad. This will be the norm even if the alleged offences are not criminal under the law of a territorial state of nationality where they were committed.⁷⁶⁶ The underlying motivation is the will of a state to ensure that its citizens comply with its law, wherever they are, either at home or abroad regardless of the law of the state where the alleged crimes would have been committed. This principle is sometimes used to circumvent constitution prohibitions where a state might be required to extradite its nationals to another state for prosecution in a place where the alleged crimes would have been perpetrated. Much as some states are constitutionally mandated to extradite their nationals, the principle of active nationality ensures that its nationals do not escape justice wherever they are. However, where the alleged offences have been committed by the state agent or cronies of the government, legal proceedings may not necessary reflect the magnitude of the offence committed and in any case they might never be prosecuted.

6.12 The Principle of Passive Nationality

The passive personality principle allows states, in limited cases, to claim jurisdiction to try a foreign national for offences committed abroad that affects

⁷⁶⁶ Muchlinski, (n 753).

its citizens.⁷⁶⁷ This principle asserts that states may exercise jurisdiction on crimes committed abroad against their nationals. This principle is grounded in: (i) the need to protect nationals living or residing abroad; and (ii) it is motivated by a substantial mistrust in the exercise of jurisdiction by foreign territorial states.⁷⁶⁸ For this to be the case, the state invoking this ground of jurisdiction also provides a broad, “double incrimination”, namely that the offence in question be considered as a crime in both states—the state of the victim and the state of defendant.⁷⁶⁹

6.13 The Universality Principle

Under the principle of universality, every state is under an obligation to bring to trial persons accused of perpetuating international crimes. By so doing, states will be helping to safeguard its interests as well as the interests of other states.⁷⁷⁰ While the purpose of bringing legal proceedings against such persons is a joint one, it is also motivated by the need to prosecute and punish (on behalf of the international community) persons responsible for heinous crimes such as war crimes. There are two types of a universal jurisdiction: (i) conditional universal jurisdiction; and (ii) absolute universal jurisdiction. In the first form of jurisdiction, asserts that only states where the accused is in custody may prosecute him or her, the so called *forum deprehensions* or jurisdiction of the place where the accused is

⁷⁶⁷ This principle has been used by the United States to prosecute terrorists and even to arrest the *defacto* leader (1989-1990) of Panama, Mr. Manuel Noriega, who was subsequently convicted by an America court for cocaine and money laundering.

⁷⁶⁸ Cassese, (n 735).

⁷⁶⁹ Cassese, (n 735).

⁷⁷⁰ Cassese, (n 735).

apprehended.⁷⁷¹The second form of jurisdiction asserts that a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of a crime, the nationality of the victim, and or even based on the fourth Geneva Convention on international crimes.⁷⁷² As many legal systems do not accept to present trial in absentia, the presence of the accused on the territory constitutes a condition for initiation of legal proceedings.

Considering the pernicious effect of money laundering on societies; and on those who cannot afford basic necessities of life—food, clean drinking water, education and housing perpetuated by those masquerading as political leaders, means that money laundering is a human right issue.⁷⁷³ The ambivalence of states towards money laundering signifies that money laundering has not been accorded the seriousness it deserves. There is international consensus that money laundering is a threat to the stability of states. However, one wonders why states have not shown the zeal to implement AML/CFT regimes as envisaged.⁷⁷⁴

6.14 International Police Organisation

The international police organisation, augmented by other regional police agencies have played a prominent role in fighting money laundering, for

⁷⁷¹ Cassese, (n 735).

⁷⁷² Cassese, (n 735).

⁷⁷³ In particular Articles 2 and 3: 'the right to life' and 'prohibition of torture and any degrading treatment', embodied in the ECHR (1950) but replicated in other Human Rights Instruments as well.

⁷⁷⁴ The International Criminal Court was created to uphold the highest international ideals in the society and preserving human sanctity. However, the fact that it left money laundering out of the scope of the crimes on which it has jurisdiction was in my view a mistake.

example through sharing data on crimes and wanted persons. Interpol has ensured that money launderers as well as other cross border crimes are pursued wherever they are hiding and brought to book. The fact that Interpol operates as a multilateral police organisation has given it the mandate on cross border jurisdictional matters and to investigate alleged crimes inside the borders of other countries. This would not be possible with national police forces because of jurisdictional limits.

The idea of international police Institution (Interpol) was first mooted in 1914 but materialised in 1923 with the composition of 176 member states, of which, forty six European member states account for 80 percent of its communication traffic.⁷⁷⁵ The move to create a transnational police was prompted by the growing concern over internationalisation of certain crimes which could not be confined in a single state, such as terrorism, drug trafficking offences and money laundering.⁷⁷⁶ The creation of an international police was also prompted by common social influences caused by people in Europe, objecting to every day crimes and inadequacies of national criminal justice system.⁷⁷⁷ The third reason was the need for common definition of crimes as some of the problems were far more understood than either recent criminological orthodoxy or as common sense would expect.⁷⁷⁸ Then there was a fourth point underpinned by the scholarship that points to the absence of a reliable and valid method of evaluating the scope of transnational crimes. This scholarship contends that there was little hard data of recorded cross border

⁷⁷⁵ J. Anderson, (eta al), *Policing Across National Boundaries*, (London Pintes, 1995), 15

⁷⁷⁶ Anderson, (eta al) (n 775).

⁷⁷⁷ Anderson (eta al) (n 775).

⁷⁷⁸ L. Johnson, *Policy Britain: Risk, Security and Governance*, Longman (2000), 154.

crimes in Europe, and the absence of information about the economic cost of such activity.⁷⁷⁹

Interpol operates on three levels: The first is the macro-level, which entails the constitutional and international legal agreements and the harmonisation of national laws and regulations. The second is the meso-level, which focuses on the operation, structure, practices, and procedures of the police and law enforcement agencies. Thirdly is the micro-level which entails the investigation of specific offences and the control and prevention of particular forms of crimes.⁷⁸⁰ At a macro-level, government ministers take decisions on matters relating to rights of entry and exit from sovereign States (agree extradition procedures, asylum policies and visa harmonisation mechanisms) and on legal issues relating to operational powers across borders in respect of arrest, detention, investigation and surveillance.⁷⁸¹

Primarily, Interpol was created to perform two fundamental functions: firstly, it was to promote and ensure mutual legal assistance between criminal police authorities within the legal limits laid down in different countries and in the spirit of Universal declaration of human rights. Secondly, Interpol was created to promote public policing that is likely to contribute to the prevention and suppression of ordinary law crimes.⁷⁸² Each Interpol member is required to nominate an office for communication with Lyon Headquarters (the National Central Bureaux (NCBS)) being the mechanism through which Interpol

⁷⁷⁹ Johnson, (n 778).

⁷⁸⁰ Anderson, M. *Policing the World: Interpol and the International Police Co-operation*, (Oxford University Press, Clarendon, 1998), 11.

⁷⁸¹ Anderson, (n 780).

⁷⁸² M. Anderson, and E. Bort, (eds.), *The Frontier's of Europe*, (London Pinter, 1998), 45.

enquiries are channelled. Police information is circulated between NCB's on international notices, which contain photographs, fingerprints and physical description of persons and colours coded according to the nature of the enquiry.⁷⁸³ The challenge that has recently been pointed out by the director of Interpol is that countries are not effectively utilising the Interpol data base in cross border profiling of wanted criminals.⁷⁸⁴ Some countries cannot react swiftly to the demands of the fast moving information age. This reinforces the premise that the capacity of countries to harness global regimes is dictated by the dynamics of development in individual countries.⁷⁸⁵

Interpol's role as a communication network restricts it to the exchange of information on a case by case basis; and partly because of this, its capacity to promote greater police co-operation in Europe and in other regions is limited.⁷⁸⁶ Interpol's work is also limited in another respect: Article 3 of the Convention (1956), mindful of the sensitivities surrounding national sovereignty, defined the organisations mission as the efficient expression of common law crimes and offences to the exclusion of other matters having political, religious and racial character.⁷⁸⁷ It was largely because of the exclusion of political crimes from Interpol's operational briefs, that following terrorist acts 1960s and the early 1970s, the European Council of ministers instigated the creation of Trevi.⁷⁸⁸ Just like Interpol. Trevi operates at three levels: the macro-level-the ministerial group meets every six months and a

⁷⁸³ Anderson (eta al), (n 782).

⁷⁸⁴ The *Independent Newspaper* 30 December 2011

⁷⁸⁵ Anderson (eta al), (n 782).

⁷⁸⁶ Anderson (eta al), (n 782).

⁷⁸⁷ Anderson, (eta al), (n 782).

⁷⁸⁸ Anderson (eta al), (n 782).

meso-level involves services by senior official group. There is Trevi 1 was set up to combat terrorism, but also to address the problem of drug trafficking. Trevi 2 is concerned with scientific and technical knowledge, research and police training. Lastly, is Trevi 3, which was set up to address the question of security such as civilian air travel, a role which was later assumed by Trevi 1.⁷⁸⁹ With regard to money laundering, Interpol operates a specialist branch (FOPAC) which co-operates with police departments and multilateral organizations in gathering and disseminating information on laundering of the proceeds of crime.⁷⁹⁰ It has developed model legislation designed to make it easier to obtain evidence needed in criminal investigations; and proceedings, aimed at confiscation of the proceeds of crime. Interpol works closely with the United Nations Agencies to complete an automated compendium of information on the status of legislation and law enforcement across different Countries.⁷⁹¹

In my view, Interpol as an international organisation replicates global asymmetries of power in its operations. As a global institution, Interpol has been skewed in favour of developed countries—accounting for 80 percent of its communication traffic; and LDC's sharing the remaining 20 percent. The work of Interpol is complimented by other regional initiatives such as Schengen Agreement (1985) which collects, collates and distributes data on potential criminals across its member countries in Europe.⁷⁹² However, it also needs to be noted that international organisations tend to be skewed in favour

⁷⁸⁹ Anderson (eta al), (n 782).

⁷⁹⁰ Anderson, (eta al), (n 782).

⁷⁹¹ L.Johnson, *Policy Britain: Risk Security and Governance*, (Longman, 2000), 154.

⁷⁹² Anderson, (n 778).

developed countries as opposed to LDCs because of their financial clout. Global institutions are largely dependent on financial contribution made by big donors for their sustainability, existence and relevance. This is presumably why LDCs do not have a strong influence in international organisations regarding the way policy decisions are reached. They contribute a negligible proportion towards operation budgets of the respective organisations. This is caught by the adage that 'influence is a commodity paid for by those who can afford to do it.' There is need for the institutionalisation of the normative AML/CFT standards based on a clear framework to reflect the varying levels of development between countries.

6.15 Conclusion

Enforcement institutions such as courts and Interpol are indispensable in the fight against money laundering and its predicate offences. Courts have always provided mechanisms to prosecute traditional offences. However, in my view domestic courts cannot be suitable forums to prosecute money laundering due to the possibility of political meddling, corruption and its effect on their efficacy. This challenge has been exacerbated by the fact that in many countries those arraigned for prosecution could be powerful government officials or their associates and untouchable.

Much as I propose the global court, I need to admit that stubborn states might be less inclined to support it, if they know that they will be caught out. This is a tough catch 22 situation. While the ICC has jurisdiction over a list of specific

crimes against humanity, it excludes money laundering from its mandate. Considering the pernicious effect of money laundering and corruption on those who cannot afford the basic necessities of life especially in LDCs, if money laundering cannot qualify as a human rights issue, it then leaves me baffled as to what human rights mean! Since it is not possible in some countries to prosecute money laundering offences in mainstream domestic courts, creating a global AML court is not only necessary but an imperative. However nobody should be carried away by the prospect of the global court because it cannot provide all answers to overlapping money laundering offences. The court can be derailed difficulties in gathering evidence from NCCs, hiring international lawyers and technicalities relating prosecuting transnational crimes and extra. Governments can refuse to submit to its jurisdiction of the global court because of the principle of sovereignty in IL. In the long run however, courts as institutions have the potential to change local attitudes and traditions. The role of enforcement institutions such as Interpol is very crucial in enhancing the fight against money laundering crimes. However Interpol is oriented to European countries, reinforcing the charge that global institutions replicate global asymmetries of power in both approach and reality.

CHAPTER SEVEN: PROPOSED RECOMMENDATION

7.1 Introduction

In view of the findings of the study, this chapter proposes desired reforms which governments and oversight institutions, either collectively or individually need to harness in domesticating the global AML/CFT framework. The implementation of these recommendations can create a platform for harmonisation of different laws, systems, procedures, customs to enhance inter-state cooperation on the threat of money laundering and its predicate crimes. These recommendations are proposed specifically based on the findings of this study.

7.2 Recommendations at a global institutional level

At a global financial institutional level, the World Bank and the IMF are as essential interfaces for development as they were when they were first introduced. These institutions have played a normative fundamental role in fostering desired reform programmes across countries. However, in view of their limited mandate on things like corruption, their mandate needs to be reconstituted to reflect the contemporary global changes and challenges. These institutions mandate which was first adopted after the Second World War has in my view been superseded by drastic changes in the current global economy. They need to be given a revised mandate incorporating corruption

and changes in the financial markets regulation such as providing lender of the last resort on issues that were not addressed in these institutions initial mandate. It is not possible to divorce the issue of financial crimes from regulation of the wider financial markets. For instance, money laundering is embedded within the web and complexity of the wider financial regulatory system.

7.3 The need for global wide consultations

The adoption of global regulatory regimes, no matter at what level they are envisaged should be preceded by undertaking global-wide consultations so that they are evolved with sufficient acceptability and legitimacy. Consultations should be undertaken in an individual country or regional markets, where the proposed regimes are to be implemented. Member countries should be consulted and possibly co-opted on specific platforms where individual regimes are evolved so that they have an ethos of representativity and legitimacy across jurisdictions. Lack of adequate representation of constituent member countries in evolution of regulatory regimes undermines cooperation of some member countries in implementing engendered regimes. The constitution of AML/CFT Committees should be broad enough to represent participating countries. This can potentially ensure that engendered AML norms are elevated to the status of customary international law in the long run. While the study acknowledges the need for a few developed countries such as the G-12 to provide leadership in evolution of prudential regulatory regimes, one cannot be oblivious that some of

engendered regimes have proved incompatible to regulatory environments in some countries. For instance, the inability of Uganda and South Africa to harness the global AML/CFT framework is testamentary either of its incompatibility or the inability of individual member countries to implement it. The Ugandan government, succumbing to pressure from the donor community enacted an AML bill in 1999 (not yet operationalized it into law); and it was also one of the first signatories of Palermo Convention in December 2000. However, it has since then not transposed this same treaty into law through its national parliament.⁷⁹³

7.4 Integrating multiple legal systems within a global system

There is a need for states to realign their diverse laws, procedures and legal systems to expected global AML/CFT standards. States are different and characterised with different development challenges and legal backgrounds.⁷⁹⁴ In my view prescribing regulatory AML/CFT regulatory models does not mean that countries are going to adopt them. This presupposes that countries will have to use comparative law to determine how their systems would assimilate the envisaged AML provisions. Comparative law enables governments of fledgling states to determine how they would adjudicate matters, what laws they would follow in different areas, and which court systems they would use and which laws to reject. Countries should use comparative law especially by looking at countries within their regions where AML laws have been implemented and how they have been assimilated.

⁷⁹³ The *New Vision* (Uganda Newspaper) of 10th February 2012.

⁷⁹⁴ Norman Mugarura, "The Subdued Giant: the Predicament of the Law in Harnessing Global Markets", (2009), 17(2) *African Journal of Internal and Comparative Law*, 325.

However model laws should be adapted to suited local conditions because when one talks of law, he/she is not just talking about the abstract. I presume he/she would be talking about culture, customs, traditions and different societies. Law is simply presents the means to foster desired virtues in the society. Thus, the global AML/CFT framework based on global standards should be pragmatically implemented and where possible some aspects of it deferred in some countries until they have developed a requisite infrastructure to implement them. While integration of economies is not easily achievable as highlighted in the integration of financial markets in Europe, there should be a mechanism for harmonisation of different legal systems.⁷⁹⁵ Countries need to see themselves, and be seen by others, as influencing the global effort to define, protect and promote engendered global standards rather than be expected to adopt a concept by other societies out of their own circumstances and traditions.⁷⁹⁶

7.5 The need for requisite legal reforms

Legal reforms are necessary so that the envisaged global AML/CFT laws are easily adapted to domestic legal systems across countries. The normative reform programmes should be implemented pragmatically to suit the prevailing local conditions in a country. Where necessary, it is important for states to replicate models in other countries where similar reforms have been undertaken. There are many examples of using comparative law in fostering

⁷⁹⁵ European Member countries are required to implement national measures through their home Parliament to transpose EU law but this does not mean that they are integrated. Economies are allowed to undertake a level of minimum harmonisation and home country control which in a way creates a dual regulatory system.

⁷⁹⁶Mugarura, (n 794).

legal reforms across countries. Driven both by internal considerations and the international influence that has arisen from globalization, Uganda and Kenya have used comparative law to achieve legal reforms.⁷⁹⁷ One relevant example is anti-corruption laws. Nigeria has explored numerous avenues to eradicate corruption through consultations, public hearings, and visits to other countries such as Ethiopia, Zimbabwe, Zambia, and Hong Kong.⁷⁹⁸ This effort has resulted in countries having to identify defects in anti-corruption legislation and introducing necessary changes such as unifying their anti-corruption laws. In 1997, the IMF and various Nordic countries suspended aid to Kenya because of corruption violations.⁷⁹⁹ These donors required requisite reforms to be undertaken before they would resume their aid programs.⁸⁰⁰ This necessitated Kenya's review of their laws in areas of de-monopolization, deregulation, privatization, prosecution and governance of enhanced human rights, accountability, and clarification of rules.⁸⁰¹ Since some of the reforms failed to correct the problems, it was also necessary to review why a law may work in one country, but not in another.⁸⁰² This is another important goal of comparative law that is useful in the African context. Much as we do not support that regimes such AML/CFT standards should be imposed on economies, donor countries should to some limited extent put pressure on countries to ensure they implement desired reform programmes.

⁷⁹⁷ Oko, Okechukwu, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, (2002), 34 N.Y.U. J. Int'l L. & Pol. 397; J.T. Gathii, *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 Conn. J. Int'l L. 407

⁷⁹⁸ Okechukwu, (n 797).

⁷⁹⁹ J.T. Gathii, *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an anti-corruption Strategy in Kenya*, (1999), 14 Conn. J. Int'l L. 407, 408.

⁸⁰⁰ Gathii, (n 799).

⁸⁰¹ Gathii, (n 799).

⁸⁰² J.T. Gathii, *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an anti-corruption Strategy in Kenya*, (1999), 14 Conn. J. Int'l L. 407, 412—416.

7.6 Mechanism for harmonization of laws

Due to increasing globalization of trade, on both a regional and international scale, harmonization of trade laws has become a necessary evil in many countries. For example, in evaluating the desirability of joining a treaty, countries should compare what works for them and what does not work and make the necessary trade off⁸⁰³ While entry into a treaty creates business opportunities, the requirements of law modernization, such as accepting arbitration rather than court adjudication for business law disputes, need to be evaluated taking into account the local legal context.⁸⁰⁴ Kenya, as part of the East African Community (“EAC”), consisting of Kenya, Uganda, and Tanzania, used Comparative Law to enhance trading and economic development amongst its members.⁸⁰⁵ The EAC was originally established in 1967 and dissolved temporarily in 1977.⁸⁰⁶ The regional economic development treaty required harmonization of laws between countries with differing historical backgrounds since Tanzania was a former German colony.⁸⁰⁷ A renewed EAC treaty went into force in 2000, and the original three countries have been joined by Rwanda and Burundi.⁸⁰⁸ Another area where comparative law is useful in these countries is when regional cooperation is not only necessary but an imperative. It is an imperative for

⁸⁰³ Ndulu, M., Harmonization of Trade Laws in the African Economic Community, (1993), 42 Int'l & Comp. L.Q. , 101-103

⁸⁰⁴ Ndulu, (n 803).

⁸⁰⁵ Mancuso, S., Trends on the Harmonization of Contract Law in Africa, 13 Ann. Surv. Int'l & Comp. L. 157, 163, n.19 (2007); East African Community website at <http://www.eac.int/> accessed February 1, 2009.

⁸⁰⁶ East African Community website at <http://www.eac.int/> accessed February 1, 2009.

⁸⁰⁷ Tanzania national website at <http://www.tanzania.go.tz/history.html> accessed February 1, 2009.

⁸⁰⁸ East African Community website at <http://www.eac.int/> accessed February 1, 2009.

countries to harmonize applicable laws so that there is a common regulatory framework for them to co-exist.

7.7 Financial Sector Reforms

The susceptibility of financial institutions to sophisticated money laundering schemes clearly highlights the need for the proper regulation of the financial market industry. This is because there is a correlation between market failure and financial sector abuse. Thus, the global AML/CFT regulatory framework is not only essential but an imperative for states to ease international cooperation against overlapping money laundering exigencies. Interstate cooperation is essential to safeguard against regulatory arbitrage; but also to prevent criminal organizations from abusing the financial system.⁸⁰⁹ States which remain to the fringes of global regulatory regimes face the risk of being sidelined or alienated. Secondly, since some LDCs are deficient in robust laws and systems, they need to embrace the global AML/CFT framework. Fledgling countries would also be able to tap into the resources of other countries such as Intelligence information sharing. The global AML/CFT framework can enhance these countries ability to foster desired changes nationally. This would caution economies with tenuous legal systems from being exploited to transmit crises through the global system.

Lack of requisite laws and policies can potentially be exploited by scoundrels to undermine the stability of the global financial system. To safeguard against

⁸⁰⁹ This was precisely the reason for the adoption of United Nations Convention on Drugs and other psychotropic Substances, (otherwise known as the Vienna Convention) in 1988.

regulatory failure, there is need for states to create a single regulatory authority based on the model of home country control. In this model, the parent authority has an oversight responsibility for the activities of both the branch and the subsidiary. This approach is necessary to ensure that where there is failure of law and policy in a host country it doesn't get transmitted to infest other economies using the global system. However, home country control paradigm can only prevent market abuse at an institutional level, but it cannot be used to freeze and confiscate assets in the absence of a domestic law. Therefore, if municipal and foreign laws are not harmonized by way of enabling legislation, markets can be undermined because of unfair competition, regulatory arbitrage and free riding of weak economies.⁸¹⁰ Financial globalisation manifested by the movement of financial institutions such as banks, investment houses, insurance companies, and securities firms across the border is necessary for economic development.⁸¹¹ As already noted global regulatory regimes are evolved by institutions such as the Bank of International Settlement working through its specialist committees such the Basle Committee on banking supervision; the FATF and the IMF and World Bank. To make sure states get to grips on their challenges, the World Bank/IMF have imposed supported reform programmes especially on fledgling economies. These economies are required to implement normative reforms as a condition for borrowing from the World Bank and IMF. The current credit crisis across Europe demonstrates that DCs are not immune from financial sector regimes prescribed by IMF and World Bank. However, it

⁸¹⁰ If foreign banks are tightly regulated when their local rivals are not, they will be out-competed by their local rivals.

⁸¹¹ Ephyro Luis B. Amatong, "Regulatory Equivalence and the U.S-E.U Financial Services Dialogue", (2006), International Finance seminar paper, 4-10.

needs to be noted that the governments of sovereign nations — especially the powerful ones can not be made to act in the global interest if they do not want to do so. The IMF and World Bank have used lending and technical assistance to LDCs as a means of keeping their influence on vulnerable borrowing economies. The role of the World Bank and IMF, in delivering technical and financial assistance to fledging countries has never been pivotal particularly in LDCs. These economies are still in need of both financial and technical assistance to develop requisite expertise in many policy areas where they are deficient. The desired reform programmes should be tailored to reflect the dynamics of development in individual countries. In my view the World Bank and IMF should be given a revised robust mandate to reflect the contemporary economic and political climate in which they operate. The post Second World War political and economic climate in which the World Bank and IMF were created has drastically changed. While the prevailing circumstances could have then necessitated the need for major powers to dominate the economic and political landscape, the contemporary circumstances are different—an issue that should be reflected in these institutions mandate. In this regard, it might be important in the interest of good leadership and democracy for the role of managing director of IMF and the presidency of the World Bank to be rotated between constituent member countries. It would seem that preserving the presidency of the World Bank/IMF permanently and exclusively to the Europeans and Americans respectively reinforces the charge of political posturing of major economic powers. The headquarters of the IMF and World Bank should be rotated between regions or relocated to countries where these institutions undertake

most of their work in countries like Africa and Asia. At an individual state level, the adoption of global regimes such as AML/CFT standards should be preceded undertaking comprehensive reforms in education, the judiciary, legal systems and other institutions so that they are able to translate the desired regulatory changes locally.

In my view, the role of global financial institutions will continue to be sidelined, unless they devise a way of fostering a good working relationship with sovereign governments. There must be a way to minimize tension because they constrain relations. Secondly, international financial institutions such as the IMF have little say over major countries, or even minor ones, other than those to whom they are lending money. If anything, these institutions are often obliged to indulge the wishes of, and avoid offending, their biggest shareholders. In my view, by widely consulting in LDCs before desired regimes are adopted, would enhance the influence of global financial institutions globally. With the US global influence on the wane, partly due to the emergence of China, leadership in the international system is much more diffuse than ever before. This has commensurately complicated the task of reaching agreements on many global governance issues such as regulation of money laundering crimes. Unless countries come to their senses and stop the politics of posturing, acting in concert on global issues will continue to get harder than ever before.

CHAPTER EIGHT: CONCLUSION

In the final analysis, the importance of the global AML framework in the fight against money laundering and its predicate crimes cannot be underestimated. The thesis has articulated that the global AML/CFT framework cannot be implemented without internalising the prevailing regulatory environment across jurisdictions. There are enormous challenges inherent in the global AML/CFT framework because it depends on compliance of states. As the study has demonstrated in chapter, interstate cooperation is not as easy to achieve as it initially sounds.

The findings of the study have corroborated the thesis that the global AML framework in its present form, is not yet compatible with the prevailing regulatory environment in the majority of LDCs. States should do more than just prescribing regulatory regimes because rules which cannot be enforced to deter undesired behaviour locally are meaningless. While 'a-one-size fits all approach' in regulation of financial markets--subject to the varying dynamics of development cannot work, Countries should nevertheless participate in the global AML initiatives so that they are not alienated on important issues of national interests. There is also the need for a common legal grid to deal with overlapping jurisdictions and; (ii) and to share resources such as intelligence information. At banking regulatory level, this study can be utilised to implement desired policy and regulations of national and cross-border financial institutions. In my view, one cannot successfully undertake a study on money laundering and its regulation globally without examining the

dynamic nature of the global market system. To fully analyze the limitations of the global AML/CFT framework, the study has also examined the precarious regulatory environment in some countries which predisposes them capacity deprivation. This was done bearing in mind the fact that harnessing any global regime in relation to any regulatory exigencies depends on the individual state's capability to harness it.

The global AML/CFT framework is necessary to foster international cooperation and how engendered regimes are to be internalised into domestic jurisdictions. However, interstate cooperation should be fostered through the adoption of United Nations model treaties and soft law instruments. International soft law instruments are particularly useful because they have created a wide range of legal norms, principles, codes of conduct and transactional rules of state practice that are recognised either in formal or informal multilateral agreements.

As noted earlier, the study has articulated the various dimensions of the global AML framework in the context of the FATF; the bank for international settlement in Basle Switzerland; the International Securities Commission Organisation (IOSCO) based in Madrid (Spain); and the World Bank and IMF normative reforms programmes and UN AML treaties. These bodies have pioneered normative regimes to regulate financial markets on various interstate issues such as money laundering and its predicate crimes. The use of soft law instruments in multilateral agreements generally underscores the consent of states to apply engendered norms but there is no *opinion juris* to

make them legally binding as rules of customary international law. It needs to be noted that soft law instruments are not legally binding on member states⁸¹² they only create regulatory guidelines on desired interstate issues. Thus, soft law instruments have contributed enormously towards development of international rules, standards and legal principles, which are later crystallised into hard law. It needs to be noted that countries have a lot to gain by adopting and internalising soft law instruments such as the Basle Committee's guidelines on banking supervision, and the FATF 40+9 recommendations. While the failure of a state to transpose soft law instruments does not constitute a breach of international law; in practice non-compliance with these instruments is likely to generate tensions between countries. For instance, jurisdictions which refuse to comply with the recommendations of the FATF are publically blacklisted ("naming and shaming") by FATF. Economic sanctions may also be imposed on non-complying countries by invoking recommendation 21 of FATF (1996). When the non cooperative jurisdiction is a dependency territory, then the blacklisting apply to that territory. Due to the importance of FATF regulatory regimes, the World Bank and the IMF have integrated them into its monitoring framework of national economies.

The UN, AML treaties just like any other treaties are technically internalised into a state subject to ratification—before they can be legally binding on that state. If a state has not ratified a treaty, its application nationally will be limited. After the treaty has been ratified, it is then be transposed through

⁸¹² International law should be enforced to demonstrate that maintain peace and order through punishing offenders.

national parliament with the exception of monist states. In monist states, ratified treaties become part of national law; and they become effective without recourse to further measures in national parliament. In the same way, AML/CFT treaties will have to be ratified and internalised through national parliaments, if they are to be effectively applied in a country. The limitation inherent in treaties as instruments of international law is that they are implemented courtesy of the individual state's consent. The practice of implementing treaties has varied from state to state. Some states may refuse to adopt the global AML treaties as demonstrated in the case of Iran's refusal to ratify the United Nations Anti-Narcotic Convention in 1988. This practice is usually common with countries which may either disapprove of the treaty and its objectives or which may view the treaty as capable of undermining their economic self-interests. States can also decide to take this course of action, if they perceive that a particular treaty is targeted at them either individually or as a group. States may also resent global regimes (if they have not actively been involved in their evolution) because as sovereign entities, they would resent being dictated upon by other states. This was underscored by the United Kingdom's refusal to adopt the United Nations Convention for International Sale of Goods (CISG) in December 1980. The UK decided to stick to its Sale of Goods Act 1979 and went further to give jurisdiction to UK courts on matters of contract law in relation to parties resident in United Kingdom. Thus, the compromise should always be to adopt model laws but to localise them to suit national interests.

Model laws are necessary in fostering the adoption of desired policy changes nationally. The advantage is that states would have willingly embraced international instruments to ease cooperation on overlapping exigencies. However, if model laws are not properly localised, they can potentially debase or sideline local economies. The adoption of model laws should be preceded by wide consultations and studies; and possibly also co-opting constituent parties in the process of creating them. It is important for different stakeholders to see themselves as having contributed towards the enunciation of regimes that govern them. There is no doubt that the global AML regimes are necessary to provide predictability and clarity on how states should respond to overlapping issues. With this regulatory framework in place, stakeholder countries can easily plan their response to overlapping exigencies; and courts can also use it to easily settle disputes as they emerge between the parties from time to time.

While appreciating the fact that treaties as legal instruments have their own shortcomings, it would still be better for the desired global AML regimes to evolve through the adoption of international treaties than informally as club rules. The challenge with international treaties is that they tend to be implemented depending on the prevailing political climate in a state. For instance, some states have ratified international treaties but procrastinated in transposing them into their national legal system. This issue has already been illuminated in relation to Uganda's failure to transpose the United Nations Convention on Transnational Organised Crimes in Palermo (2000). While acknowledging that Uganda will eventually transpose its AML obligations, this

has taken longer than necessary. Uganda adopted the principles of International Security Commission Organisation (IOSCO) in (1998) to protect investors by fighting financial crimes such as money laundering; and to create a palatable investment climate for investors is under an obligation to transpose its international AML/CFT obligations. However due to the raging poverty across LDCs, they might not view protecting depositor's assets or investor's as a priority when they themselves are exposed to net out flows of income to service national debts and other economic vagaries.

In view of the foregoing analysis, it can be argued that for the global AML framework to operate across jurisdictions, money laundering offences should be prosecuted in a neutral judicial forum.⁸¹³ Global regulatory regimes cannot work across the board, unless they are enforced through robust local and global institutions. The picture portrayed by courts in the core LDCs is that they are not only politicised but are also inefficient, inaccessible due to the culture of corruption, expensive to use, characterised by unreasonable delays, overwhelmed by the sheer numbers of offenders languishing in prisons waiting for trial and lack requisite investigation capacity. Accordingly, it is a daunting task for LDCs to domesticate the envisaged global AML regimes into their substantive national law. The proposed global court to adjudicate money laundering and its underlying predicate offences is not only necessary but an imperative to promote harmonious interstate relations.

⁸¹³ In the absence of a global court, money laundering can only be tried in a country where the offence was committed.

It is ironical that countries like Iran, Afghanistan, Colombia, (prominent participants in the production of narcotic drugs) have refused to ratify international Anti-narcotic Convention in Vienna, 1988. One of the reasons why states may refuse to adopt desired AML laws is because they would do not want to be caught out by the same rules. International law is generally riddled with gaps because it depends on the goodwill of states; and yet the state is sometimes the problem underpinning why treaties are adopted. Arguably, even if all states were to ratify the UN, AML/CFT treaties, there would still be disparities and gaps in their implementation across jurisdictions. Interstate initiatives are nevertheless essential because globalisation of markets cannot work in the absence of common regulatory initiatives. For instance, the United Nations AML treaties and other soft law instruments have created mechanisms for mutual legal assistance, investigations, prosecutions and judicial proceedings on money laundering offences. However because of some State's intransigence including posturing for political reasons, extradition proceedings have become cumbersome to invoke in international law.

In our contention, countries have very little choice but to develop a requisite infrastructure if they are interested in harnessing the global AML/CFT framework. Countries are faced with two stark choices: to either develop a requisite infrastructure first, if they are seriously interested in harnessing global AML standards; or to do nothing and lag behind other countries in terms of development. The requisite infrastructure is not only a prerequisite for assimilating normative AML standards; but it is also essential to level the

playing field, creating symmetric conditions for competition. The assumption that global laws can operate in different countries irrespective of the particularities of development in those countries is a deceptive and an unrealistic premise. For the proliferating regimes such as the proposed Basle III banking regulatory standards to work, they need to reflect global market conditions and political legitimacy of all stakeholder countries. While countries are under an obligation to give a schedule of concessions of service areas under GATS (1994) for them to receive similar market access, opening financial markets should be cautiously approached in LDCs. The foregoing issue has been highlighted in our earlier example of counterfeit currency in Uganda. Countries will continue to be sidelined by the perverse nature of global exigencies unless they first create a robust infrastructure on which to harness the system. This should include developing data processing centers to gather and to supply data to AML agencies. These centers have the potential to enhance law enforcement agencies in detecting crimes; and in strengthening the capacity of domestic banks in gathering information on customers. In this regard, this study welcomes the introduction of the Criminal Reference Bureau (CRB)⁸¹⁴ in Uganda where information on bank clients will be consolidated for use in identifying present and prospective customers.⁸¹⁵ Land ownership (including properties) should be mandatorily registered. This is essential to enhance identification of criminal profiles and use it to facilitate the work of regulatory and law enforcement agencies in preventing crimes. It is possible for registration to be implemented using the post code system as is

⁸¹⁴ Criminal Records Bureau to corroborate credit profiles of those seeking to transact Business with Banks.

⁸¹⁵ Banks in England collaborate in the exchange of information on prospective bank clients or those who seek to borrow from any individual Bank or branch.

done in DCs. Much as this proposal might be costly for cash strapped countries to implement, it is nevertheless desirable for streamlining information gathering and dissemination across agencies. It is also an imperative for LDCs to create a robust database of cases where information on markets can be consolidated and accessed to ease regulation of markets. The consolidated database of cases can potentially ensure that criminals are easily detected, monitored and dealt with swiftly by law enforcement agencies. It needs to be noted that unilateral state measures cannot go far in cautioning economies against overlapping global exigencies. There is a need for Inter-state co-operation in areas of information exchange to ease potential information flow between countries. For instance Interpol has a central database of cases where information on wanted persons can be exchanged and accessed throughout its 135 member states. The Schengen Agreement (1985) provides a platform for harmonization of visa regulations in all EU member countries. It allows a person holding a visa issued by a member country to travel in all European Union member states (with exception of UK) without being subjected to visa restrictions.⁸¹⁶ Thus, success stories where normative regimes have been introduced and succeeded should be replicated as model laws in fledging countries. Model laws are essential in creating a framework of robust laws, particularly in LDCs which are deficient in a consolidated database of cases (precedence) on important policy and regulatory issues. However, model laws should first be modified to suit local conditions before they are implemented. As i said earlier in the outset, Barclays Bank (Uganda) has established policy measures to alleviate

⁸¹⁶ Both Interpol and Schengen security arrangements have been accused of failing individual countries in cross checking information from participating countries databases—an issue capable of being exploited by criminals.

regulatory failure of financial markets in Uganda. The use of model laws has created a platform to fill the void in the law against money laundering.

If there is any lesson learnt from the recent global financial crisis (2008-2010), it is that markets and governments have no choice but to work in tandem in ensuring proper regulation of financial markets. Early government intervention is essential to prevent potential crises from spiraling out of hand. While government intervention could be seen as covert protectionism contrary to the rules of WTO, governments should negotiate derogations (exit clauses) where there is a possibility for countries being adversely affected by the premature restructuring of their economies—either due to ill-advised liberalization policies or otherwise. Thus, the global AML/CFT framework should be implemented pragmatically to reflect the varying levels of development between jurisdictions. For instance, if one takes a robust regime and introduces it in country like Somali; it will not work because of the prevailing precarious political, economic and social climate in that country today.

The study has delineated the complexity of, gaps and weaknesses inherent in the current global AML/CFT framework. The challenge to the global system generally is that it manifests itself through sovereign states—which makes it prone to the failures of individual states. The global AML regulatory framework is inclined to favour DCs as opposed to LDCs because the former are endowed with a palatable regulatory environment to harness it. In my view, the constitution of the global AML committees and other global policy platforms should reflect the heterogeneity of all participating member states. In my view, neither the G-12 countries nor any other countries can afford to

posture because as the global crises have demonstrated, crises do not posture, they are real with the potential to affect every country—big or small.

It is important for governments to spearhead research studies, (either collectively or individually) on the typologies of money laundering, cross-border jurisdictional issues in order to respond appropriately to their novel regulatory challenges. The global AML regimes should be constituted with a monitoring mechanism, not only to ensure they are easily enforceable but are also implemented across countries. In my view, the European Union as a regional market proffers a graphic model for harmonisation of diverse regulatory regimes globally. The global AML framework is essential for interstate cooperation on many aspects of money laundering and its predicate threats. On the negative note, the global system has failed to manifest itself as a viable framework bound by common objectives and purpose. The threat of money laundering will not be defeated through prescribing normative regimes alone but being accorded the good will of countries where engendered regimes are to be implemented. As far as LDCs are concerned, the priority should be to address corruption, lack of robust education, bad political leadership and the threat posed by HIV/AIDS. Countries should first undertake desired reform programmes as a prerequisite for harnessing the global AML/CFT regimes. Similarly, for global AML regimes to operate effectively, banks should be facilitated by governments to ensure they do more in spearheading the fight against money laundering. Apparently, money stolen in corruption and other predicate crimes has been able to navigate the globe through the international banking system. This has been so despite a

proliferation of regulatory rules to prevent money laundering and its predicate offences globally. In no uncertain terms, this confirms the fact that prescribed rules/regimes at a global level cannot work at a local level in abstract. The findings of the study have confirmed that the global AML framework has complicated dynamics and cannot easily be harnessed across varying jurisdictions.

The global AML framework is an imperative for interstate cooperation on overlapping issues but also to prevent free riding the reputation of other countries. While this is important, desired AML safeguards should not be adopted for the sake of it. The current global AML framework is fraught with gaps at many levels and it is devoid of a global applicability. The global system generally is emasculated by the fact that it manifests itself within another system—the state system. States have different vested interests and they cannot be assumed to have the same outlook. For example, tax evasion is an offence in United States but it is encouraged in Switzerland to boost shareholders equity. It has to be noted that when there is a conflict between national self-interests and its international obligations (as manifested by Iran's refusal to sign UN AML treaties), states tend to give primacy to their own interests. Therefore the efficacy of global prohibition regimes (not only money laundering) depends on many factors not least the national self-interests of different stakeholder countries. As if this is not enough, global regimes tend to lack a clear enforcement mechanism at a global level. With exception of Interpol, global regulatory regimes are emasculated by the fact that they are not easy to enforce inside the borders of participating member states. I am

aware that the FATF regimes are imbued with the mechanism such as on-site visits to evaluate the member states compliance with their AML/CFT obligations. In anticipation of the forthcoming FATF on-site visits, non-cooperative countries can conjure ways to hoodwink evaluators and assessors. First the FATF has a small membership of 36 countries, 4 affiliate organizations in Africa, Asia, South America and Caribbean and some organizations such as the World Bank and IMF having the observer status. However, it is still a daunting task for foreign based oversight institutions such as the FATF to police the implementation of desired AML/CFT regimes inside the borders of sovereign countries. Secondly, some of the FATF regimes such as KYC have proved incompatible with the dynamics of development across the majority of LDCs. Some states have been ambivalent, hastening to sign up to international treaties but declining their full support in transposing them nationally. In view of all these glaring failures as I have already elucidated, it is high time a global court has been introduced. The proposed global court has the potential to proffer guidelines for states to streamline the implementation of desired AML regimes globally. This can be achieved through the interpretative role of the court but also proffering and consolidating decisions as precedents on money laundering and its predicate crimes. The court as an institution can also engender a rule based ethos to foster the implementation of desired AML regimes across countries. The proposed global AML court should be fostered on the model of the ECJ in Europe and its decisions binding on member states. The decisions of the court should be made mandatory such that failure to delinquent states are subjected to sanctions in form of fines and other punitive measures as may be deemed fit. The

preponderance of the fine should depend on how long an individual state has stubbornly refused to implement its global AML/CFT obligations. Most importantly also the engendered decisions of the court can ease the internalization of normative AML/CFT regimes as norms of customary international law. A custom cannot be imposed on a community; it grows gradually from state practice and *opinion juris* (opinion of lawyers) which communities have embraced as normative for a long time. The global AML regimes are not likely to crystallize into norms of customary international law in circumstances where states do one thing in theory and another in practice. Let me point out one of the many examples, Switzerland which is the seat of the Bank of International Settlement (BIS) with a specialist committee—the Basle Committee which has an oversight responsibility to ensure that banks operate according to high ethical international standards, is the same country where the looted wealth from Africa and other countries is siphoned to for safe custody. I presume the foregoing contention explains why some states may decide to take a step back and say let us look at how the prescribed global AML norms are being implemented elsewhere and follow their experiences.

The World Bank and IMF should use their mandate and the leverage of financial sector reform programmes to impose robust anti-corruption measures on borrowing states. But also the World Bank and IMF should extend concessions (soft loans on soft terms) to facilitate the much needed development. While lending conditions are negotiated and agreed between the IMF and a respective member state, the manner in which negotiations are conducted is inclined to favour the lender. The World Bank and IMF have

leverage in the loan negotiations process because they are well resourced; but there is also the vulnerability of the borrower. LDCs are deficient in requisite negotiation capacity either regarding loan agreements or any other issue of global importance such as trade policy negotiations in the WTO.

It therefore goes without saying that lack of requisite technical capacity in many developing countries has not helped them to develop the necessary infrastructure to foster the stability of markets. LDCs have been sidelined on many issues of global relations, eviscerating their capacity to harness robust AML measures. Because of this, the majority of LDCs are prone to global exigencies such as money laundering, piracy, terrorism and other forms of criminal exploitation. In view of these shortcomings, the negotiation of loans in the IMF and in the World Bank cannot provide a level playing field for countries to gain proportionately from engendered regulatory initiatives. The marginalisation of LDCs is also manifested by the fact that they have sometimes signed up to agreements which are by their very standards unfair and likely to sideline them for many years. Individual governments only start to react to the effect of lopsided agreements after their pernicious effects have become apparent.⁸¹⁷ Thus, the shortage of technical experts on financial and trade policy issues has sidelined LDCs in their efforts to harness normative global AML regimes. While acknowledging the importance of the World Bank

⁸¹⁷ This is highlighted by the tensions between pharmaceutical companies and the government of South Africa over South Africa's bid to produce a cheap version of AIDS/HIV vaccine. South Africa was already bound by Intellectual property Rights Agreement, it signed up in the WTO. By virtue of that Agreement, pharmaceutical companies would have monopoly for the production and distribution of medicine in the country for ten years, when it realised it was facing a catastrophe over lack of affordable AIDS/HIV vaccine. The Pharmaceutical Company version of the drug was very expensive and could not be afforded by the majority of South African's AIDS/HIV sufferers. On other hand, the government could not produce a cheap affordable version because it would be in breach of its WTO obligations and it would suffer a hefty fine for breach of its obligations. The situation was only saved by the civil society criticism of Pharmaceuticals Company which was coupled by demonstrations both in South Africa and wide in the Continent.

and IMF in facilitating economies with requisite technical capacity, the scope of technical assistance is still narrow and should be extended to other areas where LDCs are deficient. The World Bank and IMF are working closely with the ministries of finance and central banks in many economies to implement desired financial sector reforms. However, it would also be better for the World Bank and IMF to facilitate education and research initiatives in member countries as these are essential for economic development. At the moment the mandate of the IMF and the World Bank in developing countries is limited to the economic sector—exports, imports, explorations and funding other development projects. It is imperative to revise the mandate of these institutions to incorporate human rights so that they foster an environment of peace and long term stability in all member countries. LDCs are deficient in requisite human resources potential to competently negotiate technical agreements with well resourced institutions such as the World Bank and IMF. In this respect, the lender will always have an upper hand and the terms governing loan contracts might never have been freely agreed. In English contract law, contracts which have been agreed through exertion of pressure or coercion are voidable and would be rescinded if they are deemed to have put one of the parties to the contract at a disadvantage. This reinforces the need for the introduction of a neutral judicial organ to adjudicate with the view to proffer guidance on the state's approach to contentious global issues.

While, it is the responsibility of the IMF to monitor the health of economies in accordance with its mandate (part IV of Articles Agreement); in my view this power should be exercised pragmatically in the interest of all stakeholder

countries. Through its surveillance mandate the IMF should have provided early warning to the US about the impending financial crisis. As such the IMF has an overarching mandate to regulate global financial markets including prevention of financial crises and money laundering. As an institution, the IMF should exercise its mandate without discrimination to ensure that where there are signs of financial mismanagement it intervenes in time to stop the situation from spiralling out of hands. Given the foregoing analysis, the IMF should have advised the US government to get to grips with its reckless lending behaviour in the interests of the wider financial markets. The IMF has been accused of double standards—more inclined to the interests of developed countries than LDCs. The World Bank and the IMF normative reform programmes have not helped much in alleviating the plight of people in less developed countries.⁸¹⁸ Privatisation as I have already elucidated has undermined the ability of many governments in Africa from delivering essential health services such as health care, leaving it in the hands of unscrupulous private sector. As health services such as hospital care, ambulance services, care of the elderly (non-existent in countries like Uganda) are privatised, they are exclusively put beyond the reach of the poor. It also needs to be noted that privatisation has increased the cost of

⁸¹⁸ This proposition is underpinned by two factors: (a) some of the above policies are adopted based on the countries performance by way of its Gross Domestic Product (GDP). According to Samir Amin, the highly paid Bank or Fund officials have never been on the ground to corroborate how this information is arrived at. In any case, their point of interface as far as gathering this information goes, are the highly placed government officials, for example Ministers of Finance, the same officials presiding over the ailing and mismanaged governments. (b) Another apparent reason for conditionalities is the need to stimulate the national economy by undertaking public sector reforms—so that respective economies are made vibrant and able to sustain their payments on borrowed loans, which seems okay from the lenders point of view. But conditionalities have wrecked governments, precipitated conditions for wars and genocide, for example, Yugoslavia where SAPs induced nationwide unemployment and also in the Uganda example with regard to the restructuring of the army in early 1990s.

accessing basic health services. In developing countries where people either have low or no viable sources of income, trade liberalisation and its attendant privatisation processes has rendered access to essential health services beyond the reach of the poor. Law rests on central premise of non-discrimination and it can be inferred that a law which encourages discrimination is a bad law. The rule of law is founded on three central pillars: (i) the absolute supremacy or predominance of regular law as opposed to arbitrary power and excludes the existence of arbitrariness of the prerogative wider discretionary powers of the government; (ii) equality before the law, which means that nobody is exempt from it, and equally subjects of all citizens to the ordinary law of the land administered by courts of law; and (iii) that rules which in foreign countries form part of the constitutional codes, are not the source, but the consequence of law and order within a community.

The IMF is supposed to operate as a neutral global financial institution but it has become dominated by European elites. Since its inception in the aftermath of Second World War, the managing director of IMF has been a European; and the President of World Bank has been an American. It has shown an inclination to assist European Economies tackle the debt and financial crises; while demonstrating a slightly different attitude towards LDCs. This can be wrongly construed as favouritism manifested by IMF's authorization of expansion of bail outs to prop peripheral European debt gripped economies of Greece, Iceland, Portugal and Ireland.⁸¹⁹ While

⁸¹⁹ In other regions especially developing economies in Africa, the IMF would have slammed austerity measures on troubled economies straight away. I am wondering whether the IMF/World Bank supported lending helps to stimulate development of economies, given that economies have received loans from these institutions without achieving much development.

prevention of financial crises is aligned to the Fund's mandate of preventing financial crisis, the prescribed policy measures such as cutting the size of the public sector, in the environment of economic down turns have been contradictory. Accordingly, the intervention of member countries in form of bail outs was deemed essential to prevent a contagion spreading from the southern to healthier Northern European economies. The 27 European member states have agreed to set up a European Financial Stability Fund (EFSF), aimed at preserving financial stability in Europe and providing financial assistance to Euro zone states suffering financial hardships. This facility is coordinated by the European central bank and it is authorised to issue bonds or other debt instruments on the market with the support of German debt management office to raise the funds needed for propping up troubled economies, recapitalise banks or even to buy sovereign debts. In the climate of financial crisis, the IMF has been quick to slam lending conditionalities or austerity measures on less developed economies. Since conditionalities are authorised by the Articles of Agreement under stand-by arrangements, they should be applied uniformly on all states experiencing financial crises globally. If European member countries are given concessions in form of bail outs and grants, similar concessions should be extended to other economies outside Europe which are also suffering financial hardships.. The rationale for this proposition is to prevent discrimination contrary to the principle of liberalisation on which the WTO is founded. Drawing on this principle, it can be argued that if IMF decides to approve concessions to peripheral European member countries of Greece, Ireland and Portugal, similar concessions should be extended to all other countries facing financial

crises. Short of that it could be perceived as favourable treatment of a selection of states at the expense of others, contrary to the liberal market philosophy and the law of WTO. However, there are certain exceptions where discrimination can be justified. This exception justifies for European member countries to extend assistance to southern European countries to stave off financial crises from spreading to healthier countries in Northern Europe. While special treatment accorded to southern European countries could signify double standards contrary to the law of WTO, it could have been justified by the need to stem a crisis from spreading to healthier economies. Similarly, the European Union enjoys favourable treatment over LDCs because of its combined Special Drawing Rights (SDR) and voting powers in the IMF. The foregoing position gives the EU a strong voice not only in the IMF but also on other issues pertaining to global governance. The influence of a member country in the IMF depends on its contributions and attendant voting rights of a particular member. The accusation of double standards does not reflect well on the IMF as a global institution. The IMF has the mandate to monitor economies on financial and monetary issues within its member countries. Adherents of the law as a system of rules would expect oversight institutions such as the IMF and World Bank to administer rules without favour or disfavour of countries. A good law should ensure that engendered rules/norms are applied in an even handed manner to regulate undesired conduct in the society. The principle of 'equality before the law' should be internalised into the practice of states and given primacy in all oversight institutions to demonstrate that the system is properly working. There is evidence confirming that LDCs do not have the requisite capacity to

harness the global system efficiently. This is partly because LDCs are exposed to a catalogue of challenges which eviscerate their bargaining powers. The majority of LDCs are deficient in physical and human resources and cannot have leverage in multilateral negotiations. The foregoing environment has predisposed LDCs to an enduring life of suffering, misery and capacity deprivation to fight money laundering and its predicate threats.

Finally, the global system is fraught with gaps and challenges at many levels. It has failed to manifest itself as a coherent system with a viable set of rules capable of being enforced globally. In my view, the global system is a myth and it is this mythology that has undermined the efficacy of the global AML framework in fighting money laundering across different jurisdictions. With the exception of a few exigencies such as climate change, the majority of global exigencies are prevailing local conditions in certain localities designated as global to foster the interests of certain market domains. The putative global AML/CFT framework cannot be harnessed globally because it is based on the false premise of presupposing that all countries have the potential to harness it. So, against all these odds, do countries like Uganda or any other country for that matter need to adopt a global AML framework? The answer is absolutely yes because countries which are deficient in robust AML/CFT systems are capable of being exploited by criminals to perpetuate money laundering globally. The global AML framework should be adopted in a pragmatic manner to reflect the dynamics of development across jurisdictions. Looking forward, the conceptual framework developed in this study will continue to be tested in our future empirical research studies (working closely

with AML oversight institutions) on money laundering and its predicate crimes across Africa and in some DCs. However, we hope to make sure that any future research studies are undertaken on a large sample of countries to test the viability of the model on which this study has been undertaken.

Appendix 1

THE FINANCIAL ACTION TASK FORCE (FATF)

INTRODUCTION

The Financial action Task Force on Money Laundering (FATF) is an Inter-government body whose purpose is the development and promotion of policies to combat money laundering—the process of criminal proceeds in order to disguise their illegal origin.

The Forty Recommendations set out the basic framework for anti-money laundering efforts and they are designed to be of universal application. They cover the criminal justice system and law enforcement, financial system and regulation, and international co-operation.

GENERAL FRAMEWORK OF RECOMMENDATIONS

Recommendation 1

Each country should take immediate steps to ratify and to implement fully, the 1988 United Nations Convention against Illicit traffic in Narcotic Drug and Psychotropic Substances (hereinafter the Vienna Convention).

Recommendation 2

Financial institution secrecy laws should be conceived as not to inhibit implementation of these recommendations.

Recommendation 3

Effective money laundering enforcement program should include increased multilateral co-operation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible.

ROLE OF NATIONAL LEGAL SYSTEMS IN COMBATING MONEY LAUNDERING

Recommendation 4

Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated money laundering (see interpretative Note).

Recommendation 5

As provided in Vienna Convention, the offence of money laundering should apply at least to knowingly participating in money laundering activities, including the concept that knowledge maybe inferred from objective factual circumstances.

Recommendation 6

Where possible, corporation themselves—not only their employees-should be subject to criminal liability.

Provisional Measures and Confiscation

Recommendation 7

Countries should adopt measures similar to those set forth in the Vienna Convention, as may be necessary, including legislative ones to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bonafide third parties.

Such measures should include the authority to: (i) identify, trace and evaluate property which is subject to confiscation, (ii) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and (iii) take any appropriate investigative measures.

ROLE OF THE FINANCIAL SYSTEM IN COMABTING MONEY LAUNDERING

Recommendation 8

Recommendations 10 to 29 should apply not only to banks, but also to non-bank financial institutions. Even those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example, bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively. (See Interpretative Notes: recommendation 8 and recommendation 8 & 9)

Recommendation 9

The appropriate national authorities should consider applying Recommendations 10 to 21 and 23 to the conduct of financial activities as commercial undertaking by business or professions, which are not financial institutions, where such conduct is allowed or not prohibited. Financial

activities include include, but are not limited to, those listed in the attached annex. It is left to each country to decide whether special situations should be defined where the application of anti-money laundering measures is not necessary, for example, when a financial activity is carried out on an occasional or limited basis.

Recommendation 10

Customer Identification and Record Keeping Rules

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self regulatory agreements among financial institutions) to identify, on the basis an official or other reliable identifying documents, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).

Recommendation 11

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients

or customers are acting on their own behalf, for example, in case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located). (See Interpretative Note: Recommendations 11 and Recommendation 11 & 15 through 18)

Recommendation 12

Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including amounts and types of currency involved if any) so as to provide, if necessary evidence for prosecution of criminal behavior.

Financial institutions should keep records on customer's identification (e.g. copies or records of official identification documents like passport, identity cards, driving licence or similar documents), accounts files and business correspondence for at least five years after the account is closed.

Recommendation 13

Countries should pay special attention to money laundering threats inherent in new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes.

1 Increased Due Diligence of Financial Institutions

Recommendation 14

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies. (See Interpretative Note)

2 Recommendation 15

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent

authorities (See Interpretative Note: Recommendations 15 and Recommendations 11 & 15 through 18)

Recommendation 16

Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provisions, if they report their suspicions in good faith to the competent authorities, if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred. (See Interpretative Note 16)

Recommendation 17

Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities. (See Interpretative Note)

2.1 Recommendation 18

Financial Institutions reporting their suspicions should comply with instructions from the competent authorities. (See Interpretative Note)

2.2 Recommendation 19

Financial Institutions should develop programs against money laundering. These programs should include, as a minimum:

- The development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;
- An ongoing employee training programme;
- An audit function to test the system.

Measures to Cope with the Problem of Countries with No or Insufficient Anti-Money Laundering Measures

Recommendation 20

Financial institutions should ensure that the principles mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries, which do not or insufficiently apply these recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit implementation, competent authorities in the country of mother institutions should be informed by the financial institutions that they couldn't apply these recommendations.

Recommendation 21

Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries, which do not or insufficiently apply these recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, their findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Other Measures to avoid Money Laundering

Recommendations 22

Countries should consider implementing feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital; movement. (See Interpretative Note)

2.3 Recommendation 23

Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic

and international currency transactions above a fixed amount, to national central agency with a computerized data base, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of information.

Recommendation 24

Countries should further encourage in general the development of modern and secure techniques of money management, including increased use of checks, payment cards, direct deposit of salary checks, and book entry recording of securities, as a means to encourage the replacement of cash transfers.

Recommendation 25

Countries should take notice of the potential for abuse of shell corporations by money launderers and should consider whether traditional measures are required to prevent unlawful use of such entities.

Implementation and the Role of Regulatory and Other Administrative Authorities

Recommendation 26

The competent authorities supervising banks of other financial institutions or intermediaries should ensure that the supervised institutions have adequate programmes to guard against money laundering. These authorities should cooperate and lend expertise spontaneously or on request with other domestic judicial or law enforcement authorities in money laundering investigation and prosecutions. (See Interpretative Note)

Recommendation 27

Competent authorities should be designed to ensure that an effective implementation of all these recommendations, through administrative supervision and regulation, in other professions dealing with cash as defined by each country.

Recommendation 28

The competent authorities should establish guidelines, which assist financial institutions in detecting suspicious patterns of behaviour by their customers. It is understood that such guidelines will primarily serve as an educational tool for financial institutions personnel.

Recommendation 29

The competent authorities regulating or supervising financial should take the necessary legal or regulatory measures to guard against control or acquisition

of a significant participation by criminal or their confederates. (See Interpretative Note).

STRENGTHENING OF INTERNATIONAL CO-OPERATION

Exchange of general information

Recommendation 30

National administration should consider recording, at least in the aggregate, international flows of cash in whatever currency, so that estimates can be made of cash flows and reflows from various sources abroad, when this is combined with central bank information.

Recommendation 31

International competent authorities, perhaps Interpol and the World Customs Organisation, should be given responsibility for gathering and disseminating information to competent authorities about the latest development in money laundering and money laundering technique. Central banks and bank regulators could do the same on their network. National authorities in various spheres, in consultation with trade association, could disseminate this to financial institutions in individual countries.

Exchange of information relating to suspicious transactions

Recommendation 32

Each country should make efforts to improve spontaneous or upon request international information exchange relating to suspicious transactions, persons and co-operation involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.

Other forms of Co-operation

Basis and Means of Co-operation in Confiscation, Mutual Legal Assistance and Extradition

Recommendation 33

Countries should try to ensure, on a bilateral or multilateral basis, that different knowledge standards in national definitions-i.e. different standards concerning intentional element of the infraction-do not affect the ability or willingness of countries to provide each other with mutual legal assistance.

Recommendation 34

International Co-operation should be supported by a network of bilateral and multilateral agreements and arrangements based on generally shared legal concepts with the aim of providing practical measures to affect the widest possible range of mutual assistance.

Recommendation 35

Countries should be encouraged to ratify and implement relevant international conventions on money laundering such as the 1990 Council of Europe Convention on Money Laundering, Search, Seizure and Confiscation of the proceeds from Crime.

Recommendation 36

Co-operative investigations among countries appropriate competent authorities should be encouraged. One valid and effective investigative technique in this respect is controlled delivery related to assets known or suspected to be the proceeds of crime. Countries are encouraged to support this technique, where possible. (See the Interpretative Note.)

Recommendation 37

There should be procedures for mutual legal assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and

premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions.

Recommendation 38

There should be authority to take expeditious action in response to request by foreign countries to identify, freeze, seize and confiscate proceeds or other property of corresponding value to such proceeds, based on money laundering or crimes underlying money laundering activity. (See Interpretative Note)

Recommendation 39

To avoid conflicts of jurisdiction, consideration should be given to the devising and applying mechanisms for determining the best venue for prosecution of defendants in the interest of justice in cases that are subject to prosecution in more than one country.

Recommendation 40

Countries should have procedures in place to extradite, where possible, individuals charged with money laundering offence or related offences. With respect to its national legal system, each country should recognise money laundering as extraditable offence. Subject to these legal frameworks, countries may consider simplifying extradition by allowing direct transmission

of extradition request between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, extraditing their national, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Annex to Recommendation 9: List of Financial Activities Undertaken by Business or professions, which are not Financial Institutions.

- (a) Acceptance of deposits and other repayable funds from the public
- (b) Lending.⁸²⁰
- (c) Financial leasing.
- (d) Money transmission services.
- (e) Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques and bankers' draft).
- (f) Financial guarantees and commitments.
- (g) Trading for account of customers (spot, forward, swaps, futures, options...) in:
 - (i) Money Market instruments;
 - (i) Foreign Exchange;
 - (ii) Exchange, interest rate and index instruments;
 - (iii) Commodity future trading.
- (h) Participation in securities issues and provision of financial services related to such issues.

⁸²⁰ This includes consumer credit, mortgage credit, factoring, with or without recourse, finance of commercial transactions including forfaiting.

- (i) Individuals and Collective portfolio management.
- (j) Safekeeping and administration of cash or liquid securities on behalf of clients.
- (k) Life insurance and other investment related insurance.
- (l) Money changing.

Nine Special recommendations in (2001)

Recognizing the vital importance of taking action to combat the financing of terrorism, the FATF has agreed these Recommendations, which, when combined with the FATF Forty Recommendations on money laundering, set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts.

Each Country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

Each Country should criminalize the financing of terrorism, terrorist acts and terrorist.

Countries should ensure that such offences are designated as money laundering predicate offences.

Each Country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts. Each Country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities. Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

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, and should have procedures in place to extradite, where possible, such individuals. Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain. Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number). Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) By terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

(iii) To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

VII. Cash Couriers

Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation. Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing or money laundering, or that are falsely declared or disclosed. Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing or money laundering, countries should also adopt measures, including legislative ones consistent with

Recommendation 3 and Special Recommendation III, which would enable the confiscation of such currency or instruments.

APPENDIX 2

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Adopted by the General Assembly on 15 November 2000 (excerpts)

Article 2

Use of terms

For the purposes of this Convention:

(a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

(b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

(c) “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

(d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

- (f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;
- (g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;
- (h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;
- (i) “Controlled delivery” shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence;
- (j) “Regional economic integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to “States Parties” under this Convention shall apply to such organizations within the limits of their competence.

Article 6

Criminalisation of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(B) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

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

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in

accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7 Measures to combat money laundering

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of

Money-laundering, which regime shall emphasise requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, sub regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Article 10 Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 11 Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for

offences covered by this Convention are exercised to maximise the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.
5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.
6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

Article 12

Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
 - (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
 - (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 13

International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 18 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant

treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.

Article 14 Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

(a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention and to intergovernmental bodies specialising in the fight against organized crime;

(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Article 15 Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party;
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 27 Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all

aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct

cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.

Article 29

Training and technical assistance

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention. Such programmes may include secondments and exchanges of staff. Such programmes shall deal, in particular and to the extent permitted by domestic law, with the following:

(a) Methods used in the prevention, detection and control of the offences covered by this Convention;

(b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;

(c) Monitoring of the movement of contraband;

(d) Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or

other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;

(e) Collection of evidence;

(f) Control techniques in free trade zones and free ports;

(g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;

(h) Methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology; and

(i) Methods used in the protection of victims and witnesses.

2. States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in the areas referred to in paragraph 1 of this article and to that end shall also, when appropriate, use regional and international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

3. States Parties shall promote training and technical assistance that will facilitate extradition and mutual legal assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or agencies with relevant responsibilities.

4. In the case of existing bilateral and multilateral agreements or arrangements, States Parties shall strengthen, to the extent necessary, efforts to maximise operational and training activities within international and regional

organizations and within other relevant bilateral and multilateral agreements or arrangements.

Article 30

Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of organized crime on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime;

(b) To enhance financial and material assistance to support the efforts of developing countries to fight transnational organized crime effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to the aforementioned account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of transnational organized crime.

Article 32

Conference of the Parties to the Convention

1. A Conference of the Parties to the Convention is hereby established to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention.

2. The Secretary-General of the United Nations shall convene the Conference of the Parties not later than one year following the entry into force of this Convention. The Conference of the Parties shall adopt rules of procedure and rules governing the activities set forth in paragraphs 3 and 4 of this article (including rules concerning payment of expenses incurred in carrying out those activities).

3. The Conference of the Parties shall agree upon mechanisms for achieving the objectives mentioned in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 29, 30 and 31 of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it;

(c) Cooperating with relevant international and regional organizations and non-governmental organizations;

(d) Reviewing periodically the implementation of this Convention;

(e) Making recommendations to improve this Convention and its implementation.

4. For the purpose of paragraphs 3 (d) and (e) of this article, the Conference of the Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the Parties.

5. Each State Party shall provide the Conference of the Parties with information on its programmes, plans and practices, as well as legislative and administrative measures to implement this Convention, as required by the Conference of the Parties.

Article 34

Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

APPENDIX 3: QUESTIONNAIRE

C/O The School of Law and Social Sciences

University of East London

Hight Street, Duncan House

Stratford, London

E15 2 JB

10 December 2011

Dear Sir/Madam:

RE: RESEARCH QUESTIONAIRRE

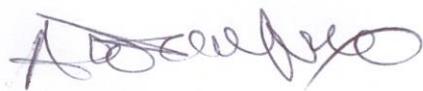
I am a PhD research student at the School of law and Social Sciences, University of East London, writing my thesis on the title: the *global anti-money laundering framework and its jurisdictional limits*. Meanwhile, I have prepared a few questions in form of a questionnaire on the subject of money laundering regulations in Uganda and United Kingdom; I would like to solicit responses on from participants. Thus, I would kindly like to ask you for your participation in this survey, answering questions as they may appropriately relate to you/r organization.

The survey is anonymous, and the participant does not have to disclose their details such as his/her name, residential address, email, date of birth etc. We

would also like to assure participants that we operate a rigorous data protection and ethical policies regarding data collected from participants. Lastly, please answer those questions in the survey that only relate to you/organisation.

Very many thanks.

Yours sincerely

A handwritten signature in purple ink, appearing to read 'Norman Mugarura', written in a cursive style.

Norman Mugarura

Name of the participant

Date of participation

Organisation

Capacity

Signature

- If you do not like the researcher to collect your name, or you would like your comments to remain anonymous, please cut the questionnaire on the dotted line.
- Staple or clip the two parts of your answer to the questionnaire together, if you have written on many sheets of papers.

1. Money laundering is a financial crime which undermines the stability of financial Markets. What is your view on the state of money laundering in your organization? Does your organization have an anti-money laundering policy framework? What are the key policy areas of your organization's anti-money laundering policy?
2. What is your opinion about the threat of money laundering in United Kingdom/Uganda?
3. Have you experienced incidences of money laundering/financing of terrorism in your organization?
4. What policy measures are operated by your organisation to counter the threat of money laundering/or financing of terrorism?

5. Are some of the AML/CFT measures aimed at enhancing inter-bank cooperation?
6. Does your organisation have any designated officer in charge of administering an anti-money laundering policy? What is the possibility of an interview with him or her?
7. Does your organization consolidate data on reported money laundering cases?
8. How does your organization monitor and evaluate clients/institutions compliance with their anti-money laundering or countering financing of terrorism obligations? How do you assess the prevalence of money laundering on the United Kingdom/Uganda economy?
9. Are there any benefits accrued from operating robust anti-money laundering policy in your organisation? What are they?
10. What are the challenges faced by your organization in implementing an effective anti-money laundering policy? How do you evaluate the effect of the above policy on your organisation?
11. What are the challenges of administering an effective anti-money laundering policy in your organisation?
12. What other agencies do you work with to foster an effective anti-money laundering environment in your organization?
13. What is your organization's staff training policy on money laundering and financing of terrorism? Is it regular or *ad hoc*?
14. Does your organization receive any support to facilitate staff training from the government? What sort of support is it, if any?

15. Does your organisation need business development support services from outside to achieve its regulatory goals?
16. What are the externalities of your organisation's anti-money laundering regulatory policy?
17. Do you think existing laws are sufficient to caution your organization or the society against the threat of money laundering? What are these laws?
18. Have you in the past experienced limitations with the law or do you have any propositions you wish that the law should address? What are they?
19. What factors do you think can explain the gap between policy and its implementation in your organization?
20. What measures has your organization instituted to foreclose the discrepancy between policies and their implementation?
21. Can you tell us the policy guidelines your organisation has instituted to harness the following regimes?
 - (a) Basle Committee banking supervision guidelines; and (b) the financial action task force forty plus nine recommendations. Do you evaluate the compatibility of these regimes with the environment your organization operates in? In other words, what are the potential challenges to your organization in implementing anti-money laundering regulatory regimes such as customer due diligence (CDD)? What other supplementary anti-money laundering measures does your organisation operate as a caution against money laundering/financing of terrorism?
22. Does your organization operate a research department to generate data? What is the possibility of gaining access to your organization's data base on these questions?

23. How do you think the newly created credit reference bureau in Uganda can facilitate the fight against financial crimes? What in your view do you think is the effect of the upsurge of global markets on crime prevention or on spreading of crimes in Uganda?

24. Is there any designated person/money laundering officer (MILO) in your organization who can be contacted for a future follow up on this survey?

25. In the absence of a specific anti-money laundering law in Uganda, how do courts prosecute alleged money laundering offences such as “Bicupuli?”

26. Are there any recorded prosecutions in your organisation?

27. How do you comment on the effectiveness of the police in fighting money laundering and other crimes?

28. How do you comment on corruption in Uganda? How does corruption undermine the effective anti-money laundering policy measures in your organization?

29. What is the possibility of a follow up interview with MILO or any person in charge of administering an anti-money laundering policy in your organization?

30. What in view is the connection between globalization and money laundering? What do you think is the way forward?

Thank you for your participation.

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