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Curbing money laundering: global reception and implementation of international anti money laundering standards- a case study on Nigeria

Curbing Money Laundering: Global Reception and Implementation of International Anti Money Laundering Standards- A case study on Nigeria

By

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A Thesis submitted to the University of Huddersfield

In partial fulfilment of the requirements for

The degree of Doctor of Philosophy

School of Law-Business School

University of Huddersfield

September 2016

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ABSTRACT

Anti-Money laundering legislation has become a major global issue, with nations and organisations under pressure to adhere and comply with strict control measures in place. The United States post 9/11 in league with other big Nations have been at the forefront of strict Anti-Money laundering initiatives, but a fair question to ask is how well the system is really doing? The implementation of the global AML framework is dependent upon the compliance of individual states, thereby making the presence of an adequate legal and institutional framework at national level a requisite requirement for an effective Anti-Money laundering system. Despite the incorporation of strict Anti-Money Laundering regulations into Nigerian laws, the misappropriation of Nigerian moneys, notably by public officials, has continued unabated. While the need for a concise and unambiguous harmonisation of international regulations cannot be overemphasised, and despite the concerted efforts in this regard, a trans-jurisdictional review by this researcher of both primary and secondary sources like conventions and academic literature have unearthed conceptual, legal, regulatory problems, as well as a seeming desire for theoretical, rather than practical compliance. In other words, global AML efforts seem more academic than practical. Accordingly, legal and regulatory reforms to International Anti-Money laundering initiatives can only be achieved with a proper appreciation of the culture and unique peculiarities of the receptive jurisdiction where emphasis is placed on the local environment rather than a mere response to International requirements for the sake of it. International AML regulations, and within this context, the FATF recommendations are meant for universal application, traversing the distinct quirks of diverse cultures, but the test here is its suitability or otherwise to the socio-cultural, political, economic and legal realities of Nigeria. The fleecing of Nigerian public moneys most notably by public officials has continued unabated despite the incorporation of strict AML laws.

ACKNOWLEDGEMENTS

My father, Professor Idris Amali, my mother, Dr (Mrs) Halima Amali; to you two I dedicate this work. For your sacrifices, love and endless support, I have no words befitting of you.

To my supervisor, Professor Stuart Toddington, I also say thank you for the support, guidance and warmth all through the course of this work. Special thanks also to Dr Ngala and the family, to Honourable Mohammed Wakil for being there for me at a critical time, and to Dr George Ndi for his support and guidance all through my years at the university. Special mention too to Dr Zubairu Dagona .Very warm thanks to my fantastic siblings, and to Jemila Suleiman. Huge thanks to my special friends Halima Buba, Hadiza Wabili, Linda Gautier, Kayla Gautier, Joseph Maidugu, Isiaka Kadir, Johnson Usman, Abdulhameed Modibbo, Patrick Ray, and Rachel Parkinson. And to Courtney Bulmer, Nicole, Harvey, Noah and Diane, thank you ever so much for everything.

DECLARATION

I, MOHAMMED ONYILOKWU AMALI, confirm that the material contained in this thesis has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

The word count for this dissertation is 68,108 (without references).

MOHAMMED ONYILOKWU AMALI

SIGNED…………….

DATE…………

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Chapter One

Introduction: Scope and Hypothesis of the Study

1.0 Introduction

This research appraises the efficacy of global Anti-Money laundering initiatives with a view to assessing the trans-jurisdictional practicalities of an internationally harmonised regime within the context of the unique peculiarities of the Nigerian state. The implementation of the global AML framework is dependent upon the compliance of individual states, thereby making the presence of an adequate legal and institutional framework at national level a requisite requirement for an effective Anti-Money laundering system. However, despite the incorporation of strict Anti-Money Laundering regulations into Nigerian body laws, the misappropriation of Nigerian moneys, most notably by public officials, has continued unabated. The International Community may demand to see laws drafted and printed in the statute books, but when the virus of large scale and endemic criminal misappropriation finds its root in the economic and moral malaise that threatens the very existence of the public sphere, the nexus between law and culture comes into play. In other words, despite the benefits that a harmonised Anti-Money laundering regime offers, the success or otherwise of such initiatives are dictated by the distinct idiosyncrasies of the receptive jurisdiction.

1.1 Definition of Money Laundering

Money laundering is a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, organised or made to appear as if they were earned by legitimate means.[1] It is a three-stage process in which (i) the dirty money must be severed from the predicate crime generating it; (ii) the money trail must be obscured or destroyed through a series of transactions in order to avoid detection; and (iii) the criminal proceeds are then reinvested in furtherance of the

[1] Mugarura, N. (2016); *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries*, Routledge Ltd, Farnham.

business objectives of the launderer.[2] In effect, laundering is the practice of integrating the proceeds of criminal enterprises into the legitimate mainstream of the financial community.[3] It is a technique designed to make illicit acquisition appear legitimate, usually by disguising the property's illegal provenance.[4] Money laundering reveals a practice whereby funds obtained from illegal transactions are transferred into secret accounts to shield their detection and possible sanctions.[5] In a more holistic appraisal of the crime, the United Nations Convention against Transnational Organised Crime (UNCTOC) defined Money Laundering as ''the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade legal consequences of his/her action; 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; the acquisition, possession or use of property, knowing at the time of receipt that such property is the proceeds of crime; participation in, association with or conspiracy to commit, attempt to commit and aiding and abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.''[6] Hopton on his part adds another dimension to the aforementioned descriptions of money laundering by adding other objects other than money.[7] According to Hopton,

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[2] *Ibid*

[3] See Sullivan, K. (2015), *Anti-Money Laundering in a Nutshell: Awareness and Compliance for Financial Personnel and Business,* 1st Edition, A Press, Berkeley, CA.

[4] Simser, J., (2006)''The Significance of Money Laundering'' *Journal of Money Laundering* Control, 9(3), pp. 293-301

[5] Nlerum Okegbule (2007)''Regulation of money Laundering in Africa; The Nigerian and Zambian approaches'' *Journal of Money Laundering Control*

[6] General Assembly Resolution 55/25 of November 15, 2000 (New York: United Nations, 2004)

[7] Hopton, D.(2009) *Money Laundering: A Concise Guide for All Business*, Routledge; 2nd Edition

‘‘the historical descriptions are fine as they go but the actual term ‘money laundering’ is itself a misnomer. It does not recognise that in modern world undertaking a laundering operation does not have to involve actual money.’’Hopton’s preferred understanding of money laundering thus is that Money Laundering happens every time any transaction takes place or relationship is formed which involves any form of property or benefit, whether it is tangible or intangible which is derived from criminal activity.[8]

All the aforementioned definitions however, although valid, have mainly focused on the criminal aspects, money, the account reports, or the illicit nature of the actions, and the consequences of such an approach is an incomplete definition of money laundering, culminating in an improper understanding of the money laundering process.[9] Criticism of these traditional definitions of money laundering stems from the fact that they focus on the activities involved in the laundering process, and while action oriented, cover a lot of perfectly legitimate activities.[10] The construction and interpretation of the word ‘illicit’ as is prevalent in most traditional definitions of money laundering seems to be a problematic one as Turner[11] argues that since the basic roles and actions are often disputed, and the process is global, the lack of common practice and code of conduct leaves room for debate about the meaning of the word ‘illicit’. Turner points to regular scenarios in criminal trials where the standard definitions are usually disputed, with the prosecution attempting to coral activities under this title while the defence argues that they are mere business activities. As a solution, Turner proffers a process similar to zero-based budgeting where each step in the process is built from ground up, creating a viable definition for the objectives and

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[8] *Ibid*

[9] See Turner, J.E. (2011), *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud*, 1st Edition, John Wiley and Sons Inc., Chichester

[10] *Ibid*

[11] *Ibid*

actions involved in money laundering. Here, recognition of Money Laundering in the criminal sense is advanced as involving the use of criminal or illicit funds and assigns criminal liability to otherwise legitimate business practices. In arriving at a definition, Jonathan Turner suggests that the first task in defining Money laundering is to recognise that it is a business function, and that the fact that the activity is criminalised does not change its underlying nature. Thus, Money Laundering according to Turner, *''involves the use of traditional business practices to move funds and the people who use engage in this activity are doing so to make money.''*[12] This approach by Turner is echoed by the definition considered by this researcher to be the most encompassing, and that is the one advanced by William Gilmore who defined Money laundering as *''a process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin, or ownership for the purpose of avoiding law enforcement.''*[13] The taking from Gilmore's definition is that money laundering is not restricted to illicit earnings; legitimately earned money could otherwise be put through a laundering process due to a variety of reasons. For the purposes of this work however, the definition advanced by William Gilmore above is this researcher's preference because it resonates with the thematic preoccupation of this research. Suffice it is to state however, that notwithstanding the differences between individual authors, all the definitions bear common features and practically mean only the endless variations of the same theme.

1.2 Historical Evolution

Scholars and historians alike agree that the concept is as old as crime itself and has been going on for several thousands of years. Sterling Seagrave explains in ''the lord of the rims''[14] how some 2000 years BC, some Chinese merchants hid their wealth from rulers for the simple reason that the rulers usually took it from them and then proceeded to banish them. In addition to hiding it, they

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[12] *Ibid*

[13] W.C. Gilmore, (1995) *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Strasbourg: Council of Europe Publishing)

[14] Sterling Seagrave,(1995) *Lords of the Rim,* Putnam Pub Group; First Printing Edition

would move it and invest it in businesses in remote provinces or even outside China. Also, in the early 17th century, the Catholic Church considered and decreed against the imposition of usurious rates as they considered them as a mortal sin. Necessity being the mother of all inventions, the merchants and money lenders decided to engage in a variety of practices that eventually became the precursors or models of modern techniques for hiding, washing and moving criminal money. The main objective here was to make interests disappear or appear to be something other than they were. One way they sought to do this was to artificially inflate the exchange rates to compensate for the supposed interest or imposed additional premiums for the business risks or as penalties for late payments. Along historical lines also, the evolution of money laundering activities could also be traced to the era when pirates preyed on European traders crossing the Atlantic sea and thereafter seek financial havens in which they can luxuriously make use of their criminal trade. They sought financial havens where they could be welcomed to spend their money, particularly at the time of retirement. These practices at that time did not bear the name money laundering- a name which originated from the United States of America at about the 1920's shortly before the prohibition era. It was used to succinctly describe the mafia's attempts to launder illegal money through cash intensive washing salons or coin laundries, which were controlled by company acquisitions or business formations. The Jazz age in America was a period in the 1920's when everyone seemed to have money and the young ones who formed the basis of this period's fame wanted more alcohol. However, the 18th amendment of the constitution of the United States of America had banned the sale, transportation and manufacture of alcohol within the borders of America. It was an attempt to legislate morality. It was clear however, that millions of people neither wanted this law, nor were they prepared to respect it. The criminals, sensing the obviously huge market for what had been declared illegal, adopted varying mechanisms to disguise the origins of the large amounts of money generated by the import and sale of alcohol and other rackets such as gambling. This they did by various financial activities, financial transactions and *investment and stock exchange activities by trying to make it a legal and capital market. Gangsters were earning huge sums in cash from extortion, prostitution, gambling and bootleg liquor and needed to show a legitimate source of these moneys. Two principal actors in this era were Al-Capone and Meyer Lansky.*

1.3 Background to the Study

The world of Money Laundering is a changing one, as are the International recommendations and findings which drive international, National legislation and regulations. There continues to be an evolution of legislative oversight and opinion impacted by emerging patterns and trends in this particular area of crime. Initially, laws and regulations were focused on Money Laundering. Post 2011, counter terrorist financing was added and more recently sanctions have appeared to become the priority. The nature of money laundering means that it operates upon the commission of prior crimes known as predicate crimes, and this research has identified corruption as the main predicate crime to money laundering in Nigeria. It assumes various forms of practices, ranging between activities such as embezzlement, official government corruption, illegal oil bunkering, illegal arms sale, smuggling, bribery amongst others. Oil and gas being the second largest contributor to the country's GDP, accounts for more than 80% of Nigerian foreign exchange earnings which makes it a veritable sector for corrupt practices. An estimated 232.000 barrels of crude oil worth an average $6.7 Billion per annum are lost by the Nigerian state to oil thieves,[15] and this is achieved with the collaboration of politicians, security agencies, criminal gangs and even multinational oil company employees.[16] Corruption in Nigeria is a way of life, and the abuse and misuse of public office for

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[15] Kar, D, and Cartwright-Smith, D. (2010) ''Illicit Financial Flows from Africa: Hidden Resource for Development.'' Washington DC: Global Financial Integrity. Available[online] <http://www.gfintegrity.org/storage/gfip/documents/reports/gfi_africareport_web.pdf> Accessed 20 January 2016

[16] President Muhammadu Buhari: ''My Plan to Fight Corruption in Nigeria.'' Policy Paper-Against Corruption: A Collection of Essays. Published 12 May 2016 Available [online] <https://www.gov.uk/government/publications/against-corruption-a-collection-of-essays/against-

private gain has been a constant feature of governance in post-independence Nigeria, with studies suggesting that public funds of between $300 Billion and $400 Billion have been lost to the menace of corruption since Nigeria became independent in 1960.[17] Nigeria exhibits the worst income disparities in the West African sub-region, with only one percent of the elites controlling eighty percent of accrued oil wealth, almost eighty percent of which is held in foreign banks, while close to eighty percent of the population live below the undesignated poverty threshold of $1 per day.[18] There have been high profile cases involving senior Nigerian politicians perpetrating the flight of public funds to foreign jurisdictions, and it therefore did not come as a surprise when Transparency International through its 2004 global perception index ranked Nigeria in 144th position out of a possible 145. The corruption perceptions Index ranks countries/territories based on how corrupt a country's public sector is perceived to be. It is a composite index, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. In the next year (2005), Nigeria ranked 152 out of a possible 159. Today Nigeria ranks 136 out of a possible 168,[19] thereby depicting no marked improvement on the corruption score which means there is still in existence, illicit funds which will ultimately necessitate laundering.

As previously stated, the illegal transnational flight of Nigerian moneys perpetrated by public officials is common place in Nigeria, thus making Money laundering a global problem

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corruption-a-collection-of-essays#president-muhammadu-buhari-my-plan-to-fight-corruption-in-nigeria> Accessed 15 May 2016

[17] *Ibid*

[18] See Abdel-Fatau Musah (2009) ''West Africa: Governance and Security in a Changing Region'' *Africa Program Working Paper Series, International Peace Institute*. Also available [online] <https://www.ipinst.org/ > Accessed 15 July 2016

[19] See <https://www.transparency.org/country/#NGA> Accessed 18 September 2016

necessitating an effective and co-ordinated international response.[20] This was the inspiration behind the implementation of series of measures including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[21] the statement of principles of the Basle Committee on Banking regulations and Supervisory Practices, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and three European Money Laundering Directives to reduce the extent of money laundering. The main international body that regulates money laundering however is the Financial Action Task Force (FATF) - an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions with objectives to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.[22] The FATF has developed a series of Recommendations that are recognised as the international standard for combating of money laundering and the financing of terrorism and proliferation of weapons of mass destruction. These recommendations form the basis for a co-ordinated response to these threats to the integrity of the financial system and are meant to help in ensuring a level playing field.[23] First issued in 1990, the FATF Recommendations were revised in 1996, 2001, then in 2003 and most recently in 2012 to ensure that they remain up to date and

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[20] Ryder N., (2008) ''The Financial Services Authority and Money Laundering- A Game of Cat and Mouse,'' *The Cambridge Law Journal*, 67 (3) pp 635-653

[21] See D. P. Stewart, (1990) ''Internationalising the War on Drugs: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances'' 18 *Denver Journal of International Law and Policy* 387-404. pp 388

[22] http://www.fatf-gafi.org/about/

[23] *Ibid*

relevant, and they are intended to be of universal application.[24] The importance of a harmonised effort cannot be overemphasised, and 'unless everybody joins in, there is little hope of curbing the problem.'[25] Harmonization is needed not only for countries to work together on overlapping global issues but also to ease conflict of laws and regulatory extra-territoriality.[26]

The evolution of AML laws within Nigeria encountered difficult beginnings regarding international compliance and this ultimately culminated in Nigeria getting blacklisted as a non-compliant/high risk jurisdiction by the FATF. Subsequently, Nigeria effected necessary changes which saw to her clearance by the international body as a compliant AML jurisdiction albeit subject to supervision by regional AML bodies. The current AML regime in Nigeria encompasses customer due diligence procedures, reporting systems for large value payment and suspicious transactions, internal control systems and all other requirements in line with the harmonised AML laws. However, the same issues that plagued Nigeria pre-compliance with global AML standards still abound, thereby calling into question the (in) effectiveness of contemporary AML regulations**.** No clearer illustration of this is to be found than in the analysis of the abject failure of isolated legislative responses to the scandal of International Money Laundering**.** John Broome[27] in his study of AML issues from various perspectives ranging from legislation, prevention, investigation, and prosecution, emphasised the importance of AML compliance at every level of an AML system. According to Broome, the highest levels of AML compliance in individual nations are achieved when driven by a sense of self-interest, and in order to achieve the effective functioning of AML

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[24] *Ibid*

[25] The Economist, 'Cleaning up dirty money' Jul 24th 1997 | From the print edition

[26] Shams, H. (2004) *Legal Globalization: Money Laundering Law and Other Cases,* British Institute of International and Comparative Law, London.

[27] See John Broome, (2005) *Anti Money Laundering: International Practice and Policies.* Thomson/Sweet & Maxwell Asia

compliance in financial sectors, high professional, legal and ethical standards are needed. Jackie Johnson[28]points to weaknesses in the global financial system rather than the national levels. Johnson emphasises on the source of laundered funds, most notably ‘corruption at the top’, tax evasion, and the reasoning here is that the issue of corrupt senior officials and correspondent banking brings higher risk into the international financial system with regards to combatting Money laundering, and that the amount of Money Laundering can only be reduced if all the loopholes to the global financial system are plugged.[29] From a developing country perspective, the process of implementing normative AML/CTF regimes is dictated by varying dynamics of development and intentions of a successful implementation of global AML laws are impeded by factors such as the diversity and regulation of financial markets. Other such factors are latent and infrastructural deficiencies, disparities in technology and a two lane system, educational shortcomings in some societies, the corruption factor, economic structural issues, and the resource constraint effect on the sequencing of financial sector reform.[30] Financial disparity is another reason why the perspective on money laundering can differ from country to country because the global differentiations of money laundering means that certain countries may feel the economic cost of money laundering while some others experience its economic benefits.[31] All aforementioned factors relate to Nigeria but none more than the corruption factor, considering that the issue of Nigerian politically exposed persons diverting public funds to personal use has increased rather exponentially in recent years. The relationship between corruption and money

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[28] Johnson, J. (2001), ‘’In Pursuit of Dirty Money: Identifying Weaknesses in the Global Financial System,’’ *Journal of Money Laundering Control*, vol. 5, no. 2, pp. 122-132

[29] *Ibid*

[30] See Johnson, J. (2001), ‘’In Pursuit of Dirty Money: Identifying Weaknesses in the Global Financial System’’, *Journal of Money Laundering Control*, vol. 5, no. 2, pp. 122-132

[31] See Turner, J.E. (2011), *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud*, 1st Edition, John Wiley and Sons Inc., Chichester.

laundering is inextricable, with the tendency that where one exists, the other lurks in the background.[32] And it is argued in this work from a historical and contemporary perspective that the Nigerian society is culturally receptive to corruption, hence the nexus between law and culture comes into play. As Geertz has said, law is one way in which we make sense of the world, one way of organizing meaning, one 'distinctive manner of imagining the real.'[33]

Culture means a *''collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artefacts, ritual.''*[34] For academic scholarship, culture has been described as an increasingly prized intellectual commodity, aggressively appropriated by other disciplines as an organizing principle.[35] Indeed, two major developments in the second half of the twentieth century have been said to manifest the concept of culture's appropriation by academic disciplines beyond anthropology, its traditional custodian.[36] The first development is the rise of the cultural studies movement since the mid-twentieth century.[37] The second is the "cultural turn," the process where, in the closing decades of the twentieth century, scholars in the social sciences and the humanities began to employ the concept of culture as an important tool for

[32] See Mugarura, N. (2016), ''Uncoupling the relationship between corruption and money laundering crimes,'' *Journal of Financial Regulation and Compliance*, vol. 24, no. 1, pp. 74-89.

[33] Geertz, Clifford. (1983) *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books, pp 73-93.

[34] Naomi Mezey, (2001) ''Law As Culture,'' 13 *Yale Journal of Law and Humanities*. 35-67

[35] Annette B. Weiner, ''Culture and Our Discontents,'' Presidential Address of the 92nd Annual Meeting of the American Anthropological Association (Nov. 1993), in 97 AM. Anthropologist 14, 14-15 (1995)

[36] Menachem Mautner, ''Three Approaches to the Law and Culture'', *Cornell Law Review*, Vol. 96:839 pp 840

[37] See Graeme Turner, (2003) *British Cultural Studies: An Introduction*. (Routledge) pp 33-38

gaining insights in their research areas.[38] The legal field has not ignored this appropriation, and this realisation that law is a ‘coming together’ – a normative public synthesis of culture, morality, economic planning and a genuine aspiration to the integrity of community – does not make life easy for the legal scholar. Nevertheless, the relationship between culture and law is so significantly and dramatically interwoven that it makes little sense to speak of an understanding of one sphere of activity without a comprehensive and systematic understanding of its relationship to the other. Law and culture are so inextricably linked that *‘‘the creation of legal meaning (juris-genesis) takes place always through an essentially cultural medium.’’*[39] Similarly, Lawrence Rosen makes a case that law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture.[40] According to Rosen, an isolation of law from culture does not make sense, because legal officials make decisions by relying on cultural assumptions.[41] Further reinforcing this position, Pierre Bourdieu holds that *‘‘the law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.’’*[42] The implication of Bourdieu’s definition is that law and culture are inseparable because they create meaning in one another. Thus, law creates culture,

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[38] Menachem Mautner, ‘’Three Approaches to the Law and Culture’’, *Cornell Law Review* [Vol. 96:839] pp 840

[39] Robert M. Cover, The Supreme Court, 1982 Term – Foreword:Nomos and Narrative, 97 *Harvard Law Review* 4 (1983)

[40] Lawrence Rosen, (2006) *Law as Culture: An Invitation*, Princeton University Press

[41] *Ibid*

[42] See Richard Terdiman, (1987) “Translator's Introduction” to Pierre Bourdieu, “*The Force of Law: Toward a Sociology of the Juridical Field, The Hastings Law Journal* 38(5) pp.805-853

while culture simultaneously creates law.[43] Law is simply one of the signifying practices that constitute culture and, despite its best efforts; it cannot be divorced from culture. Nor, for that matter, can culture be divorced from law.[44]

1.4 Research Statement and Hypothesis

The prospective repercussions of being a high risk jurisdiction 'coerced' Nigeria into incorporating changes to its domestic laws in line with the International standards prescribed by the Financial Action Task Force. While the need for a concise and unambiguous harmonisation of international regulations cannot be overemphasised, and despite the concerted efforts in this regard, a trans-jurisdictional review by this researcher of both primary and secondary sources like conventions and academic literature have unearthed conceptual, legal, regulatory problems, as well as a seeming desire for theoretical, rather than practical (actual) compliance. In other words, global AML efforts seem more academic than practical. The thesis informing this research therefore is that law, culture and politics cannot coherently be understood as independent spheres of discourse and practice because they interact so dramatically and significantly with each other that it makes little sense to speak of an understanding of one sphere of activity without a comprehensive and systematic understanding of its relationship to the other two. Accordingly, legal and regulatory reforms to International Anti-Money laundering initiatives can only be achieved with a proper appreciation of the culture and unique peculiarities of the receptive jurisdiction where emphasis is placed on the local environment rather than a mere response to International requirements for the sake of it. International AML regulations, and within this context, the FATF recommendations are meant for universal application, traversing the distinct quirks of diverse cultures, but the test here is its suitability or otherwise to the socio-cultural, political, economic and legal realities of Nigeria. The

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[43] Hursh, John (2009) ''The Role of Culture in the Creation of Islamic Law,'' *Indiana Law Journal*: Vol. 84: Iss. 4, Article 11.

[44] Naomi Mezey, (2001)'' Law As Culture,''13 *Yale Journal of Law and Humanities*. 35-67

fleecing of Nigerian public moneys most notably by public officials has continued unabated despite the incorporation of strict AML laws into Nigerian body laws. The desire to negate ‘cosmetic’ compliance forms the basis of this work, and the researcher shall avail himself the use of relevant literature to address the research aims and objectives with a view to making cogent contributions to current literature.

1.5 Conceptual Framework and Research Design

This PhD thesis is couched along a number of research lines each carrying its distinct thematic preoccupation. Along conceptual lines, the main concern is the definition of money laundering, the processes, mechanisms, stages and instruments of the laundering of illegally obtained fund. The estimative line of the thesis aims at measuring the size of the money laundering phenomenon and its socio-economic impacts/effects and consequences thereof; while the third line of research is that of awareness on the need to prevent and fight against the attendant effects of the scourge of money laundering in juxtaposition with national and global efforts so far made to put paid to the menace. There is also the suggestive line where effort is made to proffer solutions and recommendations for reform.

1.6 Aims and Objectives of Study.

The aims and objectives of this research are summarised as follows:-

1) To examine, review and analyse the efficiency of International standards to curb money laundering;
2) To identify the economic impacts of money laundering on International Development and especially on developing countries;
3) To examine and appraise the legal and preventive measures adopted by Nigeria to combat money laundering;
4) To analyse the problems associated with effective harmonisation of AML regulations and seeking possible ways of circumventing such problems;

5) To seek to attain reasoned conclusions and recommendations as to the ways to curb the scourge of the crime of money laundering.

1.7 Methodology

There appears to be a trend that a formal review of literature be made part of a methodological preface. My view and that of my supervisor is that a ‘literature review’, i.e. a reading of relevant and contemporary materials should reveal itself throughout the course of defending the thesis. The idea that one can find ‘a gap in the literature’ by trawling through what might be thought to be pertinent writings is somewhat optimistic. This is because without a well-developed thesis to guide one’s research into the literature, it would be impossible to identify important contributions, let alone find any gaps. Moreover, if one has a good understanding of the various claims that constitute one’s thesis, one may well discover a wealth of research and writings in support of, or critical of one’s own hypothesis. In this event, the task of the researcher is not to plug a gap in literature but to analyse and refine the debate by making clear what is essential to an understanding of the phenomenon in question. That said however, majority of the research would be library based where both primary and secondary would be used. These include treaties, cases as well as legislative enactments for primary sources as well as textbooks, journal articles, conference papers and commentaries published in journals. Electronic materials on academic web pages would also be used. Being a Law thesis notwithstanding, a research on money laundering and financial crimes generally is not strictly law inclined. It cuts across various disciplines ranging from sociology, economics and history. This dissertation as a result, would be done using an interdisciplinary approach based on each discipline it cuts across. Looking at money laundering in the area of history as a discipline, its historical evolution must be brought into perspective as this is the only way any reasonable solutions can be proffered to its menace. History is usually researched through the use of primary sources like text books and articles or narratives of those that were close to or were there when the event being researched took place. This work shall use as much primary source type in this regard. In summation, for the purpose of this work, the researcher has employed the use of methodology drawn from a plethora of research methods. Emphasis shall be placed on analysing the legal and regulatory framework of global Anti-Money laundering laws, a critical analysis of its validity and effectiveness. Such analytical approach shall be used to critically discuss the reception of these laws into Nigerian legal system as regards how they suit for purpose within the Nigerian context.

Specifically, the researcher shall employ the following methods:-

Interdisciplinary Legal Study-

This research albeit based on the legal and regulatory framework of Anti-Money laundering regulations, cannot escape the fact that Money laundering is a crime that transcends disciplines. The commission of the crime of money laundering carries legal, political, sociological and historical connotations to it, hence the impossibility of studying the topic in isolation. From a sociological standpoint, law is construed to be a social practice which invariably and to some extent seeks to shape and be a reflection of the society. Another view is that law exists in and is developed through society. Thus, a critical analysis of the attitude of the Nigerian society regarding Anti-Money laundering regulations and its attendant predicate offences such as corruption shall be undertaken. The emphasis here shall be on ‘law in practice’, not just ‘law in books’. The purpose here shall be the facilitation of a future change, either in the law itself, or in the manner of its administration.[45] From a law and economics viewpoint however, emphasis shall be on appraising the current legal and regulatory regime with a view to making proposals towards improvement in order to make it more efficient in some way. The researcher is aware

[45] Arthurs describes this as ‘law reform’ research. See Arthurs, H.W. (1983) Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa

that this approach may give rise to quantitative research but must stress here that the research is entirely library based making use of reputable journal articles, cases, statutes and articles on other legal systems online.

The Black Letter Approach-

Here, international conventions, decided cases and National laws form the bulk of primary sources as regards Anti-money laundering laws. Making use of the black letter approach, the researcher will analyse vital instruments such as the 1988 UN Convention(the Vienna Convention) which sought to address the threat posed by narcotics trafficking, the Basel committee statement on banking supervision, the 49+ recommendations of the Financial Action Task Force, the Nigerian Money laundering Prohibition Act amongst others. The focus will be on a descriptive analysis of the law as stated within those primary sources through the use of some reputable data base from any good quality library.

Traditional Approach

Here, a systematic exposition, analysis and critical evaluation shall be made of legal laws, principles or doctrines of money laundering and AML/CFT laws and their inter-relationship. The researcher shall use this method to look at the problems posed by the gap between AML/CFT laws and the present state of achievement. The researcher shall make use of statutory materials, case reports, standard textbooks and reference books, legal periodicals, legal history and commentaries.

Historical Research

The aim of the researcher here is not to embark upon a discussion of every AML/CFT regulation neither is it to do same with local laws for the sake of mere intellectual delight. The intention rather, like it is with historical research, is to evaluate the present law as it is, to pick the queries out, and explore the circumstances in which the present state of affairs came about. The historical evolution of the crime of money laundering right from the prohibition era to what it is today is relevant to this research, and this method shall be used for that purpose. Similarly, the legal and regulatory aspect of the AML laws shall be critically analysed from this perspective. The importance of this method of research cannot be over emphasised, as finding out the previous law can give an understanding into the reasons behind the existing law and the course of its development. The past often explains the present, most vividly.[46] Here, text books, commentaries on conventions, international instruments, local and national laws and the historical perceptions of reputable authors shall be used.

1.8 Research Questions

This research aims to answer the following questions:-

1) How has Global AML initiatives fared against the serious threat of the growth of the crime of money laundering?
2) What are the practicalities of the global AML/CFT laws within the contextual peculiarities of Nigeria?
3) How could Nigeria best use international standards and practices in Nigeria's policy making to improve its AML regime?
4) Is Nigeria's compliance to the global AML/CFT standards a mere academic exercise? Or a means to an illusory end?

[46] P.M.Bakshi, (2006) *Legal Research and Law Reform*, ILI, First Reprint

Chapter 2

Stages of the Cycle, Extent and the Effects of the Crime of Money Laundering

2.0 Introduction

The aims and objectives of this chapter are to analyse the various stages of the crime of money laundering and to then examine the national and global effects of the activity.

2.1 Stages of the Cycle

The nature of a money laundering cycle entails several stages each of which may implicate many people and institutions, and for this reason, criminals take extreme care to cover their tracks at every stage of the process. The way in which laundering takes place is dependent on the purpose for which the act is structured, and the particular skill set of the launderer. Money launderers are creative, intelligent and imaginative and they develop their methods by seeking new and un-captured business opportunities, sometimes by strategically selecting economies where regulations are lax or non-existent. Irrespective of individual differences and style, however, money launderers depend on the anonymity, speed and complexities of their transactions to carry out the scheme. By being anonymous, they make sure transactions with values obtained from offences resemble other bona-fide transactions from the environment in which they operate. The cash must have no trace to lead to its origin. The launderer's dependence on complex transactions is because spreading of funds in multiple transactions with electronic speed makes the job of the investigators a difficult or even impossible one. A standard laundering process comprises three stages: placement, layering and integration.

2.1.1 The Placement

This is the initial stage in the money laundering cycle where funds obtained from illegal activities are introduced into the legitimate financial markets. It may be done through single or multiple transactions using one or several banks deposits or the purchase of easily negotiable investments such as bonds or shares.[47] The exclusive aim of the launderer at this stage is to remove the cash from the location of acquisition in order to avoid detection from authorities and then proceed to transform it into other asset forms. When a criminal activity generates substantial profits, the individual or group involved must find a way to control the funds without attracting attention to the underlying activities or the persons involved. The transnational nature of the crime of money laundering means that cash can usually be syphoned across borders and a common technique used at the placement stage is the separation of the funds into smaller values for easy lodgements into various accounts. Thus the dissipation of large and bulky cash amounts features at this stage of the cycle. What amounts to large or bulky cash however, is a subjective rather than an objective issue in that any amount that is 'large' enough to arouse suspicion as to the legitimacy of its source can be described as being 'large and bulky'. Once the physical cash is injected into the financial system, it is replaced by a paper; electronic or digital record that can be conveyed; transported or negotiated with ease.[48] The placement stage is usually considered to be the riskiest stage of the laundering cycle because the process involves substantial sums of money being passed across counters of banks or other financial institutions.[49] It is at this stage that detection by the authorities is most likely, and this is aptly described by the analogy that *''money in flight will be first noticeable when it literally first splashes into the pool.''*[50] From a regulatory perspective therefore, this is a crucial opportunity for intervention and interception because from here on, the

[47] See Jonathan McNally, ''Money Laundering Methodology'' in Toby Graham (Ed) *International Guide to Money Laundering Law and Practice,* 2nd Edition, 2003) pp 2

[48] *Ibid*

[49] See Mugarura, N. (2012); *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries,* 1st Edition, Routledge Ltd, Farnham.

[50] B.A.K Rider, (2001) ''Taking the Profit Out of the Crime'' *Journal of Money Laundering Control (JMLC)* pp 2-3

ripples become fainter and the cash sinks deeper into the target economy.[51] In the 1980's, Eddie Antar, an American business man and co-founder of *Crazy Eddie*, an American business retail outlet that sold electronic goods, skimmed millions of dollars from the company to hide it from the Inland Revenue Service. That was the original plan, but he and his co-conspirators eventually decided they could make better use of the money if they sent it back to the company disguised as revenue which would inflate the company's reported assets in preparation for its Initial Public Offering (IPO). To inflate earnings and maintain the stock price, Antar and his advisers plotted to falsify inventory and profit reports. The scheme employed several tactics. In response to slowing sales, *Crazy Eddie* began by falsely reporting sales to other chains as if they were retail sales. Antar had always done a brisk business transhipping goods from manufacturers to other retailers. Now, it booked those wholesale transactions as retail sales. Such financial manoeuvrings accomplished several things: first, they contributed to the record-setting sales increases with which *Crazy Eddie* was wowing Wall Street in 1985 and 1986. Secondly, and more subtly, they inflated same-store sales to analysts (a critical measure of a retail company's profitability, and a key to the company's stock market success). As its core business weakened, Antar was desperate to produce the extraordinary results that had endeared him to Wall Street.[52] Falsely reporting wholesale transactions as retail sales inflated Crazy Eddie's inventory position and enhanced the company's balance sheet. For instance, the company would sell 100 colour televisions which would retail for a total of $40,000 to another chain for only $20,000.[53] Eddie laundered more than $8Million and the method he used at the placement stage of his scheme was to make a series of separate deposits to a bank in Israel, sometimes making up to twelve deposits in one day. Without

[51] *Ibid*

[52] See Belsky, G. and Furman, P., (1989) *Calculated Madness: The Rise and Fall of Crazy Eddie Antar.* Crain's New York Business, 5(23), pp 13.

[53] *Ibid*

detection, Eddie had scaled the first hurdle in the money laundering cycle by successfully introducing his funds into the legitimate financial market.

The placement stage is the foundation stage of the cycle, and versatility and expertise is of paramount importance. This expertise plays out in a variety of techniques ranging from 'smurfing' to bank fraud. 'Smurfing' is a term ascribed to money launderers who seek to avoid scrutiny from authorities by breaking up a large transaction into smaller amounts that remain below the reporting threshold.[54] Runners are used to perform multiple financial transactions to avoid the currency reporting requirements. In the Twenties and Thirties in the United States, organised crime groups would pay elderly men and women a few hundred dollars each to deposit up to $9,999 in cash into various bank accounts. Bank clerks were not expected to suspect elderly people carrying cash, however large the amount. Because many of the unwitting depositors were diminutive in nature, they were known as 'smurfs'.[55] Instructive in this regard is the case of *Lawrence Druce v Regina*.[56] This was an appeal against the amount of a confiscation order after the appellant had pleaded guilty to being concerned in a money laundering arrangement, and to possessing criminal property contrary to S. 328 (1) of the Proceeds of Crimes Act 2002. Some of the proceeds of the appellants' dirty deal were paid into various bank accounts he set up himself. He had 16 accounts with the Borehamwood branch of HSBC and one account at the Edgware branch of NatWest bank. Enquiries revealed that eight of the accounts at least, had received some of the proceeds. It appeared that a total of $1,096,818.90 had been transferred to those accounts, much of it being passed onto others. This was the criminality on which he was indicted. Conversely, Alberto Barrera was the leader of the largest smurfing operation in the early 1980s. His Miami-based smurfing

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[54] In most jurisdictions, there is a stated sum threshold which banks must report to regulatory agencies if surpassed in a single transaction

[55] Named after the small, blue cartoon characters and the scam came to be called smurfing.

[56] *(2013) ECWA Crim 40*

team included dozens of people who took cash delivered by drug traffickers and placed it into hundreds of banks in cities across the United States.[57] Records from the operation that dismantled Barrera's money laundering network stated that he received large deliveries in cash between 1983 and 1984 which he usually divided among his team, sending groups of two or three people on airline trips to various cities where they would systematically buy money orders or cashier checks from banks.[58] Barrera, however, had no efficient means of liquidating these money orders or cashier cheques and this ultimately led to his downfall because the methods he utilised drew the attention of the banks.[59]

Cash smuggling is another option for the money launderer at the placement stage of the crime. It is favoured by the criminals because wire transfers (especially trans-national ones) bear the risk of exposure of the money trail. It is not a system without its own problems, however. There is a mandatory legal requirement on individuals in most jurisdictions for international passengers to declare the exact cash sum amounts passengers are carrying before boarding any means of transport. This process forces launderers to develop inventive ways of circumventing the system. Eddie Antar carried millions of dollars strapped to his body and in his suit case during his money laundering scheme. In September 2001, Hong Kong police tracked down the biggest cross border money laundering crime, which extended to Canada, Hong Kong, Yunnan province and the Guangdong province of china mainland, involving more than 50 Billion HKD.[60] In this case, the criminal groups hired carriers to conduct day by day cash smuggling from Shenzhen Luolu customs to Hong Kong over a period of six years. That dirty money, gained by tax evasion and

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[57] See Grosse, R.E. (2001), *Drugs and Money: Laundering Latin America's Cocaine Dollars*, Greenwood Publishing Group, Incorporated.

[58] *Ibid*

[59] *Ibid*

[60] Ping He (2010) ''A Typological Study on Money Laundering'' *Journal of Money Laundering Control (JMLC)* Vol. 13 Issue 1 pp 15 -32

embezzlement in China's mainland was transferred to various bank accounts after being smuggled into Hong Kong. It could be argued that cash smuggling does not necessarily fall into the category of placement as far as money laundering is concerned, because a successful smuggle of cash across borders does not necessarily place the cash into the financial system (which is the main purport of the launderer at this stage). Smuggling of cash across borders alone is not sufficient for the launderer because the physical cash must still be immersed into the financial system. Thus taking advantage of laxity or complicity in banking and financial institutions (or more actively working to corrupt bank officials) offers other avenues for money laundering. The 2006 case of *Wachovia* bank was a classic case of bank complicity. The authorities in the United States of America uncovered billions of dollars in wire transfers, traveller's cheques and cash shipments through Mexican exchanges into Wachovia accounts. Between 2004 and 2007, illegal proceeds totalling $378.4 Billion was transferred into the bank by the Mexican based *Casa Cambios*. The bank had ignored the red flags raised by its senior Anti-Money laundering officer as regards dealing with the Mexicans. Recently in the year 2012, HSBC bank was found to have regularly laundered money for Iranian terrorists and for Al Qaeda. *''A yearlong investigation by a senate committee uncovered that the bank acted as a conduit for drug money, disguised the sources of funds to evade its sanctions against Iran, and included amongst its clients, businesses with alleged ties to terrorism.''*[61] In terms of active corruption, Pablo Escobar provides the perfect illustration. Laundering money was central to Escobar's empire and his recipe for success was relatively simple as he once said *''you bribe someone here, you bribe someone there, and you pay a friendly banker to help you bring the money back.''*[62] Irrespective of problems faced by the launderers however, smuggling remains a component part of the placement stage due to the ease with which criminals can throw authorities of the trail and effectively sever the ties between

[61] Carl Levin – Michigan Senator (2012)

[62] See J.D. Rockefeller, (2016) *Cocaine King Pablo Escobar: Crimes and Drug Dealings*

transactions involving the proceeds of crime and the origin of the crime(s). Money launderers also make use of insurance institutions to obliterate the trail of illegal proceeds by buying, altering and surrendering insurance policies and then subsequently filing insurance claims. Indirect placement can also be accomplished by forward displacement of the money laundering location into premiums paid for life insurance policies, or other financial products.[63]

2.1.2 The Layering Stage

This is considered the smokescreen stage in a money laundering activity. It is the stage where the true origin of money is disguised by making the activity difficult to be detected and uncovered. Complex financial transactions are utilised towards separating criminal funds from its origin, and methods used at this stage range from the use of offshore account by dealers, online electronic fund transfers between tax havens, and suspicious gold transactions in which large purchases of gold are undertaken in countries with low Vat rates. Other methods include over invoicing of reported goods, the use of gold, rings, bracelets, pendants etc. The value of these items usually remain constant, therefore there is the possibility of a single piece being changed many times in order to disguise the original form without any significant change to its worth. Another method is the creation of false paper trails and the intentional production of false documentary evidence to disguise the true source, ownership, location, purpose of or control over the funds. Tangible assets are purchased with cash, and converted in order to offset transaction costs. Electronic funds or wire transfers are also used at this stage due to its advantage of speed. Once placement is successful within the financial system by way of a bank or financial institution, the proceeds can now be converted into monetary instruments by the use of bankers' drafts and money orders. Another way the launderers achieve their aim at this stage is through the acquisition of material assets bought

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[63] See Schneider, F. & Windischbauer, U. (2008), "Money laundering: Some Facts," *European Journal of Law and Economics*, vol 26, no 3, pp 387-404.

with cash and then sold. Those assets bought with the illicit funds can now then be sold either locally or abroad by which way, tracing the origin becomes more difficult.[64]

At the layering stage of the Antar's money laundering scheme, after successfully introducing his dirty cash into the financial system via an Israeli bank, and before the authorities noticed the sudden huge balance in his account, he caused the Israeli bank to transfer everything back to Panama where bank secrecy laws were in force. This afforded him the freedom to make anonymous transfers to various offshore accounts. Another reported case was in Canada where a criminal organisation exported a relatively small shipment of scrap metal, but falsely reported the shipments as weighing several hundreds of tons.[65] Commercial invoices, bills of lading and other shipping documents were prepared to support the fraudulent transaction. On inspection of the cargo, a Canadian customs officer noticed that the hull of ship was still well above the water line and as such, inconsistent with the reported weight of the shipment scrap metal. An examination of the cargo revealed the discrepancy between the reported and actual weight of the shipment. The logical assumption here was that the inflated value of the invoice would have been used to transfer criminal funds to Canada.[66] There seemed a genuine case of an intention to over invoice a foreign importer by misrepresenting the quantity of goods. The criminal organisation would then have been able to transfer illegal funds back into the country using the trade transaction to justify payment through the financial system. In *R v Patel (Harish),*[67] in an appeal against convictions for offences of entering into or becoming concerned in a money laundering arrangement contrary to the Proceeds of Crime Act 2002, it was alleged that lies were told to the banks and other financial

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[64] Financial Action Task Force (FATF) Money Laundering and Terrorist Financing Typologies 2004-2005

[65] Ping He, (2010) ''A typological Study on Money Laundering'' *Journal of Money Laundering Control (JMLC)* pp 15 - 32

[66] FATF- Trade based Money laundering (Paris, June 23 2006)

[67] *(2012) ECWA Crim 2479, 2012 WL4888597*

institutions and that false documents were used to cover the transactions, and in particular, false invoices were issued. The first appellant Harish Patel had one legitimate business and had set up a further business in his sole name. The crown alleged that the businesses were used by the appellants to launder £4.6M over a period of five months. Money was deposited or transferred in Harish Patel's name to a bank in the United Kingdom. It would then be transferred to accounts in India and Dubai via the United States with false documents used to cover the transfers. The Crown further alleged that the businesses set up by Harish Patel did not buy or sell any diamonds or jewellery as it claimed, but was solely a vehicle for money laundering. They were convicted on those grounds at the court of first instance and their subsequent appeal against sentencing was also thrown out.

Criminals make use of the internet for electronic transfer of funds or wire transfers mostly at the layering stage of a laundering scheme because technological advancements means that one smart card or computer can store an immeasurable sum of electronic money. This process is quick and bridges the miles of distance and makes it difficult for regulators to make use of the customer identification policy as the complex nature of laundering money over the internet makes it difficult to be supervised. It leaves regulators with a very difficult task of determining whether the crime took place where the server is located or where the accounts are held. This sparks up a jurisdictional issue as to which regulatory body or authority should prosecute or follow the trail and ends up buying time for the launderer to dissolve his proceeds into untraceable channels.

2.1.3 The Integration Stage

At this stage, the illegal proceeds have been safely placed, mingled with legitimate funds and ready to return to the launderer through legitimate means as clean and legal money. This means the criminal has a point of reference as to source of wealth in the event of questioning by law enforcement agents or regulators. A common technique at this conclusive stage of the laundering process is the use of real estate transactions by shell companies using illicit proceeds. Such properties can then be sold with the proceeds appearing as clean money from a legitimate source. The documents that set it up can contain a valid bank account or something more than the names and address of the lawyer or agent that takes care of setting up the company, the commissioner or may be a few shareholders. With no independent assets or their own commercial operations, these types of companies are used by owners to develop their businesses or to maintain control over companies. They are registered in the country where it started but not posted on the stock market and never operate on their own. The most important aspect of a shell company to the launderer, tax evader or to terrorism financiers is that a shell company is a legal entity and so easily formed too. More so, they are particularly protective of the criminals when they are set up in jurisdictions that hold strict legislation in keeping banking secrets and this makes it almost impossible to identify the real owners or administrators of the company with a natural consequence being an obliterated trail of illegal funds. In China, Mr Cheng Kejie, a former vice chairman of the country's National People's Congress (NPC) was sentenced to death and executed for accepting bribes and for general abuse of his position while in power.[68] Cheng, aged 66 at the time was found guilty along with his mistress Li Ping of having taken 41 Million Yuan in bribes when he served as deputy secretary of the party committee of Guangxi Zhuang Autonomous region and chairman of people's Government of Guangxi. The illicit proceeds were deposited in overseas banks by a Hong Kong business man used as the middle man who on false pretence of a Hong Kong company transferred

[68] Sept. 7, 2000, 5 Gazette of The Supreme People's Court of The People's Republic of China 2000, 162-163 (The Supreme People's Court of People's Republic of China (SPC) publication of its decision approving Mr. Cheng's death penalty), copy of the decision provided by the United States Law Library of Congress ''Chronology of Cheng Kejie case.'' People's Daily, Sept. 12, 2000, accessed at http://english.people.com/cn "Public Prosecutor and Cheng Kejie." SinoLaw Reference ID: 77062-3163, unofficial English translation of compilation of Beijing court documents in the case (High People's Court of Beijing Municipality orders of Sept. 7 and Aug. 22, 2000 denying Cheng's appeal), obtained via the U.S. Library of Congress. First instance decision by the No. 1 Intermediate People's Court in Beijing (July 31, 2000): XINHUA NEWS AGENCY, available at http://news.sina.com.cn/china/2000-09-14/127152.html (in Chinese), obtained via the U.S. Library of Congress.

them to a shell company registered in Hong Kong in Cheng's name. This shell company fabricated business operations and forged accounts to launder the proceeds at the cost of paying 25% incorporation income tax and 40% individual income tax and then transferred them into a bank account appointed by Cheng. The scheme in this case was the establishment of a shell company by the criminals in advance of and fabrication of transactions as well as payment of tax in the name corporation income, through which the illicit money was legalised. At the integration stage of Antar's scheme, after successfully placing his dirty cash into the financial system and obliterating the movement of the funds with the aid of Israeli and Panamanian banks, he slowly wired the money from those accounts to the legitimate *Crazie Eddie* electronic bank account. The money got mixed with legitimate funds afterwards and became documented as revenue.

The integration stage in a money laundering process is a high order of criminal sophistication which is heavily reliant on the complicity of banks. The profits the banks make from laundering money for criminals usually is the pull the criminals have over banks that compromise their professional responsibilities and standards. However, while the banking system remains an important avenue for money launderers, there has been a gradual but noticeable trend away from the banks and increasing use of non-financial institutions which not only provide attractive services to launderers but also find themselves subjected to less regulatory scrutiny than banks.[69] The 'Hawala' banking system is one of such. It is a well-established system used for legitimate transactions and involves the transfer of value between countries, but outside the legitimate banking system. The broker, which may be set up as a financial institution, or may be an ordinary shop selling goods, has an arrangement with a corresponding business in the other country. The two businesses have customers that want funds in the other country, and after taking their

[69] Paper presented by Mr Rick McDonnel, Head, Asia/Pacific secretariat. FATF, entitled ''An overview of the Global Money Laundering problem, International AML standards and the work of the FATF'' delivered at the International Conference on Global Drugs Law, New Delhi. – 28/02/1997

commission, the two brokers match the amounts wanted by their customers and balance their books by transferring an amount between them for the time period e.g. one month.[70] A good illustration of how the system works is thus- an initial transaction can be a remittance from a customer (CA) from country A, or a payment arising from some prior obligation, to another customer (CB) in country B. A hawaladar from country A (HA) receives funds in one currency from CA and, in return, gives CA a code for authentication purposes. He then instructs his country B correspondent (HB) to deliver an equivalent amount in the local currency to a designated beneficiary (CB), who needs to disclose the code to receive the funds. HA can be remunerated by charging a fee or through an exchange rate spread. After the remittance, HA has a liability to HB, and the settlement of their positions is made by various means, either financial or goods and services. Their positions can also be transferred to other intermediaries, who can assume and consolidate the initial positions and settle at wholesale or multilateral levels.[71]

2.2 The Three Stage Cycle- Not an 'open-and-shut' case.

These three stages of a money laundering cycle however, do not necessarily constitute a cumulative standard preceding the laundering of funds. One or two of the three may suffice on their own. It is however improbable that layering or integration could occur without a precession of the placement stage. The variabilities and complexities of a money laundering process can result in cases where only a number of these stages occur, where they occur simultaneously or they overlap. A lot depends on the facilities that avail the launderer, the criminal's requirements and on the robustness or otherwise of the regulatory and legal requirements linked to the effectiveness of the monitoring systems of the financial or regulated sector.[72] While convenient, a major downside of viewing

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[70] FATF Asia Secretariat, 'Disposal of Proceeds of Crime.' Money Laundering methods workshop Report of the expert group, Hong Kong, 14 November 1996

[71] See David C. Faith, (2011) ''The Hawala System'' *Global Security Studies*, Vol 2, Issue 1

[72] Hopton, D. (2016), *Money Laundering : A Concise Guide for All Business*. 2nd Edition, Routledge

money laundering through the prisms of the three generally accepted methods of placement, integration and layering is that it does not fully reflect what really happens.[73] A major consequence of this by way of regulation is that those with the duty of recognising and arresting money laundering activity find themselves having insufficient knowledge of identifying it in all its guises.[74] The identification by the launderer of a perceived adversary could determine the mode of operation used, and this means that the structure of the transaction depends on who the likely discoverer could be or what they are likely to look out for.[75] This played out in the Barings bank scandal[76] of the 1990's where Nick Leeson despite being caught several times over the course of his unauthorised speculative trading, was on each occasion able to talk his way out of discovery because the people who had caught him did not understand what he had done.[77] Another instructive case is that of the fraudster, Walter Pavlo who was jailed for wire fraud and money laundering in the mid 90's. While in the employment of the MCI as a senior manager, Mr. Pavlo was responsible for the billing and collection of nearly $1 Billion in monthly revenue for MCI's carrier finance division. However, in collusion with a fellow member of staff and a business associate outside the company, Mr Pavlo perpetrated a fraud involving a few of MCI's own customers. At the completion of the scheme, seven customers of MCI were defrauded over a six-month period resulting in $6 million in payments to the Cayman Islands. Mr Pavlo describes knowing what the

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[73] *Ibid*

[74] *Ibid*

[75] See Turner, J.E. (2011), *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud*, 1st Edition, John Wiley and Sons Inc., Chichester

[76] Barings was brought down in 1995 due to unauthorized trading by its head derivatives trader in Singapore, Nick Leeson, who due to the absence of oversight, was able to make seemingly small gambles in the futures arbitrage market at Barings Futures Singapore and cover for his shortfalls by reporting losses as gains to Barings in London.

[77] Nick Leeson, (1996) *Rogue Trader- The Original Story of Banker Who Broke The System*. Little Brown and Company

auditors would look for, and providing them with distractions to keep them away from what he was hiding.[78] It is important to note therefore, that, be it a tax evader, a spouse seeking to hide parts of a marital estate, or a terrorist seeking to camouflage the funds he plans to use in coordinating a next attack, the overriding aim is to is to find a mechanism that bears the most minimal of risks in achieving that aim.[79] These methods may or may not conform to the three stage model of placement, layering and integration.

2.3 The Extent of the Crime.

In order to determine the *extent* of the crime of money laundering, we should ask the following three questions: (i), How much money has been or is being laundered? (ii), what is the source of laundered proceeds and illicit funds? And (iii), what is the ultimate destination of the laundered proceeds?

2.3.1 How Much?

In a digital age where a single click of a button can wire huge sums across vast distances miles, the efficiency of a launderer is enhanced and the job of the regulator becomes more difficult and more important. However, an accurate measurement of the extent of phenomenon of money laundering is difficult to achieve. Van Duyne[80] believes that very little is known either of the underground economy in general, or indeed of the money management of crime enterprises in particular. Van Duyne describes knowledge in this area as akin to that of an archaeologist who has to describe the economy of a Stone Age settlement on the basis of a few pottery fragments, a spear point and half a

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[78] See Turner, J.E. (2011), *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud,* 1st Edition, John Wiley and Sons Inc., Chichester

[79] *Ibid*

[80] van Duyne, P.C. (1994), ‘’Money-Laundering: Estimates in Fog,’’ *Journal of Financial Crime,* vol 2, no 1, pp 58-74.

jawbone, which may in the long run, lead to either over or underestimation.[81] Van Duyne further argues that the approach to money laundering has been accompanied more by fact creation than fact finding. According to him, no certified fraud examiner would ever accept a yearly report of a corporation if its figures had been gleaned and glued together in the way of the first alarmist report of the Financial Action Task Force, which figures were obviously intended for stimulating political action.[82] Authors in the field of economics recognise this problem and some have proposed methods for estimating the scale of money laundering activity. The pioneer of measuring money laundering is the British Australian economist and criminologist John Walker, who in 1994 using the 'Walker Gravity Model' did the first global estimate of money laundering by measuring illicit flows of money in and out of 220 countries.[83] John Zdanowicz [84] on his part focused on an analysis of unusual trade data by observing abnormal prices for trade based money laundering, while Bagella *et al*[85] proposed a way to measure money laundering by using economic theory to determine how much economic rationally acting a launderer would launder.[86] These efforts notwithstanding, all had their shortcomings and did not completely solve the problems associated with an accurate estimation of the crime of money laundering.[87] Van Duyne argues that the

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[81] *Ibid.*

[82] van Duyne, P.C. (1998), ''Money Laundering: Pavlov's Dog and Beyond.'' *The Howard Journal of Criminal Justice*, vol 37, no 4, pp 359-374.

[83] Walker, J, & Unger, B (2009), ''Measuring Global Money Laundering: The Walker Gravity Model,''5(2) *Review Of Law & Economics*, Article 2.

[84] Zdanowicz, John (2009). "Trade-Based Money Laundering and Terrorist Financing," 5(2) *Review of Law and Economics*, Article 3.

[85] See Bagella, Michele, Francesco Busato, and Amedeo Argentiero (2009). "Money Laundering in a Microfounded Dynamic Model: Simulations for the U.S. and the EU-15 Economies," 5(2) *Review of Law and Economics*, Article 4

[86] Unger, B. (2009), ''Money Laundering - A Newly Emerging Topic on the International Agenda,'' *Review of Law & Economics*, vol. 5, no. 2, pp. 1-13.

[87] *Ibid*

difficulty concerning the determination of the scope of the problem lies with the geographical delimitation and delimitation in time. For the limitation provided by geography, the argument is that the cross-border complexity of the crime trade and the financial handling of the proceeds frustrate any attempt at gauging exactly how much is being laundered in a particular jurisdiction.[88] This danger is especially acute when a complicated system of banking is being used in splitting up the money in small amounts, transferring to foreign front companies, putting the original sum again (partly) together (described as layering and integration) in order to obscure the money trail.[89] As regards delimitation of time, Van Duyne's argument is that the tendency to relate the extent of money laundering to the assumed yearly turnover of crime trade bears no correlation to the nature of money laundering activity because money laundering does not need to happen at a particular time with any trade. The need for money laundering depends on the time in which one needs to enter the legitimate upper world financially for whatever reason.[90] One can make a distinction between the need to report a regular (preferably not too high fiscal) income and the individual large transaction for which the declared income is too small. The 'annual income' requires a certain amount of money-laundering on a 'yearly basis', for example a moderate salary as a director of a little firm on the Isle of Man.[91]

Nevertheless, it is agreed that there is not a definite figure of the amount of money that is laundered globally but rough estimates have been suggested. The United Nations Office on Drugs and Crime (UNODC) conducted a study to determine the magnitude of illicit funds generated by drug

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[88] See van Duyne, P.C. (1994), ''Money-Laundering: Estimates in Fog,'' *Journal of Financial Crime,* vol. 2, no 1, pp 58-74.

[89] *Ibid*

[90] *Ibid*

[91] See van Duyne, P.C. (1994), ''Money-Laundering: Estimates in Fog.'' *Journal of Financial Crime, v*ol. 2, no 1, pp 58-74.

trafficking and organised crimes and to investigate to what extent these funds are laundered. The reports estimated that in 2009, criminal proceeds amounted to 3.6% of global GDP, with 2.7% being laundered[92]

2.3.2 Source of Laundered Proceeds and Illicit Funds.

Crime is the principal source of laundered wealth, and this ranges from financial crimes such as fraud, corruption and tax evasion, to violent crimes like heist, burglary, and less violent but equally devastating ones such as human trafficking and the illicit drug trade. These sources shall be discussed within the context of their contributions to the menace that is money laundering.

I: Official Corruption and the Politically Exposed Persons (PEP's)

Money laundering is usually a veritable tool for the perpetration of the crime of corruption. Corruption is the abuse of entrusted power for private gain, and it can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.[93] There is always a nexus between money laundering schemes and corruption because either the laundered assets are proceeds of corruption or the process of laundering is facilitated by corrupting law enforcement agencies or officials in the financial institution to place illicit proceeds into the system.[94] Corruption is a financial crime that has gained notoriety for the destruction of lives and communities, and for undermining countries and institutions. It generates popular angst that threatens to further destabilise societies and exacerbate violent conflicts. Corruption can happen everywhere and it mostly occurs when politicians put their own interests above those of the public by demanding money and or favours from citizens for services that should be free. It is prevalent in

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[92] See <http://www.fatf-gafi.org >(Accessed 14 June 2013)

[93] See http://www.transparency.org/what-is-corruption/ (Accessed 19 November 2013)

[94] See Goredama C. (2004) ''Money Laundering in Southern Africa: Incidence, magnitude and prospects for its control,'' *Institute of Security Studies* Paper 92, pp 4

developing world economies and the sad reality of the nature of corruption is that it hits the poor hardest. This is because it is usually the underprivileged ones who cannot afford substitute means to basic amenities like pipe-borne water, security, electricity and health-care that suffer the debilitating consequences of corruption the most. Taken literally, corruption means for instance, a Nigerian customs officer overlooking a mandatory check on imported goods in return for a bribe by whoever owned those (contraband) goods. For the purpose of this work however, corruption shall be treated within the context of the politically exposed persons (PEPs). In recent years, there has been an increasing concern about money laundering cases involving high net worth individuals who are, or who have been, entrusted with prominent public functions (commonly referred to as politically exposed persons) where their wealth has been obtained by illegal means, such as bribery and corruption.[95] Defining Politically Exposed Persons (PEP's) has been the subject of much conjecture over the years. Numerous definitions have been advanced, each with its own distinct features but finding a universally accepted one has been difficult to arrive at. It has been defined as *''individuals who are/or have been entrusted with prominent public functions, including heads of states or of Government, senior politicians, senior Government, judicial or military officials, senior executives of publicly owned corporations and important party officials.''*[96] The European Union (EU) third money laundering directive defines PEPs as natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates of such persons. The Financial Action Task Force (FATF) 40 recommendations (updated October 2004) and nine special recommendations on terrorist financing (updated February 2006) define PEPs in five component layers: (i) current or former senior official in the executive, legislative, administrative, military or judicial branch of a foreign government (elected or not); (ii)

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[95] See Kim-Kwang Raymond Choo, (2010), ''Challenges in Dealing with Politically Exposed Persons,'' Australian Institute of Criminology, <http://apo.org.au/node/20546> (Accessed 07 September 2016)

[96] Basel Committee on Banking Supervision (2001) pp10

a senior official of a major foreign political party; (iii) a senior executive of a foreign government owned commercial enterprise, being a corporation, business or other entry formed by or for the benefit of any such individual; (iv) an immediate family member of such individual; meaning spouse, parents, siblings, children, and spouses parents or siblings; and (v) any individual publicly known (or actually known by the relevant institution) to be a close personal or professional associate.

These aforementioned definitions although varying in some aspects, contain very similar themes, i.e. they are persons in authority or previously in authority in positions that they could use for the diversion of public funds into private and personal use. And although PEPs are not by definition corrupt, and the majority of PEPs do not abuse their position, they are vulnerable because they have the capacity to control or divert funds and to award or deny large-scale projects for illicit gain.[97] Questions abound however as to the level of seniority that makes a PEP, the factors to be considered as to who constitutes a close associate or an immediate family member, and the duration (if any) within which it may no longer be necessary to regard an individual as politically exposed. The FATF in its definition narrowed PEPs to foreigners, but then how do we treat local PEPs? It is imperative to note at this juncture that the definition of PEPs are more a guideline in assisting to understand what PEPs are rather than a one size fits all approach. The rationale behind this is that if a global and all-inclusive list of PEPs exist, criminals and terrorists will know who, and who not, to seek to corrupt in a bid to avoid the additional scrutiny of enhanced due diligence. A universal definition would not be successful, so rather than simply creating a checklist based PEP definition and seeking to apply it, a better approach would be for regulated entities to undertake a risk based evaluation of the types of PEP monitoring and related strategy

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[97] See Kim-Kwang Raymond Choo, (2010), ''Challenges in Dealing with Politically Exposed Persons,'' Australian Institute of Criminology, <http://apo.org.au/node/20546 >(Accessed 07 September 2016)

(e.g. corruption prevention strategy) that are likely to be most effective in the respective jurisdiction and organisation in both the short and long terms.[98] As an example, regulated entities should exercise their judgement when refining their risk criteria in their business dealings with PEPs and issues to consider should include (i) The level of seniority to be classified as being politically exposed; (ii) Who constitutes an immediate family member or close associate of PEPs?; (iii) Whether PEPs monitoring should be extended to domestic PEPs and individuals exercising functions not normally considered prominent but having political exposure comparable to that of similar positions at a prominent level; (iv) When PEP monitoring should cease for a 'former' PEP e.g. one year after leaving office or longer for individuals deemed to have a higher risk?[99] The Wolfsberg group charted a way forward with respect to these questions. The Wolfsberg Group is an association of thirteen global banks which aims to develop frameworks and guidance for the management of financial crime risks, particularly with respect to Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies. Whilst acknowledging the intrinsic difficulties of definitional closure, the Wolfsberg group limited its activities to identifying some of the more common features of PEPs, their close family and associates. The group set out characteristics of PEPs that should be used as useful indicators of seniority, prominence or importance in determining whether or not an individual should be considered as politically exposed and those indicators are as follows: (i) Heads of state, heads of Government and ministers, (ii) Senior judicial officials, (iii) Heads and other high ranking officers holding senior positions in armed forces, (iv) Members of ruling royal families with governance responsibilities, (v) Senior executives of state owned enterprises, and (vi) Senior officials of major political parties. There were a further two categories of persons which the group stated 'may' be considered to fall within the definition but may be excluded in areas where the

[98] *Ibid*

[99] *Ibid*

risk of corruption or abuse is considered to be relatively low as they do not have the same ability to control or divert funds. These two excluded categories are heads of supranational bodies e.g. the United Nations, World Bank and International Monetary Fund; Members of parliament or national legislatures, senior members of the diplomatic Corp e.g. ambassadors, deputy ambassadors, or members of boards of central banks. The operative word in this proviso is ''may'' and rightly so because there have been cases of corruption for instance amongst members of parliament and national legislatures. This in essence means the relative low risks proffered by the Wolfsberg group for this category of persons isn't a water tight condition because attendant risks still remain. A case in hand was the expenses claim that broke out in the British parliament in the year 2010. Members of parliament in the United Kingdom are entitled to claim expenses, including the cost of accommodation, wholly, exclusively and necessarily incurred for the performance of their parliamentary duties.[100] However, this privilege was grossly abused by some MPs who filed false expenses claims from the tax payer's money. Margaret Morgan, a then labour MP fiddled her expenses claims and received more than £53,000 and was charged, convicted and sentenced to a two year supervision and treatment order having suffered depression in the course of proceedings. Morgan represented Luton south and claimed nearly her entire annual allowance sum in one bogus expense entry and forged invoices for more than £20,000 of non-existent goods and services.[101] Also charged with similar irregularities were Labour MPs David Chaytor, Elliot Morley and Jim Devine. They were accused of stealing almost £60,000 in allowances through false mortgage applications, rent claims and invoices for services. Elliot Morley, representing Scunthorpe faced two charges related to £30,000 mortgage claims which he

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[100] *The Green Book*: *A Guide to Member's Allowances*: Westminster: House of commons. (March 2009) pp 59-60

[101] See 'Expenses scandal MP Margaret Moran given two year supervision order' <http://www.standard.co.uk/news/crime/expenses-scandal-mp-margaret-moran-given-two-year-supervision-order-8413999.html> Accessed 14 December 2012

allegedly was not entitled. David Chaytor of Bury North was charged on three counts related to fraudulent claims of £1,950 for IT services and £18,000 relating to rent. Morley pleaded guilty and was sentenced to 16 months in jail after being found guilty under the theft Act of 1968.[102] Jim Devine on the other hand, allegedly claimed £3,240 for cleaning services and £5,505 for stationery using false invoices and was convicted and sentenced to 16 months in prison for, in the words of the presiding Justice Saunders, *''setting about defrauding the public purse in a calculated and deliberate way.''*[103] These instances are cogent pointers to the fact that the despite the Wolfsberg group classifying Members of parliament as low risk elements to corruption, the searchlight must still be beamed on this category of PEPs just as it is on other categories. Furthermore, references to 'low risk' elements might well be conflated with areas where corruption has not previously been known to be prevalent. On this premise, Nigeria provides an example of why no leeway should be accorded any particular group of PEPs because Nigeria is classed as a high risk corruption country. In its 2013 global corruption barometer, Transparency International rated Nigeria as the eighth most corrupt Nation in the world. Britain on the other hand is not renowned for flagrantly corrupt practices- but as the expenses scandal showed, corruption amongst PEPs can occur in any department, and anywhere in the world.

Regarding the identification of close associates and close family members of PEPs, the Wolfsberg group sought to navigate the uncertainties by simply describing close family members as spouses, children, parents and siblings etc. This again leaves a loose end, because spouses could be divorced and children and parents could become estranged, although the group suggests that these factors, when they occur should be investigated and recorded. A close associate in the thinking of the group

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[102] See 'Ex MP Elliot Morley jailed for expenses fraud'< http://www.bbc.co.uk/news/uk-politics-13467137> Accessed 14 December 2012

[103] See 'Ex-Labour MP Jim Devine sentenced to 16 months in prison for expenses fraud'<http://www.theguardian.com/politics/2011/mar/31/jim-devine-sentenced-expenses-fruad> Accessed 12 January 2013

will include a PEPs widely and publicly known close business colleague and/or personal advisor, in particular, financial advisors or persons acting in a financial fiduciary capacity. The problem that arises out of this is that any PEP that intends to use an associate for any fraudulent purpose would be discreet enough not to use anyone 'widely and publicly' known to him as the Wolfsberg group contemplates in its definition. The group however states three methods that could be used to identify such an associate or family member and they are as follows:- (i) Enquiries should be made regarding Potentially Exposed Person status of prospective customers during the account establishment process; (ii) Prospective customers to be screened against a data base of such persons and these may be developed internally, provided by an external service provider or obtained from a reputable source; and (iii) The inclusion of PEP related training to appropriate staff which may be part of the regular Anti Money Laundering training. As probing as these investigative methods may seem, they tend to target the main actor i.e. the PEP while doing very little to unravel the identity of a potentially obscured figure (the close associate and family member). The Financial Action Task Force has a more proactive approach to what constitutes a family member by analysing within a socio-cultural context taking into cognizance the influence that particular types of family members generally have, and how broad the circle of close family and dependants tend to be.[104] This is particularly relevant because in some cultures, the number of family members who are considered to be close or have influence may be quite small e.g. parents, siblings, spouses/partners and children while in other cultures, grandparents and grandchildren may also suffice. In continents like Africa and many parts of Asia, cultural traditions ensure that family ties are genealogically wide whereas in most European communities, a family is usually a narrowly knit set up where only immediate nuclear family members are considered close enough within the context of PEPs. This cultural heterogeneity ensures that the meaning of who a close family member is within thinking of the FATF represents a more hands on approach than that of the Wolfsberg group. It is more

[104] Politically Exposed Persons- FATF Guidance Recommendations 12 and 22 (June 2013)

thorough and gives little or no room for problematic interpretations. On close associates, the FATF defines them to include known sexual partners outside the family unit e.g. girlfriends, boyfriends and mistresses, prominent members of the same political party, civil organisations, labour and employee union as the PEP, business partners or associates, especially those that share beneficial ownership of legal entities with the PEP or who are otherwise connected (e.g. through joint membership of a company board). Again, as it is in the case of the family members, it is the thinking of the FATF that social, economic and cultural variations may also play a role in determining how close those relationships generally are and it is these links that act as determinants to the level of risk.

Another problem that arises from the concept of PEPs is the question of the propriety or otherwise of treating non-foreign PEPs the same as foreign ones. A foreign PEP is one that seeks to establish a relationship with a financial institution outside the jurisdictional borders of the territory they hold the public position that gave rise to their categorisation in the first place. The FATF considers Foreign PEPs high risk and require the application of enhanced due diligence measures, as for all higher risk customers as described in Recommendation 10.[105] This would mean a Nigerian PEP who seeks to open a relationship with a financial institution in the United Kingdom is a foreign PEP in the same way a British equivalent who does same in Nigeria also qualifies as a foreign PEP. This again is a grey area and considering the afore-mentioned cases of the English members of parliament in the expenses scandal, both foreign and non-foreign PEPs are just basically two sides of the same coin and should not be treated separately. The suggestion of the Wolfsberg group is that domestic PEPs may be categorised as PEPs only in instances where an institution understands there to be a heightened reputational risk. But as stated earlier with Britain not really high on such a reputational risk, the MPs expenses scandal showed that

[105] Paragraph 20 of the Interpretative Note to Recommendation 10 FATF Guidance politically exposed persons (Recommendations 12 and 22) June 2013

reputation counts for nothing, and this indeed is a lacuna that could be exploited by financial institutions either intentionally or innocently. All that is legally required of financial institutions prior to going into a relationship with such domestic PEPs is the genuine belief that such PEPs have come with clean hands. It is a subjective rather than objective provision which provides a dangerous leeway to go into relationships with corrupt PEPs. There is also the question as to how long a PEP remains politically exposed, in other words, the span within which PEPs may remain categorised as such, whether it is a lifetime status or if the tag extinguishes with the ridding of the privileges that earned such a person political exposure in the first place. The FATF definition of PEPs in its recommendation 12 of its guidelines (2013) defines PEPs as persons who have been (but may no longer be) entrusted with a prominent public function. This is consistent with a possible open ended approach (i.e. once PEP, always PEP). The FATF recommends a risk based approach in this regard as against a prescribed time limit. The possible risk factors suggested are the level of (informal) influence that the individual could exercise, the seniority of the position that the individual held as a Politically Exposed Person; or whether the individuals previous positions are linked in any way e.g. formally by appointment of the PEPs successor; or informally by the fact that the PEP continues to deal with the same substantive matters. The Wolfsberg group goes along with this risk based approach by agreeing that risk associated with PEPs are closely related to the office or function they held and the influence associated with that post. The group opines that the influence of such PEPs may have substantially reduced as soon as they left office but they may have been in a position to acquire wealth illicitly, so that a high level of scrutiny with regards to such individuals may be warranted even after they have left office. Continued treatment as PEPs however, may be unwarranted if there has been no sufficiently adverse or derogatory information widely published for a period of time that is long enough to conclude that taking into account the susceptibility of the former position to corruption, their source of wealth is legitimate and the individual has not abused such remaining influence as he/she may have. The

Wolfsberg group believes that any de-categorisation should be subject to an appropriate level of senior management review and approval, which should be documented. Conjecturally speaking, such de-categorisation should not be encouraged. The position of the FATF that once a Politically Exposed Person, always a Politically Exposed Person seems a more definite approach and should be absolute with no room for change in status or de-categorisation. Keeping past public office holders (hitherto PEPs) as permanent PEPs is the closest step that can be achieved towards having a data base of all prospective financial criminals. A former PEP having being de-categorised may remain in hibernation for a period of years without displaying any of the qualities that may require him being kept as being politically exposed. Such a person may subsequently start the process of laundering the wealth he illicitly acquired while in office? At that point, a fresh process of establishing the money trail would have to be embarked upon by the financial institution, whereas any such move by a former PEP would raise the 'red flag' with the financial institutions no matter how long such PEPs laid low if he is permanently kept on a data base as being politically exposed. In identifying PEP actors within the context of corruption and money laundering, I seek recourse to a well-known American jurist, Justice Potter Stewart who on an observation on the nature of pornography said of obscene material that he might not know what it was, but *''I know it when I see it.''*[106]

Nigeria like many African Nations is a developing country, and typical of most developing economies, has been plagued by high level corruption and abuse of office by its leaders. Powerful and influential studies have shown that corruption constitutes about 70% of Africa's problems.[107] With a population of approximately 140 million inhabitants, Nigeria is the most populous country in Africa, and it has had its fair number of PEPs who have diverted state funds into personal use,

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[106] *Jacobellis v Ohio (84 S. Ct. 1676) (1964)*

[107] See for example, World Bank Economic indicators (2002, 2003) UNDP Human Development Index (2003)

and the case of former totalitarian leader General Sani Abacha is particularly instructive. The United Nations office on drugs and crime (UNODC) believes that close to 400 Billion Dollars was wasted by Nigerian leaders between 1960 and 1999, an average of almost five thousand dollars per Nigerian.[108] To put these staggering sums into perspective, imagine putting 400 billion Dollar bills in a row, it would cover the distance from the earth to the moon 75 times.[109] General Abacha was Nigeria's maximum ruler for eight years having assumed in 1993, the office of head of state and commander in chief of the Nigerian armed forces. Nigeria had long been plagued by corruption but under Abacha, corruption became blatant and systematic. General Abacha's reign oversaw a web of corruption that plundered billions of dollars from the country as he and his circle of aides and business partners allegedly tapped virtually every stage of the oil business- Nigeria's most viable industry and source of 80% of its Governments revenue. Out of the US$3BN a year Nigeria earned through its oil, it is believed that the Abacha family helped themselves to a rate of about one half and one billion dollars a year.[110] Corruption therefore, not only became a part of this Government, but its object.[111] The full extent of the practice and mode of operation of these crimes were only revealed at the end of the regime and the investigations that ensued. Following his death, the Nigerian Government set up a special investigation panel charged with the task of investigating the looting and corruption that took place under the Abacha regime. The workings of this panel led to

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[108] Nuhu Ribadu, (2010) *Show Me the Money – Leveraging Anti Money Laundering Tools to fight Corruption in Nigeria: An Insider Story*.'' Centre For Global Development

[109] *Ibid*

[110] Tim Daniel, 'General Sani Abacha—A Nation's Thief.' Background paper (Proceedings of the 6th Regional Seminar on Making International Anti-Corruption Standards Operational Held in Bali, Indonesia, on 5–7 September 2007 and hosted by the Corruption Eradication Commission, Indonesia)

[111] James Puppert, 'Corruption flourished in Abacha's Regime'- Washington Post (Tuesday June 9 1998) <http://www.washingtonpost.com/wp-srv/inatl/longterm/nigeria/stories/corrupt060998.htm> Accessed 15 June 2013

contact being made with the Government of Switzerland where its federal ministry of Justice (FOJ) was able to follow the trail of USD500M of Abacha funds frozen in Swiss bank accounts after convincing itself that the greater part of the assets were obviously of criminal origin.[112] The funds were remitted to Nigeria, with questions arising as to how such huge funds found ways into the Swiss financial system without notice. Abacha was a classic case of a politically exposed person whose activities should have been picked out ab-initio. Investigations by the Swiss Federal banking commission revealed that a total of 19 banks in Switzerland were involved in the scheme, out of which only five adhered to due diligence requirements set out by the SBFC in its money laundering guidelines issued in 1991. The erring banks were issued reprimands of varying degrees for their misdemeanours. Away from Switzerland, there were US$540M of Abacha funds located at Luxembourg and Liechtenstein as well as some unspecified amounts in British banks. Efforts to recover these sums and especially the ones in Britain failed despite evidence to suggest that a lot of the money had passed through Barclays Bank accounts. By way of estimate, it is believed General Abacha stole about US$4.3 Billion within the span of his reign at the helm of the Nigerian Government. Remittances of his loot are still being repatriated to the Nigerian Government from various foreign countries.

II: The Illicit Drug Trade:

Organised crime permeates the life of every single society in the 21st century. Its global revenues are well above a trillion dollars a year and illicit drugs are a major component of this.[113] The impact the illicit drug trade has/had on money laundering was so prominent that it provided the genesis for an international Anti-Money laundering regime. Within the last two decades, the

[112] ‘’Abacha funds to be handed over to Nigeria’’- Federal Department of Justice and Police: Press Release, FOJ, 18:08:2004

[113] Naím, M. (2006), Illicit*: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*, 1st Edition, Anchor Books.

international community in its fight against the escalating drug crisis had come to realise that the removal of the profit from drug sales rather than the seizure of such drugs was the only viable way to disrupt trafficking operations, hence the 1998 United Nations Convention against the illicit traffic in narcotic drugs and psychotropic substances otherwise known as the Vienna convention. The convention came into force two years after it was concluded (precisely on the 11th of November, 1990). It is pertinent to note that although the term Money Laundering was not used explicitly anywhere in the Convention, Article 3 deals favourably with the concept of money laundering because it requires member states to *''criminalise the conversion of property knowing that such property is derived from drug trafficking, 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 an offence to evade the legal consequences of his action.''*[114] The correlation between the illicit drug trade and money laundering can therefore not be over-emphasised, as the very nature of money laundering affords drug traffickers and other criminals the means to continue their illicit acts with impunity because it enables them to conceal the unlawful source of their wealth and thus use it to further their illegitimate goals with little or no fear of detection. The FATF in 1990 came forward with estimates of the sale of cocaine, heroin and cannabis amounting to US$122BN per year in the USA and Europe with about 50-70% of this amount or as much as US$85BN potentially available for laundering.[115] The UK office of National statistics estimated the 'value added' of criminal activities in the late 1990's and got an estimate of the 'value added' of some US$10BN-US$17BN in 1996 equivalent to 0.9%-1.5% of GDP. The bulk was drug related. The

[114] Ali, S. (1998), ''The United Nations Strengthens International Drug Control Efforts,'' *Journal of Money Laundering Control (JMLC),* Vol 2, no 2, pp 148-157

[115] FATF on Money Laundering Report of 6th February, 1990, reproduced in Gilmore W.C. (1992) '*International Efforts to combat Money Laundering'*, Grotius, Cambridge, S.A

'value added' of illicit drugs alone was equivalent to between 0.5% and 1.1% of GDP.[116] In 1997, the FATF mentioned a global turnover figure for the sale of illegal drugs of around US$300BN resulting in profits of US$120BN in profits out of which US$85BN could have been relevant for money laundering.[117] As at 1998, it was estimated that the annual turnover from drug trafficking stood at US$440BN, profits that were in fact larger than the oil and gas trade as well as the chemical and pharmaceuticals business, and indeed twice as profitable as the motor vehicle industry.[118]

The UN General Assembly condemned the laundering of money derived from illicit drug trafficking and other serious crimes. It insisted on countermeasures being taken by the international community as a whole in order to deny safe havens to criminals and their illicit proceeds. Consequently, it committed itself to fulfilling this task by suggesting a comprehensive legal framework to provide for the prevention, detection, investigation and prosecution of the crime of money laundering. Compliant states were urged to establish an effective financial and regulatory regime aimed at refusing criminals and their illicit funds access to National and international financial systems through customer identification and verification requirements (KYC principle), financial record keeping, mandatory reporting of suspicious activity as well as the removal of bank secrecy impediments to efforts at preventing, investigating and punishing money laundering. These efforts notwithstanding, the drug trade continued to generate extra ordinary revenues, with estimates in South American countries like Colombia reporting drug trafficking activities generating between $400-$600M taxes free a year for the FARC guerrillas

[116] Chris Groom, Tom Davies, ''Developing a methodology for measuring illegal activity for the UK National Accounts''- *Economic Trends*, No 536, July 1998 pp 33-71

[117] See ''Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes'' (UNODC Research report) <https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf> pp 30 Accessed 29 July 2016

[118] Opening remarks of Hennadiy Udovenko- President of UN GM- June 8th 1998

and 40-70% of the AUC's income.[119] In 2011 alone, approximately US$6.2BN worth of illegal drugs was exported from Mexico to the United States of America.[120] The drug trade relies on the international banking system to launder its billions of dollars each year because the only other practical option available when they are unable to infiltrate local banking systems is to resort to bulk cash smuggling which often weighs two to three times as much as the drugs that were smuggled in. This made the banks and financial institutions the best bet for the criminals and the global financial meltdown that hit the global economy only played to their advantage. According to Antonio Maria Costa, a former head of the United Nations Office on Drugs and Crime *''when the banks stopped to lend money to one another, drug money was the only liquid investment capital available. There is evidence that 238 Million Euros of drug money were laundered during the financial crisis.''*[121] According to Costa, there was a widespread penetration of the financial sector by the criminal sector and it would have been right to say that it was the banks rather than the criminal organisations that were actively looking for capital (including criminal money) not only as deposits, but also as share acquisitions and in some cases a presence on board of directors.[122] The monetary value of the worldwide illicit drug trade is currently estimated by the United Nations at $320BN.

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[119] Jurith, E. (2004), ''Acts of terror, illicit drugs and money laundering,'' Journal of Financial Crime, vol. 11, no. 2, pp 158-162

[120] Eric Olson, "Considering New Strategies for Confronting Organized Crime in Mexico," Wilson Centre, March 2012, <http://www.wilsoncenter.org/publication/considering-new-strategies-for-confronting-organized-crime-mexico>

[121] Andrew Spannaus interview with Antonio Mario Costa on the book ''The Checkmate Pendulum,''< http://www.transatlantico.info/2015/notizie-brevi/the-pendulum-of-power > Accessed 16 July 2016, See also Antonio Maria Costa, (2014) *The Checkmate Pendulum,* AEF Moringa

[122] *Ibid*

2.3.3 Destination of Laundered Proceeds

It may not be precise to seek to find out the final destination of laundered proceeds because of the revolving door that is the life of criminals and money launderers alike. It is an endless cycle where the completion of one crime leads to the start of another. As such, attempting to know the final outcome of laundered proceeds is bound to be an exercise in futility. The aim of washing dirty money is not to line personal bank accounts up, neither is it for personal prestige. A criminal syndicate or organisation is a business on its known, and so like all businesses, profit must be reinvested to keep the business going. Reinvestment in this regard may mean the acquisition of arms to further carry on violent attacks like heists, kidnap for ransom, terrorism etc. Suffice it is to state therefore, that laundered moneys are perpetually in transit, a conveyor belt that keeps the criminal organisations in business whilst causing considerable damage to human lives, destruction of property, insecurities amongst nations, destabilisation of financial institutions and global economies as well as hindering development in many countries across the globe.

2.4 Victims of the Crime

For all the global attention the crime of money laundering attracts, the seeming invincibility of victims of the crime may stand it in good stead to be considered as a victimless crime. A victimless crime is a term used to describe criminal offences where there is no complainant and no readily recognizable victim. Such crimes include drug abuse and prostitution and this 'victimless' status is used by some to support calls for legalisation of these activities: others oppose this view.[123] It is a crime with an infraction of criminal law without any identifiable evidence of an individual that has suffered damages in the infraction. It is an offence that lacks an identifiable victim who is the object of the crime. Such offences are usually against society itself through norms, values, attitudes and beliefs e.g. when a person smokes marijuana or uses cocaine, they violate values about

[123] Gooch, Graham, and Michael Williams (2014) *A Dictionary of Law Enforcement*. Oxford University Press.

appropriate behaviour without necessarily committing a crime that has a direct victim per se. Other examples of such victimless crimes include violation of laws concerning public decency, public order, or prostitution. In most of such victimless crimes, the objects and victims if there are any, are the perpetrators themselves i.e. the individual who violates appropriate behaviour by smoking marijuana or using cocaine does harm to himself and no one else. He is therefore the victim of his own act. This is unlike crimes like murder, rape, human trafficking and a host of others where there is always a definite identifiable victim(s) on the receiving end of the perpetrator of such acts of criminality. Money laundering by its very nature carries subtle elements of what a definition of a victimless crime stands for. This is largely due to the surreptitious victimless nature of the crime as well as its tenuous link with the violence and fear commonly associated with other crimes. But Money laundering is not in any way a victimless crime. Large criminal organisations spanning the spectrum of organised crime from drug trafficking to other illicit activities rely on this activity for their continued survival. It is the umbilical cord that connects the criminal activity to the perpetrators and allows the criminal to continue operating and growing. Victims abound: the crime results in increased taxes for those that do not evade tax; increased insurance policy premiums for those that do not make fraudulent claims; higher taxes for those who do not make bogus benefit claims; higher cost to business as well as the susceptibility of the vulnerable ones such as the elderly or the infirm who are at the risk of offences such as doorstep fraud. It means shopping on the internet or even at local supermarkets carry huge risks because the trader may be a fraudster and it means the money flows in the hands of corrupt politicians as well as dubious men who may be involved in the coordination of terrorist acts, trafficking of drugs, arms and people. Dirty money is a tax on the global economy and also a threat to the stability of the weaker parts of the global system. Money laundering by terrorists and criminal organisations has far reaching consequences of world peace and security. Arguments have been advanced that crimes like insider trading are victimless crimes because no one is injured by the insider trading, and that insider trading is an appropriate method for compensating the entrepreneurial efforts of corporate management.[124] Contrary to this, there are conditions under which injury is sustained as the result of insider trading.[125] The crime of money laundering ensures the cost of living is relatively high, and people have less to spend on things they necessarily want to spend money on. From the perspective of the developing nations, western financing schemes hollow out the wealth of these poorer countries, leaving behind economic deserts and volatile forces bent on political stability. This form of wealth transfer by deception benefits a few sharp or crooked entrepreneurs to the detriment of the larger economy. These factors dispel the mistaken notion that the crime of money laundering is not without victims. It is rather an offence with a limitless range of victims as it permeates every stratum of society- from the common man on the street, to the law abiding members of the public down to the kids at schools, the victims of the crime of money laundering are in abundance. From the foregoing, it is safe to conclude that money laundering is anything but a victimless crime. However, who the victims are, and how the crime affects them must also be examined.

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[124] Mane, H.G. (1966) Insider *Trading and the Stock Market* 1st Edition, New York Free Press

[125] *See Carpenter v United States (1987 Transfer Binder) Fed Sec L Rep (CCH) 93, 423 (U.S. Sup. Ct. 1987)*

Chapter 3

The Effects of the Crime of Money Laundering and Corresponding International Response

3.0 Introduction

Having argued against the perception of money laundering being a victimless crime, that the crime of money laundering is not without victims, it is pertinent to identify the victims of the crime and how much effect the crime has on such victims. Money laundering as a crime is both amoebic and stealthy in operation and transcends societal strata, permeating it in more ways than one. From the financial sector, to the real sector, to stunting economic development and the breach of international peace and coexistence among nations, the effect the crime of money laundering has on the international community cannot be overstated. The next leg of this research therefore, is to critically analyse the effects the crime of money laundering bears on the social, economic and political landscape of the international community and nation states.

3.1 The Effects of Money Laundering Activities

1) Economic Distortion and Investment Instability

Money laundering depresses economic growth by its diversion of resources to less productive activity and by facilitating domestic corruption and crime. This diversion and redirection of funds from sound to low quality investment or from one economic activity to another (usually with no rational economic reasons) are common practice for money launderers and do have far reaching consequences. Money launderers naturally have a preference for jurisdictions where regulation is lax, and this means that most developing economies with Anti-Money laundering legislations either in infancy or defective in operation are an easy target. Economically weak states, which basically offer financial services, run the risk of economical (and therewith political) dependence.[126] The resultant effect is the rise in inflation rates which in turn results in the loss of control of National economic polices because it impacts financial behaviour and macro-economic performance i.e. policy mistakes, volatility in exchange and interest rates as well as monetary instability. The large capital inflows or outflows artificially accentuated by the laundering process are the reason for the negative effects on the exchange and interest rates. Similarly, the phases of money laundering transactions being ‘’underground’’ or in the informal sector of the economy means such transaction do not appear in official monetary and financial statistics. This factor results in misleading information to policy makers attempting to manage macroeconomic variables. Without a proper appreciation and identification of the true causes for these financial transactions, poor economic policy decisions are more likely to be made to minimise the potential balance of payments problems due to decreasing foreign reserve.[127] Such a situation eventually fundamentally influences the process of particular assets towards which the money is invested, such as land and houses because an unhindered fluctuation of exchange rates would result in its appreciation and to an expansion of the country's money base due to capital inflow.[128] The ultimate outcome to this is an increase in demand for domestic money which would be satisfied by monetary authorities of the affected states. Described as the *Dutch disease*, an economic situation of this nature prompts a country's economic policy makers to *‘‘tighten its fiscal policy in order to create a budgetary surplus to use to sterilise the money effects of the capital inflows.’’*[129] These policy decisions may end up negatively affecting the stability of these economies and a

[126] See Schneider, F. & Windischbauer, U. (2008), ‘’Money laundering: Some Facts,’’ *European Journal of Law and Economics (EJLE)*, vol 26, no 3, pp 387-404

[127] See Quirk, P.J. (1997), ‘’Money Laundering: Muddying the Macro-Economy,’’ *International Monetary Fund, Washington.*

[128] See Vito Tanzi (1997) ‘’Macroeconomic Implications of Money Laundering’’ in *Responding to Money Laundering, International Perspectives,* Edited by Ernest U. Savona, (Malaysia: Harwood Academic Publishers) (1997)

[129] *Ibid*

country may incur debt or increase its borrowing without being able to repay these debts because the potential tax revenues from these artificially inflated industries are not sustainable. As such, when money launderers decide to shift these funds out of a particular jurisdiction, the affected industries fail to achieve projected growth targets; and tax is therefore collected lower thereby increasing by significant proportions, the possibility of a country defaulting on its debt. In Nigeria for instance, in the 1980's, and late 1990's, money laundering and other serious economic and financial activities ensured the country suffered serious economic distortions brought about by the diversion and redirection of funds.[130] The consequence of this was the sudden collapse and liquidation of hitherto flourishing financial institutions and banks when deposits of illegally acquired wealth in these institutions disappeared within a short time ostensibly after the integration of the illicit funds into the financial system may have been achieved. The Nigerian economic policy at the time was the Structural Adjustment Programme (SAP) which was introduced in June 1986 and was aimed at restructuring the productive base of the economy. It also sought to promote non inflammatory economic growth whilst devaluing the Nigerian currency as a measure to control the inflation in the nation's economy. The policy had many pitfalls because it saw an endless devaluation of the Nigerian currency due mainly to speculative and fraudulent activities and an increasing gap between demand and supply as foreign currency exchanged for more Naira. This resulted in companies becoming cash strapped and no longer being able to get enough Naira to exchange for foreign currency. The programme ended up unsuccessful as it endured serious economic distortions channelled predominantly by money laundering activities and other financial crimes through diversion and redirection of capital from sound to low quality investments.[131] It is imperative to note however, that while Money

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[130] Aluko, A. & Bagheri, M. (2012), ''The Impact of Money Laundering on Economic and Financial Stability and on Political Development in Developing Countries: The case of Nigeria,'' *Journal of Money Laundering Control (JMLC)*, vol 15, no 4, pp 442-457

[131] *Ibid*

laundering activities may lead to errors in the interpretation of economic data, and as a consequence, poor policy decisions, this does not necessarily imply that a simple causal relationship exists between money laundering and poor economic decision making. Rather, an argument for better economic models as against holding out for an argument that money laundering leads to a loss of control of economic policy seems more tenable. A pertinent point to note at this juncture is the difficulty in distinguishing the behaviour of legitimate currency speculators compared to money launderers considering the fact that the two are most likely to engage in identical activities that lead to vast cash flows into and out of the country. The impact this would have on economic policy would vary accordingly depending on the exchange control regime in place and would not necessarily be as a result of money laundering. The life of a money laundering scheme is centred on the desire to pass dirty money off as genuine and in the process also fabricate an explanation to make the source of such money genuine. As such, anytime criminals invest in business, profit generation is rarely ever the aim, as the interest is solely on any investment which could obliterate the trail of the illicit funds regardless of its low profit yield.

Money laundering distorts investments through sterile investments by money launderers because most money launderers invest their illicit funds in economic activities that are not viable or based on economic principles but rather on investments that would make detection of their activities more improbable, or where cost of avoidance is lower.[132] A criminal could for instance invest a large amount of his illicit funds on antiques and items of art in a country where those items are not major players in the economy. That diversion of scarce resources to less productive domestic assets or luxury imports bears a serious detriment on economic growth. The main attraction thus is not investments with a higher rate of return, but for those that easily allows the recycling of illicit funds

[132] See McDowell, J. and Norris, G. (2001), ''The Consequences of Money Laundering and Financial Crime,'' *Economic Perspectives: An Electronic Journal of the U.S. Department of State*, Vol 6, No 2

even if it requires accepting a low rate of return.[133] Aside investing in sterile investments, criminal organisations also have the ability to convert hitherto productive enterprises into sterile investments by operating them for the purposes of laundering illicit proceeds rather than for profit maximization responsive to consumer demand and worthy of legitimate investment capital. Commitment of an economy's resources to sterile, as opposed to productive investments (or to normal consumption expenditures that drive productive investments through higher demand) ultimately reduces the productivity of the overall economy. In practical terms, the artificial flow and outflow of capital and investments from one country to another would have destabilizing effects on the international financial markets due to its integrated nature. A distortion of this nature means that financial difficulties arising from one centre can easily spread to other global financial markets through the ''contagion'' effect and therefore create global instability. A significant factor underlying the contagion effect is the possibility that whatever serious problem sparked a liquidity crisis in one financial institution or system may also exist in another financial institution or system. There is also the factor of the interrelationships between the problem institution and other jurisdictions that will raise the possibility of liquidity problems in the former being spread to the latter. Both of these factors could be exacerbated by significant money laundering activity. With these distortions comes the reluctance of entrepreneurs to invest in such economies, and in cases where investments are made, the attendant risks are debilitating.

It could be argued at this point that no legal economy should be dependent on where and how a criminal invests his ill-gotten wealth, after all, the money may not have even emanated from the same economy it is being invested. How then could it be said that such an economy may be committing its resources to non-productive investments. The criminal, as it may seem, has even added to the economy by inserting his illicit funds into it. As cogent as this standpoint may seem,

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[133] See Vito Tanzi (1997) ''Macroeconomic Implications of Money Laundering'' in *Responding to Money Laundering, International Perspectives,* edited by Ernest U. Savona, (Malaysia: Harwood Academic Publisher)

the ramifications of sterile investments are that they drive the prices of such assets up, causing overpayment for them throughout the economy thus ‘’crowding’’ out productive investment to less productive uses and consequently erodes economic growth.[134] The main tool of destruction for the launderer here is the use of front companies. A front company is an entity, be it an individual or group or organisation used to inhibit the identification of an owner or a member of another company or organisation. It is a cover used to conceal illegal activities and it is almost always used to hide another company or individual from liability, scrutiny or negative press. The use of such by launderers compromises the legitimate private sector since the overriding motive of the launderer is not necessarily to make a profit out of the operations of the front company.[135] The launderers can easily cross subsidise the services or products that are being provided by front companies to co-mingle the legitimate funds with illicit money in order to obliterate the trail of the dirty money. It is a very common means to an end for money launderers, and examples abound, of prominent criminals who have used front companies in the course of their illicit trade. A cursory examination of this begs the question what effects setting up this front company could have on an economy. The answer lays in the fact that money launderers are most likely to support cash industries in a bid to disguise and protect the proceeds of their crime which could in turn affect the substantiality of these industries in an economy. This is because legitimate businesses are forced out because competition with front companies almost borders on impossibility considering the fact that front companies are never propelled by economic reasons (profit). This means they could easily place their products below the prevailing market rates in what is called cross-subsidisation, and this then creates an uneven and unfair competition for legitimate profit-oriented businesses. In Nigeria, between 1983 and 1985, Nigerian Money launderers concealed the proceeds of their illicit crime through the mass importation of goods ranging from automobile spare parts, baby wears,

[134] See *Australian Transaction Reports and Analysis Centre (AUSTRAC)* 1995, CAP 11

[135] Quirk, P.J. (1997), ‘’Money laundering: Muddying the Macro Economy,’’ *International Monetary Fund*, Washington; Finance and Development Vol. 34

pharmaceutical products and industrial chemicals etc. which were sold quickly at very low prices to recoup the illicit proceeds in the disguised nature of legitimate funds. This deliberate reduction in prices of products had an undermining impact on genuine local entrepreneurships because local products found themselves in a direct but unfair competition with imported goods that were higher in quality and lower in price. This ultimately resulted in local manufacturing industries suffering serious price crashes and a massive loss in investment resulting from large stock of unsold goods and products due to consumers' preference for imported goods of better quality. The effect of this was the collapse of many local industries and the retrenchment of large numbers of workers. Employees in private industries participating with Nigerian gangs in drug conspiracies were exposed and they included airline and bank personnel. Investigations also revealed a host of privately owned companies affiliated to the Nigerian drug cartels who assisted the drug cartels in laundering the illicit money.[136]

11) Reputational Risks

This factor uniquely relates to the integrity of financial institutions and markets. A financial institution is defined to include banks, body corporates, associations or groups of persons, whether corporate or incorporate which carries on business of investment and securities, a discount house, insurance institution, debt factorization and conversion firm, bureau de change, finance company, money brokerage firm whose principal business includes factoring, project financing, equipment leasing, debt administration, fund management, local purchase order financing, export finance, project consultancy, financial consultancy, pension funds management and as such other businesses as the central bank or other appropriate regulatory authorities may from time to time designate.[137] Money launderers often abuse financial institutions, including banks and non-banking institutions

[136] US Department of Justice: Drug Enforcement Administration – No form. ‘’Drug Trafficking by Nigerians’’ 1984-1985, Vol.4, No 8, 13-14

[137] Nigerian Money Laundering (Prohibition) Act, 2011

for their operations, and the fraudulent activities conducted by money launderers or corrupt individuals within these institutions may result in the increase of operational reputational risk.[138] The importance of sound financial institutions to economic development cannot be overemphasised, and a sound financial institution needs a credible reputation to thrive. One false step can cost a company's 'face.'[139] Reputation risk means more for financial companies than temporary embarrassment.[140] Although an intangible asset, banks that manage their reputation actively hold a better chance to generate more value than those that do not.[141] Reputational outlooks are so important to institutions and that it is the reason most institutions publicize activities like their corporate social responsibility efforts in order to highlight their contributions to the greater good and show they care about more than generating revenues. Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals.[142] Hancock Bank which has over 90 branches on the gulf coast for instance, provides a potent example of what influence reputation building can have on revenues. After hurricane Katrina in 2005, with many residents lacking access to money due to power outages, Hancock set up makeshift branches to

[138] Bartlett, B.L. (2002), ''The Negative Effects of Money Laundering on Economic Development,'' *An Economic Research Report*: The Asian Development Bank Regional Technical Assistance Project No.5967 Countering Money Laundering in The Asian and Pacific Region

[139] See Gregg E. Anderson, ''Reputation Risk: More important than ever'' <http://www.bankingexchange.com/risk-management/operational-risk/item/3787-reputation-risk-more-important-than-ever > Accessed 19 July 2016

[140] *Ibid*

[141] *Ibid*

[142] W.C. Gilmore, (1995) ''International Initiatives In The Field Of Money Laundering,'' 6 *Journal of International Banking and Financial Law (JIBFL)* 258

serve its customers. They also distributed money to non-customers, a strong signal of its commitment to serving the community. As a result, the bank won thousands of new customers and grew $1.6BN in the four months following Katrina, exceeding its total growth in the previous 95 years of the bank's existence.[143] So important is the value that financial institutions place on reputational image that some institutions go to somewhat unethical lengths to project attractive images of themselves. The 2012 case of Swiss Banking giants UBS suffices in this regard. The bank attempted to manipulate the London Inter-Bank Offered Rate (LIBOR), an interest banks charge each other for one month, three months, six months and one year loans. It is the rate that is charged by London banks, and is then used as a benchmark for bank rates all over the world to calculate payments under hundreds of trillions of dollars-worth of financial contracts, including mortgages and loans. LIBOR is set every day by the British Bankers' Association, based on estimates submitted by a panel of a dozen or so banks of their borrowing costs. Banks have been accused of lying about their real borrowing costs, in order to manipulate LIBOR for profit, and to make themselves look stronger during the financial crisis. The UBS instructed its staff to submit inappropriately low estimated borrowing costs for the bank during the financial crisis in order to give a false impression of the bank's ability to borrow cheaply as well as maintaining market confidence in the bank. The overriding aim here is premised on the fact that the misrepresentation could make the bank higher profits, because a low LIBOR rate is seen as an indicator to the soundness of a bank as against one with a higher one because a low LIBOR rate translates to a lower interest rate on many adjustable-rate loans. The bank was ordered to pay $1.2BN (£740M) in combined fines to the US Department of Justice (DOJ) and the Commodities Futures Trading Commission, £160m to the UK's Financial Services Authority (FSA) as well as 59M Swiss Francs (£40M) to the Swiss Financial Market Supervisory Authority (FMSA) as punishment for its

[143] Angela Parker, ''Businesses Doing Good Do Better,'' (June 17, 2013) <http://www.realizedworth.com/2013/06/businesses-doing-good-do-better-case-study.html> Accessed July 13 2014

attempted manipulation of the LIBOR rates in what was at the time the second largest sets of fines imposed on any bank.[144] How reputational risks classify as an effect of money laundering activities is based on the fact that the fruits of money laundering find the most fertile ground where corruption is rife.[145] Economic systems rely on the integrity of those who administer and regulate them and when these key roles are shown to have been suborned by bankers in smart suits, crooks and conmen, all participants in the economic system are weakened. However it comes about, when dirty money is moved, the bank or financial institution participates in a theft, even if it has been duped by a criminal who is skilled at hiding the sources of his funds. The maker of the corrupt or fraudulent money and the financial institution who help move it are equally complicit in a process where both parties are conspirators in both parts of the activity. This corrupts an apparently lawful process and the result is that the trusts placed by customers in the financial institutions are abused.

Financial institutions have a duty to deliver honest and reliable services to the general public and be scrupulous with staff and customers alike. This however is not always the case as individuals within financial institutions have overtime been found to act otherwise, thereby putting innocent customers at the risk of fraud. The negative effect of a damaged reputation on the viability of a bank is more than theoretical, as such, any business whether a financial institution, professional service, industrial enterprise, charitable NGO, or otherwise, caught in the web of money laundering could have its reputation irreparably damaged. Its Directors, management and staff could be subjects of private and public investigations out of which indictments and prosecutions could arise. At best, it would be a public relations nightmare. It only takes one unethical person who has the discretion to make decisions to jeopardize an entire organization. A reputation for integrity takes

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[144] ‘’UBS fined $1.5bn for Libor rigging’’ <http://www.bbc.co.uk/news/business-20767984> Accessed 25 June 2013

[145] See Kochan, Nick: (2005) *The Washing Machine: How Money Laundering and Terrorist Financing Soils Us* (Texere Publishing)

many years to build, and only a few moments to damage, debase, decimate and destroy.[146] This was apparent in the scandal that hit the Bank of New York (BONY) in the late 1990's. Revered as one of the largest banks in the world at the time, the bank was renowned for its integrity, but its reputation was however put to test when allegations of laundering Russian funds were raised against the bank.[147] Reputational risk is particularly damaging for banks since the nature of their business requires maintaining the confidence of depositors, creditors and the general market place. The BONY case highlighted the consequences money laundering within an institution could have on its reputational assessment by the public who may become wary that the bank as a whole has been taken over and being used as a criminal enterprise. The confidence of existing customers is certain to be shaken while the attraction of potential ones is definite to wane as a result of such a scandal, and this is ultimately bound to have negative consequences on the profitability of the business of the bank. The evidence is clear that the announcement that a firm has allegedly been involved in corrupt activities is typically associated with materially negative equity return at the time of announcement, indicating that investors are less likely to hold shares in the firm.[148] Since the market calculates the value of businesses based on anticipated future earnings, a poor reputation is usually a pointer to systemic problems which could in turn have adverse effects on revenue. Investors for this reason, increasingly analyse metrics able to provide a more accurate picture of a company's performance. The reputational problems can exist on a whole new level. Even if retail investors are unaware or unconcerned with a financial institutions reputation, other financial entities such as those with potential correspondent banking relationship with disreputable

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[146] International Chamber of Commerce Corporate Practices Manual on Extortion and Bribery (1999)

[147] ''Russia drops $22.5bn BoNY Mellon lawsuit'' (Financial Times, October 22, 2009) <http://www.ft.com/cms/s/0/b3a56732-beeb-11de-8034-00144feab49a.html#axzz4JbtGuTU9> Accessed November 2, 2014

[148] James L. Strachan, David B. Smith, and William L. Beedles, (1983) ''The Price Reaction to (Alleged) Corporate Crime'' *Financial Review* Vol 18, Issue 2, pp121–132

institution will be reluctant to do business with that institution for fear that its own valuable reputation will be contaminated. Scandals that lead to heightened regulatory scrutiny can also draw the ire of bank shareholders, and this was exemplified when Barclays bank had to pay a $450M fine to settle LIBOR-manipulating allegations, with the bank's Chief Executive Officer also forced out as a result of an effort to rebuild regulators trust.[149]

Another area apart from the financial institutions where a reputational risk of the crime of Money laundering prevails is within the context of destinations for legitimate business investments. Competing countries may find it difficult to do so if there is a perception that such a country has a poor track record of dealing with Money Laundering or is seen to be a centre for money laundering activity because legitimate investors are naturally wary of associating with any country that has a negative reputation.[150] Even though such investors have legitimate dealings, the overriding fear is the tendency that investing in such countries known as money laundering centres may attract more scrutiny from regulators in their own country which may prompt additional compliance measures taken by such countries with the resultant effect being the introduction of further costs that ultimately affects the profitability of any venture. It will therefore make a lot of financial sense to such investors to move their investments elsewhere. When the integrity of Nigeria's financial system and financial institutions were at its lowest state of abatement in the 1980's and late 1990's due to the negative impact of economic and financial crimes for instance, investors thought it wise to invest elsewhere than the Nigerian economy. The Nigerian economy at the time was not considered investment friendly hence the boycott and this had far reaching consequences leading to the collapse of hitherto viable financial institutions. The negative image of Nigeria as a hub for

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[149] Halah Touryalai, ''10 Biggest Banking Scandals of 2012,'' Forbes, Dec. 27, 2012, http://www.forbes.com/sites/halahtouryalai/2012/12/27/10-biggest-banking-scandals-of-2012/ Accessed 11 September 2016

[150] van Fossen A.B. (2003), ''Money Laundering, Global Financial Instability, and Tax Havens in the Pacific Islands,'' *The Contemporary Pacific*, Vol 15, no 2, pp 237-275

Money laundering activities reached its nadir when the country was blacklisted by the Financial Action Task Force (FATF) as a non-cooperative country. As a result, western financial markets grew increasingly reluctant dealing with Nigeria, Nigerian banks had trouble dealing with foreign counterparts, and the investors stayed away. The negative impact this had on the country was not restricted to Nigeria as an entity because even Nigerian business men who harboured plans to do business outside the shores of the country were viewed with suspicion and therefore faced extra hurdles their counterparts from FATF approved jurisdictions would not necessarily have faced.

111) Corruption, Organised Crime and Social Costs

This factor is directly linked with political corruption and all the predicate offences of the crime of money laundering. Corruption is the abuse of entrusted power for private gain. It hurts everyone whose life, livelihood or happiness depends on the integrity of people in a position of authority. Corruption holds back economic development, prevents a free market operating for businesses and consumers, and further exploits already marginalised groups. It is a complex social, political and economic phenomenon that affects all countries. The United Nations Office on Drug and Crime holds that corruption attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law and creating bureaucratic quagmires whose only reason for existing is the soliciting of bribes.[151] Money laundering requires an underlying, primary, profit-making crime (such as corruption, drug trafficking, market manipulation, fraud, tax evasion), along with the intent to conceal the proceeds of the crime or to further the criminal enterprise.[152] There has been varying literature on the nexus between corruption and money laundering with arguments that money laundering does not necessarily precede corruption, which in essence means that there

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[151] <https://www.unodc.org/unodc/en/corruption/index.html?ref=menuside > Accessed 11 July 2012

[152] Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) <http://www.imf.org/external/np/leg/amlcft/eng/> Accessed July 28 2015

would still be corruption without money laundering.[153] While this argument has its merits, (not all proceeds gained from corrupt practices such as kickbacks and briberies necessarily have to be laundered, as they could be diverted into personal use), it fails to acknowledge that money laundering is an ever ready rostrum available to those who engage in corrupt practices to extirpate the trail of such proceeds. Money laundering and corruption occur habitually, with the presence of one underlining the other, thereby allowing money launderers to enjoy their corrupt earnings without fear of exposing the original source of funds.[154] Corruption and organised crime plays a major role in the political instability and underdevelopment that persists in such countries. Organised crime always attempts to acquire political influence and to provide room for or remove blockages to their illicit activities. Political corruption is an essential element of organised crime; it is not just about election rigging. In broad terms, political corruption is the abuse or misuse of public or governmental power for illegitimate private advantage, an effort to secure wealth or power through illegal means for private benefit at public expense.[155] It can lead politicians in office to steer away from good government. Their decisions can benefit those who fund them, the public interest comes second. Forms of political corruption include bribery, extortion, influence peddling, fraud, embezzlement, and nepotism. Crime groups need legitimate state structures to sustain and expand their activities and this is particularly evident in many developing countries where the vast wealth accumulated by criminal activities empowers criminals with influence on the political structure of such countries. They go about this either by directly bribing political office holders or by financial donations to political campaigns and to strategic aspirants with the overriding aim

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[153] Levi, M. (2002), ‘’Money Laundering and Its Regulation,’’ *The Annals of the American Academy of Political and Social Science,* Vol 582, no 1, pp 181-194

[154] Gounev P, Bezlov T (2010) ‘’Examining the links between Organised Crime and Corruption,’’ *Trends in Organized Crime,* vol. 13, no. 4, pp. 326-359.

[155] Lipset, Seymour M. and Gabriel S. Lenz. (2000). ‘’Corruption, Culture and Markets’’ In *Culture Matters: How values shape Human Progress,* ed. Lawrence E. Harrison and Samuel P. Huntington. 112-125 New York: Basic Books.

being the gaining of influence over elected public office holders. Such was the case in Colombia when the then President of the country, Ernesto Samper was accused of funding his campaign during the country's 1994 elections with approximately US$6M donated ostensibly by the Cali cocaine cartel.[156] Such gratuitous donations especially, when from criminal organisations usually have an ulterior motive and are not just done out of goodwill.

There are usually three motives for providing political funds: 1) ideological or idealistic, 2) social, aiming at social honours or access, and 3) financial, striving for material benefits.[157] The third of the listed motives is particularly relevant to the purview of this work because it is a factor that festers corruption- one of the most notable predicate offences to the crime of money laundering. When political donations are made for financial and material benefits, those benefits could come in the form of political appointments into incumbent governments as a show of appreciation or a pay back, or in the form of supporting the illicit operations of criminal organisations. In the case of the Cali cartel, it was for the protection of the Government in their illegal cocaine trade. This kind of influence of criminal organisations can weaken the social fabric, collective ethical standards and ultimately, the democratic institutions of a society. Just like the organised crime groups, individuals also seek the political refuge of Governments by financially supporting aspirants at the polls. Very little or no attention at all is paid to the trail of such moneys. Investment in electoral politics can present a safe haven for corrupt persons in dire need of protection. Such individuals may invest their spoils in order to make profits of power and the purse; for protection, to dispense influence and to steal more. After success at the polls, such financial donors are usually rewarded by appointments into lucrative portfolios of the Government, awarded huge contracts or given

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[156] Henry Millard, G. (1997), ''Drugs and Organised Crime in Latin America,'' *Journal of Money Laundering Control (JMLC),* vol. 1, no. 1, pp. 73-78

[157] See Vifredo Pareto (1935) *The Mind and Society: A Treatise on General Sociology*. Vol 1, Edited by Arthur Livingston, translated by Andrew Bongiorno and Arthur Livingston, New York Dover

protection, whatever the motive may have been. It also serves as a subtle way to clean his illicit money because by investing in the election of a candidate, and by getting appointed or awarded contracts, he recoups the dirty invested money albeit in washed and legitimate fashion. This practice is prevalent in most developing countries, and in Nigeria, the illicit and illegitimate use of money for political influence is a marked feature of the country's body politics. It is important to note however, that financial funding is an issue that varies according to jurisdiction because certain funding practices that are legal in one jurisdiction may not be so in another. The Nigerian Anti-Corruption Law (the corrupt practices and other related offences Act of 2000) identified a long list of practices that constitute corruption and they include the use of pecuniary advantage, gratification, influence peddling, insincerity in advice with a view to gaining advantage etc.[158]

Another facet of political corruption in Nigerian politics is the high cost of seeking public offices. Many politicians involve in bribing delegates and voters in the vote buying game to either get back into office or to get in for the first time. Talking from personal experience, I have seen an incumbent Nigerian Chief Executive of a state in his motorcade during electioneering campaign throw out wads of bill into the air to children and adults who were lined on the streets to catch a glimpse of him. Money was splattered all over the street as people scrambled to pick as much as they could. Foodstuff is distributed to households, token sums of money in envelopes doled out to voters with a message as to who they should vote for. The amount of resources deployed to capture elective offices means it is not difficult to see the correlation between politics and the potential for official corruption. The greatest losers are the ordinary people, those voters whose faith and investment in the system are hijacked and subverted because money, not their will is the

[158] The *Corrupt Practices and other Related Offences Act 2000; Act No 5, Laws of the Federation of Nigeria (LFN)*

determining factor in elections.[159] Private rather than public interests dictate policy, and these factors all weigh heavily on the social costs because corruption predicates the abuse of Governments resources by diverting them from sectors of critical importance such as health, education and development thereby depriving the common man of economic growth and developmental opportunities. This drives up the cost of government due to the need for increased law enforcement and health care expenditures (for example, for treatment of drug addicts) to combat the serious consequences that result. Corruption is a vice which weighs more on the poor than anyone else because they are the least to absorb its cost and depend most on the very public services that corruption destroys. Economic development is stolen from them and they suffer from decaying infrastructure and greedy Government agencies which instead of serving them, seek to further empty their pockets.[160] The average citizen may barely afford the substandard medical facilities available, while Government/Public officials get access to first class medical treatments by flying abroad to developed countries for attention. Nigeria, despite its huge agricultural resource base being the world's largest producer of cassava, yam and cowpea- all staple foods in sub-Saharan Africa as well as a major producer of fish, still classifies as a food deficient nation and imports large amounts of grain, livestock products and fish. The neglect of rural infrastructural development adversely affects the profitability of agricultural production. This is most prevalent in the rural areas where up to 80 per cent of the population live below the poverty line with limited social services and infrastructures because most of such are usually concentrated in the cities.[161] The lack of rural roads impedes the marketing of agricultural commodities, prevents farmers from selling their produce at reasonable prices, and leads to spoilage. Limited accessibility cuts small-

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[159] President Olusegun Obasanjo in an address delivered at the INEC-Civil Society Forum Seminar on 27 November 2003

[160] See Nuhu Ribadu, (2010) *Show Me the Money – Leveraging Anti Money Laundering Tools to fight Corruption in Nigeria: An Insider Story*. Centre for Global Development.

[161] See <http://www.ruralpovertyportal.org/country/home/tags/nigeria > Accessed June 30 2016

scale farmers off from sources of inputs, equipment and new technology, and this keeps yields low. As the population swells and puts pressure on diminishing resources, escalating environmental problems further threaten food production. Land degradation as a result of extensive agriculture, deforestation and overgrazing are already severe in many parts of the country. Drought has become common in the north, and erosion caused by heavy rains, floods and oil pollution is a major problem in the south and south-east.[162] In addition to its agricultural wealth, Nigeria happens to be Africa's largest producer of oil and the seventh largest in the world. However, approximately 70 percent of Nigerians still live on less than US$1.25 a day.[163] The consequence of this corruption induced lack of development is social inequalities and a widening gap between the rich and the poor which may trigger vices such as violence, armed robbery and large scale theft. The oil rich Niger Delta region of Nigeria which harbours the oil has seen major bouts of violence with tensions high as oil spills continue to crush the farming and fishing industries. Most people in this region live in abject poverty despite residing in a region that has the largest oil output in Africa. The decades of oil exploitation, environmental degradation and neglect leaves in its wake, an impoverished, marginalised and exploited citizenry which ultimately produced a resistance in the form of the formation of militant groups who resorted to self-help by carrying out acts of sabotage like oil pipeline bombings as well as the very well documented cases of kidnap for ransom. Expatriate workers of the multinational companies are frequently kidnapped and only released on conditions favourable to the militants, and in this case, mostly a substantial amount of money by way of ransom. This is a clear reaction to what the locals perceive as marginalisation by the relevant bodies that are meant to look after their welfare. Violent conflicts tend to occur when citizens who are aggrieved over long standing incidences of inequality and poor governance begin

[162] *Ibid*

[163] *Ibid*

to make demands for change and challenge the authority of the state.[164] There are theories in literature however, that dispel this notion and one of such is the 'political economy of war.' This theory is to the effect that people rebel not because of the existence of historical and social grievances but because of the opportunities available to them to do well out of war.[165] Using this perspective in the context of the civil wars in Liberia and Sierra-Leone, David Keen argued that there was some rationality that soldiers and rebels colluded to profit from war.[166] Keen also argued that the objective of warfare is never to win, but to create conditions where plundering can proceed without the requirements of accountability. There are less assertive arguments however, of the causal link between economic incentives and outbreak of insurgency of civil wars, that the 'economy of war thesis' may actually be a by-product and not a cause of conflict. This means quintessentially that the economy of conflict merely results from entrepreneurs and commercial interests making the most profit from and capitalizing on uncertainty and disorder in conflict environments.[167] These arguments all have merits, but whatever the inspiration may be for people to indulge in violent resistance, the causes of conflict are context specific and differ from one case to another but most conflicts especially in Africa are generally rooted in perceptions of political and economic marginalisation, social exclusion and crises of identity and citizenship.[168] The vice of

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[164] E. Hutchful and K. Aning, ''The Political Economy of Conflict'' in A. Adebajo and I. Rashid (eds), *West Africa's security challenges: Building Peace in a Troubled Region.* Lynn Rienner and International Peace Academy, Boulder, Co and London (2004), pp195-222

[165] Paul Collier, ''Doing well out of war: An Economic Perspective,'' in M. Berdal and D. Malone (eds) *Greed and Grievance: Economic Agendas in Civil wars.* Lynn Rienner and International Peace Academy, Boulder, Co and London pp 91-112

[166] David Keen, (2005) *Conflict and Collusion in Sierra-Leone,* (A project of the International Peace Academy) Palgrave New York

[167] Ikelegbe, A. (2006) ''The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria,'' *African and Asian Studies*, Vol 5, no 1, pp 23-56

[168] Rene Lemerchand, (2000) ''Exclusion, Marginalisation and Political Mobilisation: The Road to Hell in the Great Lakes'' In: A. Wimmer et al., *Facing Ethnic Conflicts: Toward a New Realism,* Rowman and Littlefield, Oxford, (2004), pp 61-77

corruption is what creates the avenue for the resistance aggrieved people put up and/or the opportunistic exploitation of the situations of civil unrest.

IV) Terrorism

Terrorism as an effect of the crime of money laundering operates in ways different to how corruption does. While corruption operates like a revolving door (in that it is both a pre-cursor to a Money laundering activity as well as a consequence of it), terrorism can only apply as a consequence. To put it in context, terrorist organisations do not engage in acts of terror in order to launder funds, but rather launder funds in order to fund their acts of terror. The cardinal aim is to maim, to destroy, and cause grief, hence money laundering is just a means to an end for terrorists. The Al-Qaeda led terrorist attack of September 2011(9/11) provides a water-shed moment in strict monitoring of banking transactions in order for every monetary transaction to have an identity i.e. the source and origin of any bank transaction. It provides a perfect example of the correlation between money laundering and terrorism. The 9/11 attack is believed to have cost Al Qaeda about a half million dollars to organize and execute, according to the US 9/11 Commission report.[169] Getting the funds into use by the financiers and executors of the attack represented a high degree of knowledge and exploitation of the anonymity provided by the huge international and domestic financial system to move and store their money through a series of unremarkable transactions. The operation could rank as one of the most sophisticated cases of scrambling the source and movement of funds because despite thorough investigation by the Federal Bureau of Investigation (FBI), till date; there is no evidence as to the source of the funds used to carry the attack out. The sophistication with which the facilitators of the attack operated was described vividly by the FBI in the following terms- ''*We will never know the exact amount of funds the*

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[169] This is according to the US 9/11 Commission report. See Bruce Riedel, 'The World After 9/11 – Part I' (Article | September 6, 2011)< http://www.brookings.edu/research/articles/2011/09/06-after-911-riedel >Accessed June 1 2014

hijackers deposited into their accounts, as they made transactions which made it difficult to trace the money. For example, at times they made substantial cash withdrawals, followed by substantial cash deposits. It is impossible to tell if the deposit reflected new funds or merely the return of funds previously withdrawn but not spent. Nor is a complete analysis of their expenditures possible. They conducted many transactions in cash. Although the FBI has obtained evidence of many these transactions, there surely were many others of which no record exists. Additionally, gaps remain in our understanding of what exactly the hijackers did in U.S., so it is possible that they spent funds on activities of which we have no knowledge. Because the hijackers' activities and expenses are not fully known, we cannot say with certainty that every dollar has been accounted for. We believe, however, that the identified funding was sufficient to cover their known expenses and the other expenses they surely incurred in connection with their known activities. Investigations reveal where the funds were dispatched from but no trace of how the funds were generated.''[170] Investigations further revealed that ''*Al Qaeda funded the hijackers in the United States by three primary and unexceptional means: (1) wire or bank-to-bank transfers from overseas to the United States, (2) the physical transportation of cash or traveller's checks into the United States, and (3) the use of debit or credit cards to access funds held in foreign financial institutions. Once the funds were in the United States of America, all the hijackers used the U.S. banking system to store their funds and facilitate their transactions.''*[171] The best available evidence indicates that approximately $300,000 was deposited into the hijackers' bank accounts in the United States by a variety of means. Just prior to the flights, the hijackers returned about $26,000 to one of their Al Qaeda facilitators and attempted to return

[170] National Commission on Terrorist Attacks Upon the United States- Terrorist Financing Staff Monograph (Appendix A: The Financing of the 9/11 Plot)

[171] See National Commission on Terrorist Attacks Upon the United States- Terrorist Financing Staff Monograph (Appendix A: The Financing of the 9/11 Plot)

another $10,000, which was intercepted by the FBI after 9/11.[172] The existing mechanisms to prevent abuse of the financial system did not fail, they were never designed to detect or disrupt transactions of the type that financed 9/11.[173] The effects of the events of 9/11 on the United States of America and the world at large are enormous, and although it may have cost Al Qaeda just over half a million dollars to organize and execute, the property damage in New York and Washington alone cost about $100 billion. The cumulative economic cost to the global economy cannot also be overstated, the attack led directly to the war in Afghanistan and indirectly to the war in Iraq with an estimated cost (of those two wars) at $4 trillion. So 9/11 was not only traumatic, it was a cheap investment that cost America dearly in lives and treasure.[174] It therefore suffices that money laundering and the financing of terrorism are financial crimes with economic effects which can threaten the stability of a country's financial sector or its external stability more generally. Effective anti-money laundering and combating the financing of terrorism regimes are essential to protect the integrity of markets and of the global financial framework as they help mitigate the factors that facilitate financial abuse. Action to prevent and combat money laundering and the financing of terrorism thus responds not only to a moral imperative, but also to an economic need.''[175]

3.2 International Response- (Anti-Money Laundering)

Having identified and analysed the negative effects the crime of money laundering carries, it is germane to the thematic preoccupation of this work to appraise the international response to its

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[172] *Ibid*

[173] *Ibid*

[174] See Bruce Riedel, 'The World After 9/11 – Part I' (Article | September 6, 2011) <http://www.brookings.edu/research/articles/2011/09/06-after-911-riedel > Accessed June 10, 2016

[175] Min Zhu (Deputy Managing Director of the IMF) <http://www.imf.org/external/np/exr/facts/aml.htm > accessed June 10, 2016

challenge. The phrase '*pecunia non olet'* (money does not stink) is attributed to Roman Emperor Vespasian (AD69-AD79) as regards a tax levied for the use of public toilets which had been imposed in Rome. However, this expression may currently be substituted for a new one of '*pecunia nunc olet*' (money smells now).[176] Laundered money is dirty money and dirty money does indeed smell, hence the efforts of various international bodies to mitigate the effects of the crime of money laundering through efforts that shall be analysed here-within. The perspicacity of those who involve in financially motivated crime means that they understand the need to scramble their money trails by creating a perception of legitimacy of the source of ownership of the ill-gotten wealth. As already been discussed in earlier parts of this work, right from the prohibition era, mobsters realised the need to keep the trail of dirty money as far away as possible from their name and person by the use of shell corporations and the loan back concept of lending money. The efforts to counter these shrewd practices however, are of fairly recent origin and do not date back to the time of inception of the crime. Incipient propulsion for a harmonised international action against money laundering arose in the 1980's within the context of efforts to combat the problem of drug trafficking, hence a high priority being afforded to law enforcement strategies designed to disrupt the organisation and management and break the economic power of major trafficking networks.[177] The problems of drug abuse and illicit trafficking were recognised as needing global action long before this period and it led to instruments like The Hague International Opium Convention of 1912 which contained many elements of a comprehensive drug control treaty, and the 1931 Convention for limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. Both instruments were however, considered ineffective in dealing with the range of complex issues raised by international drug trafficking which meant there was a need for more

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[176] Garcia, J. (1999), ''International Measures to Fight Money Laundering,'' *Journal of Money Laundering Control (JMLC)*, Vol. 3, no. 1, pp. 39-43.

[177] W.C. Gilmore, (1995) ''International Initiatives In The Field Of Money Laundering,'' 6 *Journal of International Banking and Financial Law (JIBFL*) 258

encompassing instruments. This in a way had a bearing on initiatives against money laundering since the traffickers had to clean the proceeds of the illicit drug trade thereby indulging in money laundering practices.

3.2.1 The Council of Europe

In 1980 the Council of Europe adopted the first International instrument against money laundering.[178] Established in 1949 'to promote European unity, foster social and economic progress and protect human rights', it was the first international organisation which emphasised the importance of taking measures to be used for combating the dangers of money laundering with respect to democracy and the rule of law. Concerns over the growing number of criminal acts prompted the council to examine the problems that had arisen in European countries as a result of Money Laundering. This led it to establish a select committee in 1977 to examine the issue through a process of deliberations which culminated in the 1980 adoption of a formal recommendation entitled 'Measures against the Transfer and Safe-keeping of funds of Criminal Origin'. The thinking behind the recommendation was the consideration by the Council that the transfer of funds of criminal origin from one country to another and the process by which they were laundered through insertion in the economic system gave rise to serious problems. It also encouraged the perpetration of further criminal acts which caused the phenomenon to spread nationally and internationally. The recommendation called on member states to establish close National and International cooperation between banks and appropriate authorities in exchanging information about the circulation of bank notes which have been used in connection with criminal offences. Banks were also required to conduct identity checks on customers whenever an account or security deposit is opened, safe deposits are rented, cash transactions involving sums of a certain magnitude are made, and in all cases bearing in mind the possibility of transactions in several parts. It also

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[178] Recommendation No. R (80)10 on measures against the transfer and the safekeeping of funds of criminal origin

recommended staff training to enable employees to control the identity of clients and, also, to identify the alleged criminal activities. These recommendations were however, not generally implemented and this led to criticism in certain parts that the Council of Europe was probably 'ahead of its time.'[179] This does not however, pass-over the significance of the recommendation and in particular, the recommendation highlighted the critical impact of the ''know your customer'' procedure on a financial institutions ability to insulate its facilities from criminal infiltration, and to cooperate with investigative authorities. These concepts would be further refined and elaborated in subsequent initiatives that garnered widespread acceptance.[180] The right time for a comprehensive action against Money Laundering under the auspices of the Council of Europe came in 1986 when in line with the concerns of the United Nations at the time, the European ministers of Justice requested that the European Committee on crime problems develop international norms and standards to guarantee effective international cooperation between judicial (and where necessary police) authorities as regards the detection, freezing and forfeiture of the proceeds of illicit drug trading.[181] This led to the selection of experts in these fields whose terms of reference were the examination of the applicability of the European Penal Law Conventions to search, seizure and confiscation of proceeds of crime and consider this question in light of the works of the United Nations as regards the financial assets of drug traffickers and for the committee to prepare an appropriate European legal instrument in this field if it deemed it necessary. The United Nations had at this point adopted the Convention against Illicit Drugs in Narcotic Drugs and Psychotropic

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[179] See H.G. Nilson, (1991) ''The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law,'' *Criminal Law Forum*, Vol.2, No. 3, pp 423

[180] See Kern Alexander, (2001) ''The International Anti-Money Laundering Regime: The Role of the Financial Action Task Force.'' *Journal of Money Laundering Control (JMLC*) 231

[181] W.C. Gilmore, (1995) ''International Initiatives In The Field Of Money Laundering,'' 6 *Journal of International Banking and Financial Law (JIBFL)* 258

Substances which addressed the threat posed by International narcotics trafficking,[182]and the experts tried to use the terminology and the systematic approach of that convention unless changes were felt necessary for improving different solutions.

The workings of the select committee resulted in the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime. The aims were to provide a complete set of rules applicable to all stages in proceedings, starting with the initial enquiries into a laundering offence and continuing until enforcement of a confiscation decision given abroad. Unlike the 1980 equivalent, the 1990 Convention is an International law agreement governing investigative conduct and does not embrace ways of enhancing the role of financial institutions in preventing and detecting money laundering. The aim of this Convention is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. The Convention is intended to assist States in attaining a similar degree of efficiency even in the absence of full legislative harmony. This Convention has been ratified by all Council of Europe member states, which makes it a particularly useful tool for international cooperation due to its various provisions on mutual assistance. Furthermore, it is opened also to countries which are not members of the organisation. The Convention[183] remains a landmark treaty which forms an important cornerstone of anti-money laundering standards, and is widely ratified.[184]A comprehensive perusal of the workings of the Council of Europe is beyond the scope of this work.

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[182] Convention against Illicit Drugs in Narcotic Drugs and Psychotropic Substances, 20th December 1988, 28 ILM 493, 26 UNTS (1992) (Hereinafter the UN Convention)

[183] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg, 8.XI.1990) European Treaty Series - No. 141

[184] 48 States are Party to this treaty, including all 47 Council of Europe member States and one Non-member State (Australia).

3.2.2 The 1988 United Nations Convention (Convention against Illicit Drugs in Narcotic Drugs and Psychotropic Substances.[185]

This sought to address the threat posed by international narcotics trafficking. Although not the first of such initiatives,[186]the perception was that focus on the legal tools and law enforcement strategies to combat drug trafficking were insufficient because despite those earlier agreements contributing significantly to the anti-narcotics movement, they only emphasised on the control of production of drugs and their diversion into the market place. It therefore suffices that the inadequacies of the earlier instruments necessitated the advent of the Vienna Convention. This Convention was the heart of an effective strategy to counter modern international drug trafficking, and it sought to ensure vigorous enforcement of the law in order to reduce illicit availability of drugs, deter drug related crime, and contribute to drug abuse prevention by creating an environment favourable to efforts for reducing illicit supply and demand. This was articulated in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control adopted by the 1987 UN Conference on Drug Abuse and Illicit Trafficking.[187] The UN General Assembly had in 1984, unanimously adopted a resolution expressing the conviction that 'the wide scope of illicit traffic in narcotic drugs and its consequences made it necessary to prepare a convention which considers the various aspects of the problem as a whole, and in particular, those not envisaged in existing

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[185] Jimmy Gurule, (1998) ''The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances –A Ten Year Perspective: Is International Cooperation Merely Illusory?'' *Fordham International Law Journal*, Volume 22, Issue 1, pp 79

[186] There were prior international instruments such as the International Opium Convention of 1912 and 1931, the Single Convention on Narcotic Drugs of 1961 as well as the Convention on Psychotropic Substances of 1971

[187] See ''United Nations International Conference on Drug Abuse and Illicit Trafficking: Decisions of the Conference.'' *International Legal Materials* 26.6 (1987): 1637-724.

international agreements.'[188]A draft convention was therefore requested of the UN Economic and Social Council at the behest of the General Assembly to be prepared as a matter of priority. Pursuant to this fiat, the commission adopted a resolution identifying 14 elements for inclusion in a draft convention which in turn began a lengthy process of negotiation. This resulted in the 1988 conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna[189]where a detailed treaty consisting of 34 articles and an annex was adopted.[190] A novel provision of the treaty was that undermining the financial strength of drug traffickers by the provision of tools to the law enforcement community akin to the realities of international cooperation is vital to an effective way to combat such illicit activity. Although as the name implies, the treaty was basically against illicit narcotic trade, it provided the first time further attention was given to the concept of money laundering after the afore-mentioned Council of Europe recommendation of 1980. It placed a strict obligation on participating countries to criminalise a comprehensive list of activities connected to drug trafficking as well as the requirement that a drug related money laundering should be a criminal offence.[191] There is also an obligation placed on each party to, subject to its constitutional principles and the basic concepts of its legal system criminalise the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or any of the offences criminalised by each

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[188] See William Gilmore, (2011) '*'Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*.'' 4th edition, Council of Europe Publishing, Strasbourg

[189] The Conference was attended by 106 Countries including Nigeria and the Treaty was signed on 20/12/1988 while it came into force on 11/11/1990

[190] W.C. Gilmore, (1995) ''International Initiatives In The Field Of Money Laundering,'' 6 *Journal of International Banking and Financial Law (JIBFL)* 258

[191] Art 3 (1)

state under the directives of the treaty.[192] This provision is based on the fact that any Anti-drug strategy must criminalise money laundering and deprive drug traffickers of their illicit profits. Although the term Money Laundering is not explicitly mentioned in the instrument, it provided an extensive definition of the crime.[193] The Convention was couched to ensure that money laundering and narcotic related activities were accorded the requisite level of seriousness by the judicial and prosecutorial authorities of each participating state.[194] It required the criminalising by each party of money laundering and drug trafficking predicate offences such as conspiracy, aiding and abetting. The Convention requires that parties ensure that their courts and other competent authorities having jurisdiction take into account factual circumstances which make the commission of a comprehensive list of factors which renders these offences particularly serious.[195] Amongst the factors cited relevant to money laundering includes offences committed by public office holders (Politically Exposed Persons) and whether the offence is connected to that office, involvement of organised criminal groups, and whether violence was used.[196] Party states are also required to enact far reaching domestic laws providing for the confiscation of all forms of property, proceeds or instrumentalities used in or are derived from covered offences, and this property includes not only the narcotic drugs and psychotropic substances, materials and equipment, and other instrumentalities, but the proceeds of the offence as well.[197] This measure has been described as a ‘’major breakthrough’’ in attacking the benefits derived from drug trafficking activities and [they]

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[192] Art 3(1) (C) (i)

[193] Art 3(1) (b)

[194] See Kern Alexander, (2001) ‘’The International Anti-Money Laundering Regime: The Role of the Financial Action Task Force.’’ *Journal of Money Laundering Control (JMLC)*Vol 4, no 3 pp 231-248

[195] Art 3(5)

[196] Art 3(5) (d)

[197] Art 5 (1) (a) (b)

are a forceful endorsement of the notion that attacking the profit motive is essential if the struggle against drug trafficking is to be effective.[198]

An integral part of criminal justice system is its ability to deprive criminals of their illegal earnings. By dismantling their organisations financially, criminals must be hit at their supposedly more vulnerable spot: their assets.[199] There is also requisite obligation on parties to take steps to enable authorities to identify, trace, freeze or seize property, proceeds, instrumentalities or any other objects as preliminary steps to eventual confiscation. This includes the freezing, seizing and/or forfeiture of such property.[200] Courts and other competent authorities are also required to compel the production or seizure of bank, financial or commercial records necessary to trace, identify, seize and forfeit proceeds and instrumentalities of drug trafficking.[201] This requirement is irrespective of the existence of bank secrecy laws as they do not constitute a valid defence. The convention is explicit that no party shall decline to act on the grounds of bank secrecy.[202] This provision has been hailed as one of the most important provisions in terms of the prosecution of international drug-trafficking and money laundering offences.[203] There is therefore an affirmative compulsion upon states not to shield materials which are needed in forfeiture proceedings from

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198 D. Sproule and P. Saint-Denis, (1989) ‘’The UN Drug Trafficking Convention: An ambitious step.’’ *Canadian Yearbook of International Law* Vol 27, 263, pp 281–282.

199 Nelen, H. (2007), ‘’Hit hem where it hurts most; The Proceeds of Crime Approach in The Netherlands,’’ *Crime, Law and Social Change*, Vol. 41, no. 5, pp. 517-534.

200 Art 5 (1) (2)

201 Art 5(3)

202 Art (7) (5)

203 David P. Stewart, (1990) ‘’Internationalizing the war on drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,’’ *(Denver Journal of International Law and Policy)*, Vol.18, pp387

discovery.[204] International cooperation is of imperative importance as regards forfeiture proceedings and party states are required to, upon the request of another, assist in taking measures to identify, trace, freeze or seize proceeds, property, instrumentalities or any other objects for the purposes of eventual confiscation either by the requesting party or its own authorities.[205] This is of particular importance and must be aggressively pursued on an international scale because without cooperation amongst all nations affected by illegal drug activity, the drug traffickers could easily defeat domestic forfeiture laws by simply removing their illicit wealth from the jurisdiction in which it is generated.[206] The convention entered into force on the 11th of November, 1990 and is signed by major drug consumer Nations in North America and Western Europe as well as key transit states in the Caribbean and Central America. It has a widespread acceptance so much so that it is regarded as the 'foundation of the International legal regime' in the anti-money laundering field because it set the path for more concerted efforts to address the problem of Money laundering.[207] The major deficiency within the wordings of the Vienna convention as far as money laundering is concerned however, was the fact that it was specific in scope and application, i.e. drug related money laundering. This meant that moneys generated from other offences fell within the convention's blind spot and as such were free to be laundered without encroaching on any

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[204] Art 5(2)

[205] Art 5(4)

[206] William J. Snider, *International Cooperation in the Forfeiture of Illegal Drug Proceeds, 6* CRIM. L.F. 377, 378 (1995), See also Jimmy Gurule, (1998) ''The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances –A Ten Year Perspective: Is International Cooperation Merely Illusory?'' *Fordham International Law Journal,* Volume 22, Issue 1, pp 79

[207] See William Gilmore, (2011) *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*. 4th Edition, Council of Europe Publishing, Strasbourg

instruments against money laundering. This lacuna led to the criminalisation measures initiated by the United Nations Convention against Transnational Organised Crime.[208]

3.2.3 The Palermo Convention

This was the first legally binding United Nations instrument in the field of organised and serious crime and thereby extended the criminalisation measures proffered by the Vienna Convention to include the proceeds of serious crime. It was adopted by the UN General Assembly at its millennium meeting in November 2000 and was opened for signature at a high level conference in Palermo, Italy in December 2002. Countries were required to apply the offence of money laundering to a broad range of predicate offences, including all serious offences as well as offences of participation in an organised criminal group, corruption and for obstruction of justice.[209] The convention applies to the prevention, investigation and prosecution of stipulated offences and other serious crime and this was supplemented by three protocols with regard to people trafficking, migrant smuggling, and the illegal manufacture and tracking of firearms.[210] The powers of Governments were also strengthened in order to combat serious crimes by the provision of a more rounded common action against money laundering through harmonised national laws. This was aimed at expunging the uncertainties of a crime in one country being or not being a crime in another.[211] There were further efforts by the United Nations such as the Convention against

[208] GA Res.55/25, UN GAOR; 55th Session, Sup., No49, Vol 1, at 43, UN Doc A/55/49

[209] C. Png, ''International legal sources I – The United Nations Conventions,'' in W. Blair and R. Brent (eds) (2008) *Banks and Financial Crime- The International Law of Tainted Money*, Oxford University Press, pp 43.

[210] *Ibid*

[211] See Zagaris, B. (2010), *International White Collar Crime: Cases and Materials*, Cambridge University Press, New York.

Corruption which extended the definition of money laundering to include the 'concealment and laundering of the proceeds of acts of corruption.'[212]

3.2.4 The Merida Convention

Whilst aligning with the Palermo Convention in requiring that nations criminalise money laundering, the Merida Convention goes a step further with regards to its definition of predicate offences by requiring countries to apply money laundering to the widest range of offences.[213] There was also the *Global programme against Money Laundering by the United Nations Office on Drug Crime and Control (UNODC)* in 1997 in response to the mandate given to UNODC through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The broad objective of the Global Programme is to strengthen the ability of Member States to implement measures against money-laundering and the financing of terrorism and to assist them in detecting, seizing and confiscating illicit proceeds, as required pursuant to United Nations instruments and other globally accepted standards, by providing relevant and appropriate technical assistance upon request.[214] Its benefits cannot be overemphasised, and there has been an increased level of awareness among both the private and public sector, [215]and an increase in the number of countries that have introduced the necessary anti-money laundering methods that meet the international standards.[216] The GPML also bears a positive impact on the global AML policy; it is

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[212] Merida Convention Article 23 (1) (a) (i)

[213] Ryder, N. (2013), *Money laundering - An endless cycle?, A comparative Analysis of the Anti-Money laundering Policies in the United States of America, the United Kingdom, Australia and Canada*. Routledge, London

[214] See ''UNODC on Money Laundering and Countering the Financing of Terrorism'' <https://www.unodc.org/unodc/en/money-laundering/index.html?ref=menuside> Accessed October 1, 2015

[215] See Global Programme against Money Laundering; Situation Analysis. <www.unodc.org/pdf/gpml.pdf > Accessed July 28, 2016

[216] *Ibid*

therefore safe to conclude at this juncture that the birth of the International community's anti-money laundering efforts can be found in the UN narcotic substance policy.[217]

3.2.5 The Basel Committee Statement on Banking Supervision

This is another major instrument against the threat of money laundering. Established by the central bank governors of the Group of Ten countries (G10) in 1974, it was designed as a forum for regular cooperation between its member countries on banking supervisory matters. Its aim was to enhance financial stability by improving supervisory knowhow and the quality of banking supervision worldwide. The Committee seeks to achieve its aims by setting minimum supervisory standards; by improving the effectiveness of techniques for supervising international banking business; and by exchanging information on national supervisory arrangements. And, to engage with the challenges presented by diversified financial conglomerates, the Committee also works with other standard-setting bodies, including those of the securities and insurance industries. The committee adopted a concordat in 1975 that sought to encourage the exchange of information between home and host country regulatory authorities in the supervision of banking institutions and to ensure that banking organisations operating on a transnational basis are properly supervised. It adopted its statement of principles on money laundering in 1988 in what was the first time the committee prescribed ethical standards of professional conduct to which banks were expected to adhere. The committee felt the need to mitigate the reputational risk of banks inadvertent associations with criminals or criminal proceeds.[218] While absolving bank supervisors of primary responsibility in the event of illegitimate

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[217] See Ryder, N. (2013), *Money laundering - An Endless Cycle?: A Comparative Analysis of the Anti-Money laundering Policies in the United States of America, the United Kingdom, Australia and Canada*, Routledge, London.

[218] C. Png, ''International legal sources I – The United Nations Conventions,'' In W. Blair and R. Brent (eds) (2008) *Banks and Financial Crime- The International Law of Tainted Money,* Oxford University Press

transactions, the committee nevertheless held that ensuring that money launderers do not exploit the financial institutions still falls within their remit and as such cannot be indifferent to that threat. The committee implored banks to verify the true identity of all customers (know Your Customer) and to initiate effective procedures of obtaining the requisite identification from new customers, with failure to provide such information by the customers being a valid ground for banks to refuse services requested. Bank cooperation with national enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality is also another important recommendation of the committee. The committee believes that there is no justifiable reason why local legislation should impede the transfer of customer information from a host bank branch or subsidiary to its head office or parent bank in the home jurisdiction for risk management purposes.[219]When banks become aware that deposits made by customers are of a criminal origin or bear any semblance to such, the committee advises that banks severe ties with such customers or take other necessary steps such as freezing such accounts and/or denying assistance. The Basel statement however, has no binding effect on the G10 countries but serves rather just as a soft law in what has been referred to as 'best practices.'[220] This buttresses the supposition introduced by the Council of Europe recommendation of 1988 to the effect that financial institutions are the lynchpin to effective anti-money laundering detection and prevention. One major flaw however is that the statement does not prescribe any mechanism to promote compliance with its provisions.

[219] See ''Basel Committee updates advice on anti-money laundering practices'' <http://www.centralbanking.com/central-banking/news/2277975/basel-committee-updates-advice-on-antimoney-laundering-practices> Accessed January 1, 2014

[220] See C. Png, 'International legal sources I – The United Nations Conventions', in W. Blair and R. Brent (eds) (2008) *Banks and Financial Crime- The International Law of Tainted Money*, Oxford University Press, 2008

3.2.6 The Financial Action Task Force (FATF)

This is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. Established by the G-7 summit that was held in Paris in 1989, the formation of the FATF was a direct reaction to the growing threat of money laundering as well as the growing concern of the effects money laundering activities could have on the banking system and to financial institutions. Specifically, the objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a policy-making body which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.[221] To achieve this aim, the FATF has since 1990, developed a series of Recommendations which form the basis for a co-ordinated response to these threats to the integrity of the financial system and help ensure a level playing field. These recommendations are recognised as the international standard for combating of money laundering and the financing of terrorism and proliferation of weapons of mass destruction. The recommendations are intended to be of universal application, and to ensure that they remain up to date and relevant; they have been reviewed seven times, with the latest review being in 2012.[222] These revisions are intended to strengthen global safeguards and further protect the integrity of the financial system by providing governments with stronger tools to take action against financial crime. In the aftermath of the September 11, 2001 terrorist attacks in America, the FATF issued the Eight Special Recommendations to deal with the issue of terrorist financing. The continued evolution of money laundering techniques led the FATF to revise the FATF standards comprehensively in June 2003. In October 2004 the FATF published a Ninth Special Recommendation, further strengthening the agreed international standards for combating

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[221] See <http://www.fatf-gafi.org/about/ >

[222] There were prior reviews in 1996, 2001, 2003, 1996, 2001, 2003

money laundering and terrorist financing - the 40+9 Recommendations. The 2012 review saw to the completion of a thorough review of the FATF standards and recommendations by an expansion to deal with new threats such as the financing of proliferation of weapons of mass destruction, and to be clearer on transparency and tougher on corruption. The nine Special Recommendations on terrorist financing have been fully integrated with the measures against money laundering. Whilst the FATF Recommendations are not international law instruments, there are substantial linkages in the substance and underlying policies of these recommendations and the UN conventions and UN Security Council resolutions.[223] The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. The implementation of the FATF Recommendations have been enhanced through their endorsement as AML/CFT international standards by the Executive Boards of the International Monetary Fund (IMF) and the World Bank, and the undertaking of mutual evaluations by the FATF and its associated bodies and assessments by the IMF and the World Bank.[224]Approximately 118 countries around the world have been assessed on their level of compliance with the international standards on anti-money laundering and combating the financing of terrorism (AML/CFT) since 2004.

Conclusion

There have been very commendable efforts in the fight against the crime of money laundering at the international level which should naturally transmit to national bodies. Nevertheless, questions still abound if these instruments have, ipso facto proved ample enough to stifle the menace of

[223] See Stessens, G. (2000), *Money Laundering - A New International Law Enforcement Model*, Cambridge University Press, Cambridge, pp 18.

[224] Jensen, N. & Png, C. (2011), ‘’Implementation of the FATF 40+9 Recommendations,’’ *Journal of Money Laundering Control (JMLC)*, Vol 14, no. 2, pp. 110-120

money laundering. Relating this to Nigeria, questions abound whether the international instruments suit the complexities of the Nigerian society both in terms of reception and adoption.

Chapter 4

Nigerian Reception and Implementation of International Anti-Money Laundering Instruments

The previous chapter revealed encompassing international efforts towards tackling the crime of money laundering. However, of paramount importance is the proper incorporation of these international instruments into national and domestic laws of member states. From a Nigerian perspective, questions need to be asked whether these laws have been implemented, and how effective they are. The transnational nature of the crime of money laundering and the transient nature of launderer's provides the likelihood of procedural difficulties in implementation especially as it relates to jurisdictional issues. This however is supposed to be negated by international cooperation between states through the process of Mutual Legal Assistance. This is a process by which states seek and provide assistance in gathering evidence for the use in the investigation and prosecution of criminal cases. Nigeria being a signatory to a number of such treaties will not be availed the excuse of procedural bottlenecks as an impediment to proper implementation/execution of international AML standards. Taking this into consideration, it will not be preposterous to conclude that the International Anti Money Laundering instruments should come in handy to the Nigerian state. This however, is far from the actual reality. Money laundering in Nigeria takes varying forms, including but not limited to investment in real estate; wire transfers to offshore banks; political party and campaign financing; deposits into foreign bank accounts; abuse of professional services (lawyers, accountants and investment advisers); bulk cash smuggling etc. These proceeds come from crimes such as official corruption, drug trafficking, illegal oil bunkering, bribery, embezzlement, contraband smuggling, theft, financial crimes, advance fee fraud known as '419'[225] all generate hundreds of millions of dollars annually. Of all the aforementioned crimes, none typifies the Nigerian society as much as corruption does. Only in the

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[225] Named after the fraud section in Nigeria's Criminal Code

realms of mythology should one seek appropriate representations of the heights and depths of corruption that defines the society.[226] This chapter aims to (i) analyse the reception of International Anti-Money Laundering standards into Nigerian Laws; (ii) identify and analyse the Nigerian Anti-Money Laundering instruments; and (iii) Examine the efficiency of International standards to curb money laundering within the Nigerian context

4.1 The Nigerian Anti-Money laundering Regime; A Historical Evolution

The international initiatives which ultimately led to the formation of the Financial Action Task Force brought about proactive measures against money laundering on an international level. Nation states complied by enacting laws aimed at addressing the problem within the distinct precincts of their individual jurisdictions. Nigeria being a signatory to those instruments, took steps towards aligning with the crusade against Money Laundering and it authorizes four legislative Acts of money laundering. They are: the *Money Laundering Act (2011)* which broadens the scope of the law to cover the proceeds of all crimes; an *amendment to the 1991 Banking and Other Financial Institutions Act (BOFIA)* that extends coverage of the law to stock brokerage firms and foreign currency exchange facilities; the *Central Bank of Nigeria (CBN)* which serves as the banking regulator in Nigeria with the power to approve or revoke bank licenses, power to freeze suspicious accounts and promote monetary stability with a sound financial environment; and lastly the *Economic and Financial Crimes Commission (EFCC)* Act that coordinates the Anti-Money Laundering (AML) investigations, information sharing and making illegal the financing and participation in terrorism.

4.1.1 Nigerian Drug Law Enforcement Agency (NDLEA) Decree 48 of 1989

This was the first significant piece of money laundering legislation in Nigeria and its promulgation was particularly a welcome development within the Nigerian context. Nigeria had

[226] Wole Soyinka- A Nigerian Nobel Prize Laureate

at that time developed large-scale drug trafficking activities and was identified as second only to China in the exportation of heroin into the United States.[227] This was facilitated by drug lords being able to operate from a relatively safe home base, characterized by a lack of law enforcement capacity, a certain political instability, indications of corruption and few resources to devote to fight against organised crime.[228] This made Nigeria an attractive proposition to money-launderers and active participation in international fraud and drugs ensured that there was always a regular stream of dirty money heading for the country. Established to enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs, the agency was empowered to investigate persons suspected to have dealings in drugs and other related matters. This Decree brought Nigeria in line with the provisions of the United Nations Convention against Illicit Drugs in Narcotic Drugs and Psychotropic Substances but it was homogenously silent on the term money laundering. However, it was rather unequivocal in its adoption of the provisions of the Vienna Convention by stating that the Agency was *''reinforcing and supplementing the measures provided in the convention on Narcotic Drugs 1961, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances and the United Nations Convention Against illicit traffic in narcotic drugs and psychotropic substances and its grave consequences.''*[229] In the spirit of the Vienna Convention also, the Decree sought to undermine the financial strength of drug-traffickers by *''adoption of measures to eradicate illicit cultivation of narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic in narcotic drugs and psychotropic substances.''*[230] The provisions for seizure,[231]

[227] Chibuike Ugochukwu Uche, (1998) 'The Adoption of a Money-laundering Regime in Nigeria' *Journal of Money Laundering Control (JMLC)* Vol. 1, Issue 3 pp 220-228

[228] *Ibid*

[229] S.3(1)(m) of the National Drug Law Enforcement Agency Act

[230] S.3(1)(d)

forfeiture[232]and criminalisation of offences[233]as articulated by the Vienna Convention were also covered by the wordings of the Act. Jurisdiction was placed exclusively in the Federal High Court of Nigeria to try any of the offences stipulated under the Act.

The narrow scope of the Decree with regards to money laundering predictably caught up with this Decree and by 1995, Nigeria enacted a new *Money Laundering Act.*[234]This statute featured the fundamental flaw of the NDLEA Decree 48 of 1989, to wit: it restricted money laundering offences to the laundering of proceeds of illicit drug trafficking; hence its scope of operation and effect were limited.[235] It limited predicate offences to drugs related crimes, trafficking, possession and distribution. The aim was to make certain that a documentary trail is left in all money laundering transactions through banks and to create a closer link between banks and the NDLEA. This new law however, did not stand the test of time as a series of loopholes which militated against its effectiveness were discovered. Amongst such defects were the ambiguity in the definition of money-laundering; the provisions of forfeiture for assets not being far reaching, and the failure of the Act to take account of the practice of evading mandatory reporting requirements by the customers of financial institutions. Conversely, the Act also failed to provide a 'safe harbour' for financial institutions in respect of the mandatory reporting requirements which was seriously impacting on compliance. Other notable deficiencies with the 1995 Act were discretionary powers it conferred on financial institutions whether or not to report a suspicious transaction. The penalties

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[231] S.33

[232] S.27

[233] S.26

[234] Decree No. 3 of 1995- Laws of the Federation of Nigeria (LFN)

[235] Adegboyega A. Ige,(2011) 'A Review Of The Legislative And Institutional Frameworks For Combating Money Laundering In Nigeria' – *Nigerian Institute of Advanced Legal Studies (NIALS) Journal on Criminal Law and Justice* Vol. 1

prescribed under the Act were aimed only at employees and directors whilst leaving out the financial institutions concerned. These factors were obvious loopholes for non-compliance. Within the context of Nigeria, this was not surprising, considering the usual pattern of legislation in the country hardly taking cognizance of all the circumstances before laws were passed. This was apparent during the military regimes where decrees were rolled out after meetings of the military-dominated ruling councils without legislative debate.[236] These deficiencies will prove costly to Nigeria and were exposed in the year 2001 when the Financial Action Task Force (FATF) blacklisted Nigeria as a non-cooperative country due to the body's perception that the country's political administration was unwilling or incapable of getting to grips with the perilous scourge of money laundering. This was occasioned by the task force's review of the laws and regulations in 47 countries selected on the basis of FATF members' experience which pitted rules and practices in these countries against 25 criteria. Of the 47 countries under review, 23 were found to be severely lacking and as such declared non-cooperative. Nigeria fell within this list hence the black-list. However, there is another narrative as to how/why Nigeria found itself blacklisted, and this was to the effect that Nigeria only discovered it was declared uncooperative when the country's then special adviser to the President (on budget monitoring and governance) travelled to Paris in 2001 to attend a meeting of transparency International.[237] Investigations into the matter subsequently revealed that the international body did in fact contact the Nigerian administration through the office of the Nigerian Minister for finance but the correspondence trickled down the bureaucratic echelons until it landed on the desk of a junior civil servant who was said to have sent a half-hearted response to the FATF. There were further missives from the FATF seeking to organise a

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[236] See Abiola Ojo,(1987) *Constitutional Law and Military Rule in Nigeria*, Evans Brothers Nigeria Publishers Limited Ibadan

[237] See Nuhu Ribadu, (2010) *''Show Me the Money – Leveraging Anti Money Laundering Tools to fight Corruption in Nigeria: An Insider Story.''* Centre for Global Development

fact finding trip which were ignored.[238] The narrative is that this Kafkaesque led to the declaration of non-cooperation and subsequent blacklist of Nigeria by the FATF without the country's leadership even being aware.[239] This begs the question whether the suspension would have been avoided were it not for the administrative lapses that brought about the communication gap between Nigeria and the body, or if it was an unavoidable consequence. Either way, Nigeria got blacklisted and the FATF demanded improvement regarding Anti-Money laundering laws. Concerted efforts were made by the Government of Nigeria to improve the image of the country and it was de-listed from the black-list in June 2006. However, while it is impossible at this point to ascertain whether Nigeria would have been blacklisted/suspended if the aforementioned bureaucratic anomalies that plagued communication between the FATF and the country had not happened, the Nigerian Government nevertheless immediately sought to address the country's AML deficiencies by the propagation of an improved cooperation with the FATF by enacting the *Money Laundering (Amendment) Act of 2002*. The Act extended the scope of the offence of money-laundering by expanding the realm of its predicate offences from drugs to any crime/ illegal act. It also extended AML obligations to non-bank financial institutions and enhanced customer due diligence requirements. After reviews, defects were still apparent and these lacunas led to the enactment of the *Money Laundering (Prohibition) Act 2004* which repealed the 2002 Act and made far reaching provisions as far as money laundering in Nigeria was concerned. The Act limited the amount of cash that private individuals and corporate entities could hold for the purpose of making any payments to Five Hundred Thousand Naira(500,000,00) and One Million Naira(1,000,000,00) respectively.[240] It also provided that any transactions involving sums of money above these stipulated maximums required being done through a financial institution. In an economy as cash

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[238] *Ibid*

[239] *Ibid*

[240] S.1(1)

based as Nigeria's, this provision sought not only to minimise reliance on such, but to also circumvent the consequences of the inability of regulatory agencies formulating and implementing forward looking monetary and fiscal policies. Furthermore, a limit of Ten Thousand Dollars ($10, 000, 00) with regards to amounts which could be transferred to or from a foreign country was placed, which also entailed that any sum exceeding this amount (or its equivalent in Naira, securities or any other form) be reported to the Central Bank of Nigeria or to the Securities And Exchange Commission in the case of a public corporation.[241] Such a report was required to indicate the nature and amount of the transfer, the names and addresses of the sender and receiver of the funds.[242] The thinking behind this provision was to aggrandize the monitoring process by keeping track of financial transactions. It prohibited the laundering of the proceeds of crime or any illegal act; incorporated and defined designated Non-Financial Institutions and vested the regulatory responsibility of same on the Federal Ministry of Commerce. Provisions were also made for appropriate penalties for all violations.[243] Besides the successive Acts, there were other statutory measures undertaken by the Nigerian authorities in the fight against money-laundering.

4.1.2 The Independent and Corrupt Practices Commission (ICPC)[244]

This is an important Nigerian body in the Nigeria's Anti-money laundering efforts, and it seeks to prohibit and prescribe punishment for corrupt practices and other related offences.[245] Corruption is an ill that has eaten deep into every facet of the society as several years of military rule saw it rise to almost institutionalised levels. Corruption enthroned duplicity, crass selfishness, avarice as well

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[241] S.2(1)

[242] S.2(2)

[243] S.16

[244] The Corrupt Practices and Other Related offences Act 2000. No.5'

[245] The Explanatory Memorandum- <http://icpc.gov.ng/the-establishment-act/ > Accessed January 22, 2015

as indolence and it appeared everyone became frenzied to take the short-cut to achievement. Economically, corruption rendered Nigeria a classic study in paradox of grinding poverty in the midst of God-given abundance.[246] It made transparent accountability in governance at all levels extremely difficult.[247] In order to curb the tide, the then newly elected President of Nigeria declared a war against corruption hence the establishment of the commission.[248] It is worthy of note at this juncture however, that previous regimes had successively instituted Legal instruments, measures and policies designed to combat corruption in the country. Paradoxically, rather than achieve the desired results, there were anomalies in the implementation of these remedial measures that engendered a culture of impunity and rendered the malaise more chronic.[249] The ICPC Act brought a fresh and decisive perspective to the fight against corruption by adopting a holistic approach encompassing enforcement, prevention and educational measures. It captures in a single document, a host of corrupt offences in their old and sophisticated guises. It sets up the Independent Corrupt Practices and Other Related Offences Commission with wide-ranging powers. The Act brings under its purview, all Nigerians in the private and public sectors, and even those public officers with constitutional immunity.[250]

The Independent Corrupt Practices Commission was thus established charged with duties[251] as delineated in Section 6 (a-f) of the Act summarized as follows; (i) to receive and investigate reports

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[246] See http://icpc.gov.ng/legislative-background/ Accessed January 22, 2015

[247] Ogbonna M.I (2004), ''The ICPC and the fight against Corruption'' In Saliu H.A (Ed) *Nigeria under Democratic Rule (1999-2003)* Vol.1 Ibadan University Press

[248] In his inaugural speech, President Olusegun Obasanjo enthused ''Corruption will be tackled head-on. No society can achieve its full potential if it allows corruption to become the full-blown cancer it has in Nigeria…There will be no sacred cows.'

[249] See <http://icpc.gov.ng >

[250] See <http://icpc.gov.ng/icpc-history/>

[251] See <http://icpc.gov.ng/legislative-background/>

of corrupt offences as created by the Act and in appropriate cases prosecute the offender(s) – Enforcement duties; (ii) to examine, review and enforce the correction of corruption-prone systems and procedures of public bodies, with a view to eliminating or minimizing corruption in public life- prevention duties; and (iii) to educate and enlighten the public on/against corruption with a view to enlisting and fostering public support for the fight against it. A cursory look at these duties show that the functions transcend mere investigations, arrests and prosecution of people who are guilty of corruption but rather, extends to corrective, preventive and educational responsibilities. The ICPC however, like other anti-corruption agencies before it, despite fleeting successes, has not recorded strides commensurate with the aims of its creation.

4.1.3 The Economic and Financial Crimes Commission (EFCC)

The commission was established in 2003 mainly in response to the pressure from the Financial Action Task Force which named Nigeria as non-cooperative in the fight against money-laundering due to the severe negative perceptions of the country as a money-laundering heaven and other forms of economic and financial crimes. Established by the EFCC (Establishment) Act 2002 and (repealed and re-enacted by EFCC) Act 2004, the law made the EFCC the overall coordinating agency for anti–money laundering activities in Nigeria, with powers of prevention, enforcement and recovery of assets. The EFCC is responsible for the investigation of all financial crimes, including money laundering, but also, among other things, bribery, fraud, drug and human trafficking, illegal arms dealing, smuggling, oil bunkering, illegal mining, tax evasion, counterfeiting, and piracy.[252] The commission is also authorized to seize assets and require banks to freeze bank accounts and share all required information. It may initiate investigations into the financial affairs of anyone suspected to enjoy a lifestyle or own assets that seem out of line with

[252] See Nuhu Ribadu, (2010) *Show Me the Money – Leveraging Anti Money Laundering Tools to fight Corruption in Nigeria: An Insider Story.* Centre for Global Development

their legitimate income.[253] The powers of investigation and prosecution[254] are also within the exclusive remit of the commission and this is particularly important in circumventing instances whereby separate agencies indulge in petty bickering and point fingers at each other while neither takes responsibility for failure. Also domiciled within the EFCC is the *Nigerian Financial Intelligence Unit (NFIU)* which is the Nigerian arm of the global financial intelligence units. It operates as an autonomous unit in the African region and seeks to comply with international standards on combating Money Laundering and Financing of Terrorism and proliferation. The NFIU largely draws its powers from the Money Laundering (Prohibition) Act 2011 as amended in 2012 and the Economic & Financial Crimes Commission (EFCC) establishment Act, 2004. The core mandate of the NFIU as required by international standard is to serve as the *"national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of the analysis to law enforcement and anti-corruption agencies.*[255] The EFCC started on a very bright note by giving ordinary Nigerians, jaded by endemic corruption, and overwhelmed by cynicism, a glimmer of hope when the commission made high profile arrests and secured convictions. The commission also secured the repatriation of funds stolen and stashed in foreign accounts by corrupt politicians, with the United Kingdom and Switzerland. The commission however, just like the ICPC has toiled as regards its effectiveness due to factors that shall be discussed later in this work.

4.1.4 The Central Bank of Nigeria (CBN); and the Securities and Exchange Commission (SEC)

On the spectrum of regulatory bodies, the CBN and SEC hold forth. The CBN- the apex bank of the country, acts as a financial sector surveillance body, identifying trends and patterns of

[253] *Ibid*

[254] Section 7(1) (a) of the EFCC (Establishment) Act 2004.

[255] See <http://www.nfiu.gov.ng/index.php/nfiu> Accessed January 10 2016

corruption in banks and other monetary institutions. There is also the responsibility to coordinate efforts among financial organisations to increase efficiency in regulatory oversight through the Financial Services Regulation Coordinating Committee, representing a framework for coordination of regulatory and supervisory activities in the Nigerian financial sector. The Securities and Exchange Commission on its part is a government agency mandated to regulate and develop the Nigerian capital market.[256] In regulating the market, the Commission undertakes the registration of securities and market intermediaries to ensure that only fit and proper persons / institutions are allowed to operate in the market. It inspects capital market operators, surveillance and investigation of alleged breaches of the laws and regulations governing the capital market and enforcement of sanctions where appropriate. The commission also has powers of enforcement taken against market operators who are found wanting.

4.2 Money laundering (Amendment) Prohibition Act 2011

Despite efforts to get itself off the FATF blacklist, Nigeria found it tough to satisfy the regulatory body of its readiness for consideration as a fully compliant country in the war against money laundering. During this period, the *Inter-Governmental Action Group against Money Laundering in West Africa (GIABA)* bore the task of checking Nigeria's intentions regarding the enactment of AML/CTF Laws. This group was established by the Economic Community of West African States (ECOWAS) Authority of Heads of State and Government in the year 2000 as a major response and contribution of the *ECOWAS* to the fight against money laundering. It is a specialized institution of *ECOWAS* responsible for strengthening the capacity of member states towards the prevention and control of money laundering and terrorist financing in the region. Apart from member states, GIABA grants Observer Status to African and non-African States, as well as Inter-Governmental

[256] See <http://www.sec.gov.ng/what-we-do.html > Accessed 10 January 2016

Organizations that support its objectives and actions and which have applied for observer status.[257] In this observer status, the organisation sought to analyse and gauge Nigeria's levels of compliance with the FATF 40 + 9 Recommendations in what it called the Mutual Evaluation Report. In its adopted report dated May 2008, in a summary of the AML/CFT measures in Nigeria as of September 24 to October 5, 2007 (the days of the on-site visit), Nigeria was rated Partially-Compliant (PC) or Non-Compliant in 13 out of the 16 core and key recommendations of the FATF. This was not considered good enough to take the country off the blacklist. However, in the year 2010, Nigeria made a political commitment to address its deficiencies within a year, and this eventually led to the enactment of the *Money Laundering (Amendment) Prohibition Act* of 2011. This 2011 Act made for the comprehensive prohibition of terrorism, the laundering of the proceeds of crime, or any illegal act. It also provided appropriate penalties and expanded the scope of supervisory and regulatory authorities so as to address the challenges faced in the implementation of the anti-money laundering regime in Nigeria. In line with the FATF recommendations, the Act placed specific duties on banks and financial institutions as follows:-

1) The duty to establish the identity of customers (Know Your Customer)

2) The duty to report an international transfer of funds

3) The duty to report suspicious transactions

4) The duty to preserve records of a customer's transaction

5) The duty to disclose a customer's transactions

6) The duty to develop anti-money laundering programmes

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[257] See <http://web.giaba.org/about-giaba/index_656.html > Accessed July 2nd 2016

4.2.1 The KYC Principle.

This is a principle hinged on the essential need for financial institutions to know who exactly they are engaging in business with in order to prevent themselves from inadvertent involvement in money laundering in any shape or form. While organisations harbour the hope that the occurrence of criminals in their customer and supply data bases and among their business associates is minimal, there is increasing evidence of growing financial undoing. The UNODC estimated in 2009 that criminal proceeds amounted to 3.6% of global GDP. The estimated amount of money laundered globally in one year is 2-5% of global GDP, or $800M-$2 Trillion Dollars. What this means in essence is that criminals are very much involved in day to day activities with financial institutions, hence the need for identification and verification of customers as contained in the FATF 40 recommendations on money laundering and nine special recommendations on terrorist financing(FATF 40+9). However, contrary to the general view held in many quarters that the emergence of verification of the identity of customers was a brain child of the FATF recommendations; it has always been practiced in England and some other commonwealth countries. It was traditionally regarded as a matter of necessity for a bank to both check the identity of a new client and to ascertain whether they were suitable to hold an account. Failure to do so ultimately left such a bank open to an action in conversion by a party who suffered loss as a result of failure to do so.[258] Nevertheless, the FATF recommendations provides a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. They are the universal/international standards in this field and have been recognised, endorsed, or adopted by many international bodies including Nigeria. Not knowing who you are doing business with can be costly to banks and financial institutions generally. The need for the KYC principle cannot be

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[258] See *Ladbroke v Todd* [1914] 30 T.L.R See also *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] A.C. 68, PC

overemphasised. It is absolutely essential at the time of applying for business. The sinister motives of terrorists and their financiers are at times fuelled by an increasingly false confidence that liberal democratic governments will not closely scrutinize most financial transactions.[259] The gathering and amalgamation of customer information such as source of funds, type of business activity etc., places banks in a better stead to anticipate the level of customer account activity. This in turn opens the possibilities to offering improved services to the customers and serves as a form of protection to investment advisors by knowing exactly what and what not to include in their clients portfolio. By submitting the required information, customers actually not only help the bank to discharge its statutory/regulatory obligation but also safeguard their own interest. Knowing and understanding customers is an overriding rule of exceptional companies. Award winning business builders know their customers as well as their own families, perhaps even more so.

In establishing the identity of customers, the Nigerian Money Laundering Act explicitly states that *''a financial institution and a designated Non-Financial Institution shall verify its customers identity and update all relevant information on the customer before opening an account for, issuing a passbook to, entering into a fiduciary transaction….during the course of the relationship with the customer, as well as to scrutinize all on-going transactions undertaken throughout the duration of the relationship in order to ensure that the customer's transaction is consistent with the business and the risk profile.''*[260] Where the customer is an individual, such a customer shall be required to provide *''proof of his identity, by presenting to the Financial Institution or Designated Non-Financial Institution a valid original copy of an official document bearing his names and photograph or any other identification documents as the relevant*

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[259] R. Wedgwood, "Countering Catastrophic Terrorism: An American View," in: *Enforcing International norms against Terrorism*, Edited by Andrea Bianchi. Hart Publishing (2004) 103-104

[260] S.3 (a) (b)

regulators may from time to time approve.''[261] The determination of proof of address is a necessity, and in this case, originals of receipts issued within the previous three months by public utilities suffice. Other documents as the relevant regulatory authorities may from time to time approve also satisfy this requirement.[262] In the case of a corporate body, such a customer shall be required to provide proof of its identity by providing its certificate of incorporation and other valid official documents attesting to the existence of the body corporate. Additionally, the manager, employee or assignee delegated by such a body corporate to open an account shall be required, in addition to all the identification documents an individual customer is required to produce, but also an accompanying power of attorney granted him in that behalf.[263] The Act also makes reference to a casual customer where-in its states that such customers are to comply with the identification requirements stipulated for regular customers prior to engaging in business transactions with financial institutions or designated non-financial ones. This is specifically when and only if the transaction in question involves any number or manner of transactions including wire transfers involving a sum exceeding US$1,000 or its total equivalent if the amount is known at the commencement of the transaction or as soon as it is known to exceed the sum of US$1,000 or its equivalent.[264] The Act is not explicit as to what constitutes a casual customer but a 'casual customer' may be described as a customer who transacts with a bank without having an account in the said bank.[265] However, considering the mandatory requirements of S.3 (1) which makes it paramount that the identity of potential customers be ascertained before any form of relationship

[261] S.3(2)(a)

[262] S.3 (2) (b)

[263] S.3(4)

[264] S.3(5)

[265] Orji Uchenna Jerome,(2001) ''A Review of the Special Duties of Banks under the Nigerian Money Laundering Act,'' *Journal of International Banking Law & Regulation (JIBLR)* Vol. 26, Issue 6

is entered into with such a customer by the bank, it is difficult to see the possibility of such a relationship in the first place. This notwithstanding, it is worthy of note that Nigerian banks have taken the approach of identifying all potential customers irrespective of the amount involved in the transactions they intend to make.[266] On a conclusive note, the KYC principle aims to prevent banks from being used by unscrupulous or criminal elements for their criminal activities including money laundering, prevent frauds and risk, the protection of bank's reputation, and the avoidance of opening of accounts with fictitious name and address as well as the elimination of bad customers and protection of good ones.

4.2.2 Duty to report suspicious transactions.

This duty mandates the reporting of any transaction that a bank deems as irregular and/or surrounded by conditions of unusual activity. The main issue is to determine what could be regarded as 'unusual and suspicious'. Going by the customer profiling requirement as discussed under the KYC rule, any transaction that falls out of the routine of the customers previous transactions should fall in the category of being unusual. Although there is no set prior period within which banks may refer to in determining what is regular or not, the spirit of this provision presupposes that such banks know their customers enough to realise and spot a red flag immediately such arises. Suspicion on the other hand provides a trickier scenario. What appears suspicious may in fact not be anything sinister. Such is the difficulty of pinpointing what exactly constitutes suspicious transaction. All one can say is that the suspicious transactions will often be characterised as being inconsistent with a customer's known legitimate business objectives. Therefore, a useful method in identifying suspicious transactions is first to identify unusual transactions before examining these further to access whether they are suspicious and therefore

[266] *Ibid*

require reporting.[267] Also, a transaction which appears unusual is not necessarily suspicious. Even customers with stable and predictable transactions profile will have periodic transactions that are unusual for them. Many customers will, for perfectly good reasons, have an erratic pattern of transactions or account activity. So the unusual is, in the first instance, only a basis for further enquiry, which may in turn require judgement as to whether it is suspicious. A transaction or activity may not be suspicious at the time, but if suspicions are raised later, an obligation to report then arises. It is a possibility which is more fanciful that the relevant factor exists. As such, a vague feeling of unease would not suffice.[268]

Under the Nigerian Act, *''where a transaction in the opinion of a financial institution or designated non-financial institution involves terrorist financing or is inconsistent with the known transaction pattern of the account or business relationship…''*[269] Where legal or regulatory requirements mandate the reporting of a suspicious activity, once a suspicion has been formed, a report must be made.[270] As a corollary to this, the Nigerian Act requires financial institutions and designated non-financial institutions to within seven days of a transaction it considers as suspicious, draw up a written report containing all relevant information on such a transaction including the identity of the principal and, where applicable, of the beneficiary or beneficiaries.[271] Furthermore, such an institution must take appropriate action to prevent the laundering of the proceeds of a crime or illegal act and at the same time, send a copy of the report and action taken

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[267] Mark Tantam, Nick Mathews and Joe Traynor, ''Practical Implementation of Regulations and Rules'' in Toby Graham (ed) *International Guide to Money Laundering Law and Practice*, 2nd edition (Lexis Nexis,2003) pp 66

[268] This is based on the English case of *R v Da Silva [2007] 1 WLR 303*

[269] S.6(1)(d)

[270] *FATF Guidance* (2007), para.3.16

[271] S6(2)(a)

to the Economic and Financial Crimes Commission.[272] There is a degree of ambiguity here in that the Act does not specifically define what an 'appropriate action' means, but reading through the provisions of S.6 (4-7) of the MLA, it can be ascertained that it means the prevention of laundering of funds pending an initial investigation of the transaction that brought about the suspicion. The reporting of such a suspicious transaction to the commission is usually followed by an acknowledgement of receipt by the commission which shall be sent to the financial institution within the time allowed for the transaction. The commission may by a notice, defer such a period for a maximum of 72 hours by placing a stop order on the account if it is discovered that such an account or transaction is suspected to be involved in any crime. At the expiration of such a stop notice, or where the initial acknowledgement of receipt to the bank was not accompanied by a notice, the bank or financial institution may carry out the transaction.[273] The bank is free of any liabilities if it proceeds with the transaction even if the commission has sent out a notice to block the transaction in so far as such notice has on the expiration of 72 hours not reached the bank. Computation of time here does not start from when the notice was sent out, but when it was received. By the provisions of S.6(7), the Federal High Court may at the request of the commission, or other persons or authority duly authorized in that behalf, order that the funds, accounts or securities referred to in a report be blocked. This is when it has proved impossible to ascertain the origin of funds, hence a suspicious transaction. The adherences to the suspicious requirements are mandatory on banks and a failure to comply is deemed an offence liable on conviction to a fine of N1.000.00 for each day during which the offence continues.[274] Notwithstanding this provision also, the Central Bank of Nigeria may also impose a penalty of not less than One Million Naira or the suspension of any license issued to the financial institution

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[272] S6(2)(b)(c)

[273] S6(6)

[274] S.6(9)

or designated non-financial institution for failure to comply with the suspicious reporting requirements.[275] It is important to note at this juncture, that possibilities exist where accounts may get blocked or transactions declined based on the aforementioned factors, which may not necessarily be proceeds of any crime. Under previous laws, such a customer could successfully maintain an action for damages against a bank because there was no form of protection for the banks. However, specifically under the current Nigerian Act, the directors, officers and employees of financial institutions and designated non-financial institutions who carry out these duties in good faith are not liable to any civil or criminal proceedings brought against them by customers.[276] Statements made by those making a Suspicious Activity Report (SAR) that they have a suspicion suffices, and it will be exceptional for courts to require those that report a suspicion to provide a justification for having a suspicion. The English Court of Appeal has held that Suspicion need not be proved at all, and there is no mechanism where an officer of a bank can be required to be cross examined as to the existence of their suspicion.[277] This was premised on the ground that any cross examination of a bank employee who had confirmed he had suspicion would be pointless and tantamount to a court investigating such a suspicion. In reality, it will be for those challenging the making of an SAR to prove that no suspicion existed.[278] There have been arguments against this position on the grounds that where banks do not produce evidence of suspicion; it will be too easy for banks to assert a suspicion that was baseless.[279] As valid as this argument may seem, it is decided that *''the existence of suspicion is a subjective fact,*

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[275] S.9(2)

[276] S.6(10)

[277] *K Limited v National Westminster Bank (2006) ECWA Civ 1039*

[278] Brown, G. and Evans, T. (2008) ''The Impact: The breadth and depth of the Anti-Money laundering provisions requiring reporting of suspicious activities,'' *Journal of International Banking Law and Regulation (JIBLR)* 23(5) 274-277

[279] *K Limited v National Westminster (Supra)*

and there is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not.''[280]

An interesting point to note under the Nigerian Act is that while it explicitly mentions directors, officers and employees of a financial institution as being exempted from any civil or criminal liability in the event of an action by an aggrieved customer, it is silent on the liabilities of the same group of people in the event of a failure to report a transaction that should have raised a red flag and has ultimately led to the laundering of funds. The Act rather imposes liability and penalty on the bank or financial institution as an entity. This is rather flawed because the banks do not form the suspicions; they are formed by employees and officers of the bank on the frontline of the Anti-Money Laundering departments. If the Act has specifically exempted such people from liability, the same Act should hold the individuals accountable for their actions too. This is no way suggesting that the banks or financial institutions should escape punishment, but rather a reactive opinion to the inconsistency of the punitive measures of the Nigerian Act in this regard.

4.2.3 Duty to Disclose Customer's Transactions

There is a mandatory duty imposed upon Nigerian banks to disclose customer transactions that exceed a stipulated threshold. As a consequence, banks are required to (within seven days) report any single transaction, lodgement or transfer of funds in the excess of N5,000,000 or its equivalent in the case of an individual; or N10,000,000 or its equivalent in the case of a body corporate.[281] This provision circumvents (in part) the SAR provisions in that suspicion does not play any part in initiating disclosure. The transaction must be reported once it goes beyond the stipulated threshold if and only when done in a single transaction. Many money launderers are familiar with these thresholds however, and in order to remain anonymous and avoid the detection of law enforcement officials, they "structure" their transactions so that the

[280] *K Limited v National Westminster (Supra)*
[281] S.10(1)

recordkeeping or reporting requirements will not be triggered. This intentional structuring of lodgements below the stipulated threshold (Structuring/smurfing) by the letter of the Nigerian law is not an offence because there is no explicit provision prohibiting such transactions. It is important to note too that not all multiple transactions constitute structuring. Today however, with the CTR requirements in place, customers could argue that the fiduciary duty of confidentiality a bank owes its service users is being breached if details of transactions are revealed as required by law? After all, confidentiality is the cornerstone of the bank-customer relationship and banks usually have a strict duty to protect the confidentiality of all Customers and former Customers affairs. This is couched on the common law duty of secrecy (confidentiality) imposed upon banks which implies that *‘‘banks should not as matter of course disclose their customer's affairs, but only when reasonably necessary.’’* This is a qualified duty, and a leading common law authority is the British Court of Appeal decision in *Tournier v National Provincial and Union Bank of England* where-in, specifically, Bankes L. J. stated: *“On principle I think the qualifications can be classified under four heads: (a) Where disclosure is under compulsion of law; (b) Where there is a duty to the public to disclose; (c) Where the interests of the bank require disclosure;* and *(d) Where the disclosure is made by the express or implied consent of the customer.”*[282]

Going by this dictum from the learned Judge, banks and financial institutions alike should be protected by the compulsion as well as the duty imposed on them by law to reveal any transactions that fall within the realms of suspicion as stipulated by the law. The Nigerian Act follows this lead by stating explicitly that directors, officers and employees of financial institutions and designated non-financial institutions who carry out their duties under the Act in good faith shall not be liable

[282] *[1924] 1 K.B. 461*

to any civil or criminal liability nor have any criminal liability or civil proceedings brought against them by their customers.[283]

4.2.4 Duty to preserve records of a customer transactions

The preservation of customer records is sacrosanct to any attempt at the regulation of money laundering because the lack of it hinders such regulatory measures which will then result in law enforcement bodies not being able to trace and investigate acts of money-laundering. As such, financial institutions and designated non-financial institutions are required to preserve a record of a customer's identification for a period of at least 5 years after the closure of the account or the severance of relations with the customer as the case may be.[284] This will also include records and other related information of a transaction carried out by a customer as well as any suspicious transaction reports the financial institution may have previously made on such a customer's transactions within the preceding 5 years of severance of relationship or closure of the account.[285] The aforementioned records shall be preserved at the disposal of regulatory authorities and shall be communicated on demand to such bodies.[286]

4.2.5 Duty to develop Anti-Money Laundering Programmes

The development of programmes aimed at combatting money laundering is prevailed upon Nigerian Financial institutions and Non-Financial institutions alike. This duty is sought to be achieved by the designation of compliance officers at management level, at its headquarters, at every branch and local office. There are also regular training programmes for employees, the

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[283] S.6(10)

[284] S.7(A)

[285] S.7(B)

[286] S.8

centralization of the information collected and then the establishment of an internal audit unit to ensure compliance.[287]

4.3 The Current Law

The current Anti-Money Laundering law in Nigeria is the Money Laundering (Prohibition) (Amendment), 2012 and it was passed into law as an amendment of the principal Act specifically to expand the scope of Money Laundering offences and enhance customer due diligence measures and allied matters.[288]

The amendment Act has 12 new provisions-

1. Amendment of section 2 (5)

2. Amendment of section 3

3. Amendment of section 6

4. Amendment of section 9

5. Amendment of section 10

6. Amendment of section 11

7. Amendment of section 12

8. Substitution for section 15

9. Amendment of section 16

10. Substitution for section 20

11. Substitution for section 23

[287] S.9(1) (A-D)

[288] Amendment of Act No.11, 2011

12. Amendment of section 25

Under the principal Act, a false declaration to the Nigerian Customs Service or failure to declare at all pursuant to S.12 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act amounted to an offence and liable on conviction to a forfeiture of not less than 25% of the undeclared funds or negotiable instrument. This was amended to a complete forfeiture of such undeclared funds by the Amendment Act.[289] More is also demanded of Financial and Non-Financial Institutions as regards customer identity in that the identity of such customers must be ascertained, whether permanent or occasional, natural or legal person or any other form of legal arrangements, using identification documents as may be prescribed in any relevant regulation.[290] This ensured that the nature of customer transactions is most likely to be determined from the start of the business relationship rather than later. The provisions of the Principal Act only demanded a verification of such identity without particularly seeking to know the nature. The identity of the beneficial owner must also be determined and reasonable measures taken to verify the identity of such a beneficial owner using relevant information or data obtained from a reliable source such that the Financial Institution or the Designated Non-Financial Institution is satisfied that it knows who the beneficial owner is.[291] Also under the amended Act, the wordings of the Principal Act were altered from “Special Surveillance on Certain Transactions” to a new marginal note “Suspicious Transaction Reporting”. The time lapse under the Principal Act which was 7 days within which a report had to be made in the event of a suspicious transaction was expunged by the new Act which compels an immediate report once the suspicion is formed by the relevant authority.[292] This ensures

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[289] S.2

[290] S.3(1A)

[291] S3(1)(C)

[292] S.4(A)

that a dubious transaction is not given any time to manifest before action is taken. Such a report is to be made to the Economic and Financial Crimes Commission only and only the Chairman of the commission may place an order stopping a transaction that bears suspicions.[293] The Principal Act had such powers shared by the Governor of the Central Bank of Nigeria. The failure to comply with internal procedures, policies and control attracted a penalty to be imposed by the Central Bank, the Securities and Exchange Commission, National Insurance Commission or any other relevant regulatory authority.[294] This was a departure from the provisions of the principal Act where only the central Bank commanded such powers.

Shell banks are expressly prohibited and no person is allowed to establish and own one in Nigeria and financial institutions are precluded from entering into or continue correspondent banking relationships with shell banks. They must also satisfy themselves that a respondent financial institution in a foreign country does not permit its accounts to be used by shell banks.[295] The Principal Act only made reference to numbered and anonymous accounts.[296] The offence of Money laundering is expressly defined and prohibited by the amendment Act.[297] The Principal Act had an ambiguity about it as regards this as there was no express mention of the crime to tally with the offences stipulated. The only mention was in the marginal notes. The amended Act however clearly states “any person or body corporate, in or outside Nigeria, who directly or indirectly conceals or disguises the origin of converts or transfers; removes from the jurisdiction; or acquires, uses, retains or takes possession or control of any fund or property, knowingly or reasonably ought to

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[293] S.4(D)

[294] S.5(2)(A-B)

[295] S.7(2)(3)

[296] S.11 *MLPA Act* 2011

[297] S.15(1)(2)

have known that such fund or property is, or forms part of the proceeds of an unlawful act; commits an offence of money laundering.[298] Any person who is found to commit the offence is liable on conviction to a term of not less than 7 years but not more than 14 years imprisonment.[299] This was unlike under the Principal Act where the punishment on conviction was for a prison term not less than 5 years but not more than 10 years.[300] Body corporate were also included in the list of possible Money Laundering offences under the amendment and liable on conviction to a fine of not less than 100% of the funds and properties acquired as a result of the offence committed as well as a withdrawal of licence.[301] Like the Principal Act, jurisdiction is exclusively reserved to the Federal High Court to "try offences under this Act or any other related enactment..."[302] The addendum also addresses the issue of delays by conferring on the same court, the powers to adopt all legal measures necessary to avoid unnecessary delays and abuse in the conduct of matters.[303] An application for stay of proceedings in respect of any criminal matter brought under this Act shall not be entertained as a matter of course.[304] This of course, is subject the provisions of the Constitution of the Federal Republic of Nigeria. The Act gives powers to the Attorney General of the Federation who is the Chief Law Officer of the country to make orders, rules, guidelines or regulations as are necessary for the efficient implementation of the provisions of the Act.[305] These may include the method of custody of video and other electronic recordings of suspects

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[298] *Ibid*

[299] S.15(3)

[300] S.15(1)(B) *MLPA*(As Amended) 2011

[301] S.15(4)(A)(B)

[302] S.20(1)(A-B)

[303] S.20(3)

[304] S.20(4)

[305] S.23(1)

apprehended under the Act; method of compliance with directives issued by relevant international institutions on money laundering and terrorism financing counter measures; procedure for freezing, unfreezing and providing access to frozen funds or other assets; procedure for the prosecution of all money laundering cases in line with international human rights standards; and any other matter the Attorney - General may consider necessary or expedient for the purpose of the implementation of the Act.[306]

On another note, Nigeria made strides towards aligning itself with terrorism laws as regards terrorist financing by the passing into law of the Terrorism (Prevention) Act No. 10, 2011 which was amended by the current Terrorism (Prevention) (Amendment) Act, 2013. The enactment of the Anti-Terrorism Act was a turning point in the implementation of a robust counter terrorism measures in the country because it is a major requirement for an effective AML/CFT system. It is very important to the terrorists to conceal the use of the funds so that the financial activity goes undetected, and for such reasons, the FATF recommends that each country criminalises the financing of terrorism, terrorist acts and terrorist organisations.[307] Such offences are also to be made predicate offences to the crime of money laundering. Nigeria did follow this lead by the promulgation of the terrorism Act. The amended Act makes provision for extra-territorial application and strengthens terrorist financing offences. Efforts to combat the financing of terrorism requires countries to consider explaining the scope of the AML framework to include non-profit organisations particularly charities, to make sure such organisations are not used directly or indirectly to finance or support terrorism.[308] The Nigerian Act holds that anyone found to be a

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[306] S.23(2)(A-E)

[307] *FATF Special Recommendations*

[308] *Ibid*

financier to terror is liable on conviction to a life prison term.[309] A prison term of not less than twenty years is imposed on anyone found liable to dealing with terrorist property

4.4 The FATF All-Clear

After being de-listed from the black list in June 2006, Nigeria remained under the monitoring process of FATF/GIABA. IN 2010, the FATF identified the key areas of deficiency and by June 2013, conducted an on-site visit to the country having noted the improvements with regard to the highlighted deficiencies. In the aftermath of this visit, the FATF identified Nigeria's significant progress in improving its AML/CFT regime and noted the establishment of a legal and regulatory framework to meet its commitments in its Action Plan regarding the strategic deficiencies that the FATF had identified in February 2010. Nigeria therefore ceased to be subject to FATF's monitoring process under its on-going global AML/CFT compliance process.''[310] Considering that classification as a high risk jurisdiction comes with trepidations of many financial institutions from other jurisdictions to transact any form of business with their Nigerian counterparts, the efforts of Nigeria towards aligning with the model Anti-Money Laundering standards can only be admired. The country was now free from the repercussions of being labelled non-cooperative and "it is expected that there will be great reduction in the costs and time line of financial transactions between individuals and institutions between Nigeria and other countries. Besides the guarantee of improved global rating for the country's financial system, the amended laws and regulations will strengthen the enforcement and regulatory capacities of relevant institutions in Nigeria.''[311]

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[309] S.13(1)

[310] Jurisdictions no longer subject to the FATF's on-going global AML/CFT compliance process. (Paris October 2013) <http://www.fatf-gafi.org/countries/n-r/nigeria/documents/fatf-compliance-oct-2013.html#Nigeria> Accessed June 2015

[311] This was part of a press release titled *Nigeria Finally Exits FATF* by Stephen Oronsaye, Chairman, Presidential Committee on Financial Action Task Force

Conclusion

Admirable strides have been made by Nigeria since the events that culminated in the blacklist over a decade ago but the practicalities of these strides are yet to stand the test of time. The FATF recognises the fact that countries have diverse legal, administrative and operational framework and different financial institutions. This means they cannot take all identical measures to counter the threats of money laundering. Whether Nigeria took cognisance of this while framing its Anti-Money Laundering Standards remains to be seen. However for reasons that shall be advanced in subsequent chapters of this work, I hold the firm ground that the FATF only sanctioned an academic progress rather than a practicable one suited to the complex peculiarities of the Nigerian Nation.

5.0 The FATF Recommendations; (Application and Practicalities)

5.1 Introduction

The legal and regulatory improvements Nigeria made to its Anti-Money Laundering outlook in the last decade was a direct reaction to the force and pressure of the FATF, and this ultimately brought a new order by aligning Nigeria with International standards regarding Money Laundering laws. However, it is important to note that Nigeria could easily have declined compliance and remained on the blacklist if it desired. This probability makes it necessary to examine the possible scenario and the punitive measures that would have availed the FATF had compliance been discountenanced by Nigeria. The effects of being blacklisted as non-compliant have been discussed in previous chapters, but the effect of laws goes beyond mere passage and sanction. They must be implemented with the intended effect and in order to achieve the desired intention that necessitated its creation in the first place. The *Nigerian Money Laundering Act 2012* satisfied the requirements required of the International regulatory body, but how this law holds up within the context of the Nigerian economy and society in general is equally worthy of a considered examination. The previous chapter discussed the strides Nigeria made in its reception of International AML standards, and concluded by questioning whether the strides were more academic than practicable. This chapter aims to (i) appraise the legal force of the FATF recommendations; (ii) analyse the efficiency of these international Standards to curb money laundering within the context of the Nigerian society; and (iii) analyse the propriety or otherwise of the FATF endorsement of Nigeria as a fully compliant AML jurisdiction within the contemporary aftermath of the endorsement.

5.2 The legal Force of the FATF Recommendations; (Law and Culture: The Letter, Spirit and Performance of Law)

Laws, in their most general signification, are the necessary relations arising from the nature of things.[312] They carry distinct features- the letter of the law; the spirit of the law; sanctions; cost; side effects; performance and fallibility. Without necessarily referring to the FATF recommendations as laws, they shall be tested against these features to determine the force they ultimately carry. The letter of the law (the *litera legis)* equates to its literal meaning, and it appears to signify the formal boundary between legal and illegal actions, which tend to dichotomize our judgments of culpability and punishment in "legal" versus "illegal" terms.[313] By letter of the law, it is meant a written order, a set of instructions or software that provides directions for human behaviour. The entire written content of a law *is* the 'letter of the law', but it presumes to convey the *spirit of the law*. The 'spirit' of the law represents its general meaning or purpose, and what is assumed to be a rational understanding of the intention of the law.[314] It thus averts to the social and ethical values assumed to be codified by the letter of the law.[315] The spirit of the law can be contained only within the letter of the law, and this spirit or purposeful intent is *''what the law ought to be.''*[316] In other words, laws are tools that are intended to be useful. Since

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[312] Montesquieu, C.D.S., Baron & Nugent, T. (2011) *The spirit of laws*, Complete Edition, Cosimo Classics, New York, NY

[313] Garcia, S.M., Chen, P., Gordon, M.T. (2014), ''The Letter versus the Spirit of the Law: A Lay Perspective on Culpability,'' *Judgment and Decision Making*, vol. 9, no. 5, pp. 479-490.

[314] Garner, B.A., Black, H.C. (2009), *Black's Law Dictionary*, 9th Edition, West, St. Paul, Minn

[315] Ostas, D.T. (2004), ''Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law,'' *American Business Law Journal*, vol. 41, no. 4, pp. 559-594.

[316] Finkel, NJ. (2009), *Common-sense Justice: Jurors' Notions of the Law*, Harvard University Press, Cambridge, U.S

the spirit of the law is the reason for its existence, the letter of the law is subordinate to the problem-solving intent of the law. To realise the intent of the law there must be a mechanism of coercion in place: sanctions, restrictions, prohibitions, or commands for action that attempt to regulate or change the behaviour or status of those individuals and institutions that are subject to the law. A mechanism for enforcement or authorized sanction must be present to encourage individuals and institutions to comply with the law, and in this case, subsidies, fines, and imprisonment are examples. The promulgation of laws also bears cost effects brought about by its consumption and diversion of resources. These costs are borne by the people through the imposition by the authorities of revenue generating sanctions like taxes, fines and fees. Laws have their side effects too which though unintended, are a possibility, just like all other human creations. The indices used to measure these side effects are human rights, living standards and quality of life of the people- any or all of which may be intentionally degraded when a law is in enforced. The performance of a law is also an important feature generally, and this means the measure of the problem solving benefit minus the measured sum of its burdens (restriction cost side effects). If the net benefit is zero, the law is useless, if the net benefits are negative, the law is detrimental. Laws are also fallible being that they are a product of human creation and may fail in their objectives due to a combination of factors. The FATF recommendations despite not necessarily being referred to as law; bear all these features. However, what weights they carry in the eye of the law must be ascertained.

5.2.1 Soft Law

International financial regulation is mainly a system of soft law. This means they are standards, guidelines, interpretations and other statements that are not directly binding and enforceable in accordance with formal techniques of international law but nevertheless capable of exerting powerful influence over the behaviour of countries, public entities and private parties.[317] They are rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain indirect legal effects, that are aimed at and may produce practical effects.[318] The FATF recommendations are regarded as extremely persuasive 'soft law' by OECD countries and by OECD non-members.[319] Soft law including in the international law context, is succinctly explained as *''collectively, rules that are neither strictly binding nor completely lacking in legal significance…guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.''*[320] A general view of soft law is summarised as follows: *''soft law is not truly law at all but rather a category of potentially significant legal developments or materials. To the extent such developments or materials achieve legally binding status, they only do so through one or more of the formal law-creating processes.''*[321] Soft law in the glossary of terms in that same text reads: *''soft law': Non-binding or emerging norms which may or may not eventually harden into binding law: rules not yet grounded in a recognised, formal source of law.''*[322] Another international law text from Canada explains soft law in part as: *''an understanding between states how they might be expected to*

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[317] See Ferran, Ellis & Kern Alexander, "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board", series edited by the University of Cambridge, Faculty of Law, in *Legal Studies Research Paper Series*, no. 36/2011, Faculty of Law, University of Cambridge, published by the University of Cambridge, Cambridge, UK, June 2011

[318] See Linda Senden, (2004) *Soft Law in European Community Law* (Hart publishing)

[319] See Bantekas, I. (2003), ''The International Law of Terrorist Financing.'' *The American Journal of International Law*, vol. 97, no. 2

[320] Garner, B.A., Black, H.C. (2009), *Black's Law Dictionary*, 9th Edition, West, St. Paul, Minn

[321] J.H.Currie, (2001) *Public International Law* , Toronto: Irwin Law Inc. pp10

[322] *Ibid*

behave.''[323] And further explains as follows: *''....called soft law because they are not directly enforced in domestic courts or international tribunals.''*[324] Soft law is often used as an overreaching term to describe the informal law making power of the international financial regulators and central bankers in the world who participate in the negotiation and approval of legally non-binding international financial rules.[325] They may, however, be very influential.

The questions that arise now revolve around the effectiveness and use of soft laws, and why they are utilised at all. The tendency for most soft law instruments is to leave a considerable leeway for adaptations to fit to local circumstances, thereby not encroaching too far on sovereign legislative autonomy is one of the advantages of the soft law concept. It can both facilitate consensus in the initial standard-setting process and avoid implementation misfits.[326] The flexible nature of the decision making structures of soft law bodies which usually comprise of a limited number of participants makes it possible for a quick reaction to changing circumstances. This forms another advantage of the soft law concept, namely that it is a mechanism that can be superior to hard law making process in meeting the need for regulation that can be changed and adapted in response to the ever evolving, high complex interactions of the modern world.[327] This capacity for soft law to change easily can foster willingness to try out regulatory innovations in circumstances of uncertainty, and if the experiment works, could in turn lead to a stabilisation of expectations in the

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323 Hugh M. Kindred et al, (2014) *International Law Chiefly as interpreted and applied in Canada*, 8th Edition, Emond Montgomery Publications

324 *Ibid*

325 See Emily Lee, (2014) ''The soft law nature of Basel 111 and the International financial regulations'' *Journal of International Banking Law and Regulation(JIBLR)*, Vol. 29 (10), pp. 603-612

326 See Hillgenberg, H. (1999), 'A fresh look at soft law,'' *European Journal of International Law(EJIL)*, vol. 10, no. 3

327 Boyle, A.E. (1999), 'Some Reflections on the Relationship of Treaties and Soft Law', *International and Comparative Law Quarterly*, vol. 48, no. 4, pp. 901-913.

area. The benefit of the soft law model lies in its consensus drawing ability which transcends national boundaries and political differences. The soft law model invites participation from multiple countries, multiple levels of policy makers, and multiple market players, sidestepping concerns about the feasibility and legitimacy of a world government. Moreover, soft law instruments benefit from collective knowledge of industry experts.[328] They could be highly influential too by serving as 'best practice' market norms to which industry players adhere for a range of motives from positive appreciation of the benefits of international standardisation through to a defensive urge to demonstrate that they can be trusted to self-regulate. The International Organization of Securities Commission's code of conduct fundamentals for credit rating agencies is an example of international code aimed at influencing industry practice.[329] As a result of these kinds of incentive-related reasons, banks and other regulated firms may adopt international standards, even when the country in which they are based has not implemented them, because they will want to signal to the global market that they adhere to the latest and most sophisticated models that have received the approval of international bodies.[330] Another positive aspect of soft law is that it provides for options that expand the international regulatory kit.[331] Unlike hard law which ordinarily gives rise to enforceable obligations and therefore has to be reasonably certain and predictable to determine what is expected of them, soft law by its very nature of not being directly

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[328] See Gadinis, S. 2013, ''The Financial Stability Board: The New Politics of International Financial Regulation,'' *Texas International Law Journal(TILJ)*, vol. 48, no. 2

[329] See Ferran, Ellis & Kern Alexander, "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board", series edited by the University of Cambridge, Faculty of Law, in *Legal Studies Research Paper Series*, no. 36/2011, Faculty of Law, University of Cambridge, published by the University of Cambridge, Cambridge, UK, June 2011

[330] *Ibid*

[331] See Gregory C. Shaffer & Mark A. Pollack, (2010) ''Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance,'' *Minnesota Law Review* Vol 94, pp 706-99. See also Hillgenberg, H. (1999), ''A fresh look at soft law,'' *European Journal of International Law*, vol. 10, no. 3

enforceable, can be more open textured. This means that international standards may be articulated at too high a level of generality to be immediately operational and will need to be supplemented by more detailed rules enacted at national or supranational level to make the position more concrete and to ensure practical effectiveness.

These advantages of soft laws notwithstanding, they are not entirely benign. From an implementation point of view, there is a contention that soft law measures are often experimental and may harden in due course with the requirement being its codification within national laws so as to make them legally binding, without which enforcement will be difficult.[332] Similarly, soft laws deprive member states of the individual ability to opt out of commitments because the laws are not subject to ratification by the parties.[333] From the perspective of the Financial Action Task Force and its recommendations, being soft law, and with no direct punishment for countries failing to comply, implementation was always going to be an issue. There had to be a way to induce unwilling compliance from reluctant states and this was achieved by pressurising states into regulatory reform by publicly blacklisting those adjudged to be non-compliant with new standards. But how effective is blacklisting a country in achieving compliance if they are not supported by sanctions or binding legal decisions? The general assumption will be that they will be ineffectual because such actions usually carry no legal authority and only issue recommendations.[334] There are precedents however which shows that blacklists actually do provide an effective medium with which international organisations can coerce states into effecting policy change. Blacklisting has been seen to generate compliance by one or two related causal mechanisms namely the reactive

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[332] Lastra, R.M. (2004), ‘’Risk-based capital requirements and their impact upon the Banking Industry: Basel II and CAD III,’’ *Journal of Financial Regulation and Compliance*, vol. 12, no. 3

[333] *Ibid*

[334] Sharman, J.C. (2009), ‘’The Bark is the Bite: International Organizations and Blacklisting,’’ *Review of International Political Economy*, vol. 16, no. 4, pp. 573-596.

compliance or the pre-emptive compliance.[335] In the case of the former, it is argued that decision makers in targeted jurisdictions may observe and then react to material loses resulting from reputational damage caused by blacklisting, while the latter is tied to an anticipation of material economic loses from being blacklisted and thus action is taken in order to forestall such damage. Both reactions are two sides of the same coin in that although there may be distinct variations in pathways, the results are one and the same since the reforms mandated by the international organisations eventually get implemented.[336] Different intervening variables distinguish the two paths to the dependent variable (compliance); the experience of actual material loss for reactive compliance, and the anticipation of such for pre-emptive compliance.[337] The nature of a financial institution of a jurisdiction usually explains the path which such a country follows. As such, when financial institutions in targeted jurisdictions are heavily reliant on high profile, institutional business particularly sensitive to reputation, they always opted for a pre-emptive compliance approach. Such countries usually cultivated their image as secure and stable investment destinations in order to attract lucrative business deals. The Cayman Islands for instance suffered no noticeable decline in the volume of investment in the year it was on the NCC list; rather there was a steady growth in the creation of mutual funds, trust companies, banks, insurance companies and off balance sheet vehicles.[338] Despite this, the Caymans acted by complying swiftly with the FATF standards because it was a jurisdiction whose selling point was reputation as its most important asset. Similar to the Caymans in this regard was the Isle of Man which made an early commitment to the OECD despite evidence that the country's financial services industry continued

[335] *Ibid*

[336] *Ibid*

[337] Sharman, J.C. (2009), ''The Bark is the Bite: International Organizations and Blacklisting,'' *Review of International Political Economy*, vol. 16, no. 4, pp. 573-596.

[338] *Ibid*

to grow rather than suffer any damages within the period it was blacklisted.[339] The same cannot be said of jurisdictions couched on secretive private client banking, trusts and companies who are less concerned about issues of reputation, as those jurisdictions complied only as a reaction to disinvestment and material economic losses.[340]

5.2.2 Opposition to the Blacklisting Technique

This NCCT initiative encountered varying degrees of resistance from the very beginning. Blacklisted jurisdictions opposed the idea for obvious reasons, but the most formidable opposition came from the International Monetary Fund (IMF) who felt strongly opposed to the coercive force the blacklisting model brought about. The IMF had on its own in the year 2001 also initiated efforts in the area of AML and it saw the NCCT list as a complete variant to the IMF's more cooperative working methods. As such, several IMF board members especially those from developing countries strongly opposed blacklisting because there was a feeling that the FATF was punishing poor states while letting its rich members off the hook. For example, a representative of Antigua, who was also the deputy chair of the Caribbean Financial Action Task Force stated that the FATF was ''the creation of a handful of rich nations, 'and declared it unacceptable ''that a handful of states, however powerful, should usurp the right to dictate standards to the rest of the world under the threat or imposition of sanctions.''[341] The Government of St Kitts and Nevis when blacklisted by the FATF in June 2000 described the initiative as a *''sinister plot' which it would oppose.''*[342] There were concerns about the legitimacy or otherwise of the blacklisting

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[339] *Isle of Man Financial Supervision Commission Annual Report 2000-2001*

[340] See Sharman, J.C. (2009), 'The Bark is the Bite: International Organizations and Blacklisting,' *Review of International Political Economy*, vol. 16, no. 4, pp. 573-596.

[341] See Hülsse, R. (2008), 'Even clubs can't do without legitimacy: Why the anti-money laundering Blacklist was suspended,'' *Regulation and Governance*, vol. 2, no. 4, pp. 459-479.

[342] Johnson, Jackie (2001) 'Blacklisting: Initial Responses, Reactions and Repercussions,' *Journal*

technique because arguments were advanced that the blacklist violated international norms and the AML regime's own principles which holds that participation is voluntary and recommendations non-binding.[343] Similarly, the politicised practice of blacklisting was viewed as contradictory to the technocratic and apolitical character of the FATF as an expert body.[344] The NCCT list and in particular the imposition of economic sanctions on non-cooperative countries was regarded as a breach of the sovereignty norm.[345] The Cook Islands for instance, categorically stated through its Prime Minister in 2001 that the Island would refuse to cave into multilateral initiatives that *''infringed its sovereign right to develop and implement policies.''*[346] Likewise, there were reservations on the part of some developing countries as to the real motives behind the blacklisting technique. Such countries viewed the blacklist with suspicion and felt there was a hidden agenda on the part of the FATF. The Caribbean countries in particular, accused the FATF countries of using money laundering as a pretext for fighting tax havens, and more generally for protecting their own financial centres from the competitive pressures from the offshore countries.[347] The seeming lack of transparency with the procedures of the NCCT process was also another issue where aggrieved countries felt the legitimacy of the blacklist was to be called into question. There was also a perception that the FATF applied double standards; only non-FATF

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of Money Laundering Control , 4 (3): 211-20

[343] Doyle T (2002) 'Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law,' *Houston Journal of International Law* 24(2):

[344] Sharman JC (2004) ''International Organisations, Blacklisting and Tax Haven Regulation,'' (*Paper presented at European Consortium of Political Research Joint Sessions*), Uppsala, April 13–18.

[345] See Hülsse, R. (2008), 'Even clubs can't do without legitimacy: Why the anti-money laundering Blacklist was suspended,' *Regulation and Governance,* vol. 2, no. 4, pp. 459-479.

[346] Johnson, Jackie (2001) 'Blacklisting: Initial Responses, Reactions and Repercussions,' *Journal of Money Laundering Control* 4 (3): 211-20

[347] See Hülsse, R. (2008), 'Even clubs can't do without legitimacy: Why the anti-money laundering Blacklist was suspended,''*Regulation and Governance*, vol. 2, no. 4, pp. 459-479.

members ran the risk of being blacklisted despite the fact that a number of FATF members also fell short of a full implementation of the FATF recommendations.[348]

The International Monetary Fund (IMF) weighed in on the FATF regarding the blacklisting policy, with the FATF finally agreeing to suspend the policy in the year 2002. Blacklisting by the FATF according to the IMF damaged reputations because it reverberated at each level and threatened the free flow of new investment, and generally caused a decline in Government revenue and general economic activity. The importance of reputation to jurisdictions was reflected in an IMF report which stated that ‘’most likely, the major competitive factor in the current international environment is a country’s established reputation.[349] The Cook Island for instance initially defied the blacklist because it miscalculated costs of resistance compared to cost of reform. Experience would later reveal this mistake as the country’s reputation was tarnished due to the initial listing, followed by the knock-on blacklisting by governments and firms, and reputational damage began to translate into material damage.[350] St Kitts and Nevis on its part felt it could afford to ride out the OECD and FATF campaigns, rather than suffer the direct and indirect costs reform demanded. However, the emerging glare of the economic damage caused by blacklisting compelled the Government to comply as it revealed that compliance was indeed the cheaper option.[351] In the case of Nigeria, being an economy heavily reliant on International trade and with reputation sacrosanct to the sustainability of the country’s economy, the blacklist forced it to act pre-emptively to avoid the damage that comes with a tainted reputation. This eventually led to Nigeria being de-listed and

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[348] Reuter P, Truman E.M (2004) *Chasing Dirty Money: Progress on Anti-Money Laundering*. Institute for International Economics, Washington, DC.

[349] *IMF 2002; 18*

[350] See Sharman, J.C. (2009), ‘The Bark is the Bite: International Organizations and Blacklisting,’ *Review of International Political Economy,* vol. 16, no. 4, pp. 573-596.

[351] *Ibid.*

subsequently declared fully compliant and safe to international business dealings. The FATF's desire to cooperate more closely with International Financial Institutions (IFIs) paved the way for the IMF to successfully persuade the FATF to abandon the blacklisting method of coercion. The IFIs strongly opposed the NCCT practice and the IMF viewed it as being against the nature of the fund.[352] There was thus a clash of philosophies between confrontation and coercion on the one side, and consensus and voluntarism on the other.[353] In November 2002, the FATF and the IMF reached an agreement whereby the FATF agreed not to undertake another round of NCCT initiative for at least another 12 months. The International Financial Institutions effectively made the end of the blacklist technique a precondition for their engagement and the FATF obliged. The blacklist was abandoned altogether in the year 2006. A range of other reasons have been advanced as to why the FATF gave the blacklisting stance up. There are arguments that it was an effect of a policy shift in the United States of America.[354] Another explanation holds that the suspension was necessitated by administrative reasons because the FATF secretariat given its small size and budget was unable to cope with additional workload that came with the NCCT practice.[355] There is also the perception that the blacklist was called off because it had achieved its goal since all the countries on the list had implemented AML Regulations, theoretically at least. This particular argument has however been derided as weak because the suspension of the NCCT list truncated an ongoing and unfinished

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[352] See Sharman, J.C. (2006), *Havens in a Storm: The Struggle for Global Tax Regulation*, 1st Edition, Cornell University Press, Ithaca

[353] See Hülsse, R. (2008), 'Even clubs can't do without legitimacy: Why the anti-money laundering Blacklist was suspended,' *Regulation and Governance*, vol. 2, no. 4, pp. 459-479.

[354] Wechsler W.F, ''Follow the Money,'' *Foreign Affairs (Magazine Published by the Council on Foreign Relations)* Volume 80, Number 4 (July/August 2001) 40–57 <https://www.foreignaffairs.com/issues/2001/80/4 > Accessed July 2016

[355] See Sharman, J.C. (2006), *Havens in a Storm: The Struggle for Global Tax Regulation*, 1st Edition, Cornell University Press, Ithaca

process.[356] At the time, the FATF had only assessed a total of 47 countries, and the perception is that it was quite certain that some others would potentially have shown up on the blacklist.[357]

5.3 The Application of the International AML Standards within Nigeria's Socio-Political and Legal Frame-work.

The process of implementing normative AML/CFT regimes is dictated by varying dynamics of development in the majority of less developed economies who face a range of problems in adopting global international Anti-Money laundering regulations. On this score, the ministerial conclusions of the Conference on Countering the Financing of Terrorism held in Hague in March 2006 noted that all countries faced certain challenges in fully implementing the FATF 40+9 Recommendations. The capacity and resource constraint of low-income countries makes the simultaneous implementation of all necessary measures difficult. The UN Human Development Index (1996) defines less developed economies as those where each citizen survives on $1 or less a day on average. They are the countries which face the challenge of absolute systemic failure and deficiency in the necessary level of infrastructural development.[358] Nigeria by its very nature comfortably falls within the ambits of such a description, and such jurisdictions require education, judicial reforms and the creation of robust anti-money laundering institutions as a prerequisite for the transposition of desired market changes.[359] Such factors will ease the ability of states to assimilate global AML/CFT standards into domestic society. This is because without them, it will be unrealistic for states subject to different dynamics of development to adopt the same regulatory

[356] See Hülsse, R. (2008), ''Even clubs can't do without legitimacy: Why the anti-money laundering Blacklist was suspended,'' *Regulation and Governance*, vol. 2, no. 4, pp. 459-479

[357] *Ibid*

[358] Mugarura, N. (2016); *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries,* Routledge Ltd, Farnham

[359] *Ibid*

framework at the same time in the interest of the market and not of the individual state concerned. As a result, the deficiency on the part of some states requisite incapacity to implement such a framework effectively therefore makes it less likely for them to be expected to harness normative anti-money laundering regimes.[360] Notwithstanding these complexities, Nigeria was found worthy of being fully compliant with global AML laws and as discussed in earlier parts of this work, struck off the blacklist it found itself previously. However, compliance on paper and compliance in practical terms constitutes two distinct things. Is the Nigerian compliance merely an academic exercise or a truly realistic one? How suited to the Nigerian societal norms these recommendations were/are remains to be seen. A societies norm are *''the language a society speaks, the embodiment of its values and collective desires, the secure guide in the uncertain lands we all traverse, the common practices that hold human groups together.''*[361] In this sense, social norms act like roadside guardrails on life's highway, guiding human behaviour through various circumstances.[362] Whether the FATF recommendations bore cognisance of these factors is a matter that goes beyond conjecture.

While in a strict legal parlance, the compliance can be deemed sufficient, the same may not be said within a socio-political context? Reasons abound as to why compliance on paper may not necessarily translate to an effective practical compliance. From a strict perspective of less developed states without necessarily being exclusively a Nigerian problem(s), the efforts towards harnessing indigenous laws with global AML laws are laden with challenges. Many Nation states or jurisdictions in developing countries are deficient in terms of infrastructural development, hence

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[360] *Ibid*

[361] Cristina Bicchieri (2006) *The Grammar of Society: The Nature and Dynamics of Social Norms*, 1st Edition, Cambridge University Press

[362] Garcia, S.M., Chen, P. & Gordon, M.T. (2014), ''The letter versus the spirit of the law: A lay perspective on culpability,'' *Judgment and Decision Making*, vol. 9, no. 5, pp. 479-490.

slow in transposing the envisaged global AML standards into domestic law. Simple as they may seem, these infrastructural problems affect the effective administration of basic procedures set out by the FATF regarding requirements such as book and records of transaction for prudential keeping, supervision, statistics and tax records. Many developing countries also face the problem of a lack or want of a limited database which tends to inhibit the ability of local AML institutions or agencies in internalizing the experiences of money laundering and its attendant predicate threats. Similarly, small states are always reluctant to prosecute money laundering offences for fear that the negative publicity generated by such prosecutions could jeopardize the economy in terms of the flow of Foreign Direct Investment (FDI).[363] A perfect example of this particular hindrance was played out in Zambia when the Government of then President Frederick Chiluba threatened to imprison journalists who reported the prevalence of the HIV/AIDS scourge in the country. Although this example does not particularly resonate with the theme of this work, it highlights the fears developing countries hold as regards a negative reputation which they feel will scare the limited foreign investors who may be ready to look their way away. As such some states choose to operate in secrecy by disguising the definition of certain crimes or in the case of Uganda, operate on the fringes of the envisaged global AML framework by delaying the creation of any distinct AML legislation.[364]Another major challenge to the global harmonisation of Anti-Money laundering regulations within the less developed economies is the fragmented global economy which is fraught with inequalities. This means the regulation of financial markets should in essence, reflect the diversity and complexity of the world.[365] A model to follow will be the doctrine of mutual

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[363] Mugarura, N. (2016); *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries*, Routledge Ltd, Farnham

[364] *Ibid*

[365] *Ibid*

recognition as enunciated by the *Cassis de Dijon case*[366] used in commercial sphere to overcome the hindrance of international movement of natural and juristic persons, goods and services that may be posed by the co-existence of multiple jurisdictions. The case involved a French liqueur that had an alcohol level above that prescribed by the German alcohol control specifications. In what was later to be known as the *Cassis de Dijon* principle, the court upheld the principle of mutual recognition by denying admissibility of such a limitation which then meant that a product manufactured according to regulations and permitted in one EU member state must be permitted in other EU member states.[367] Mutual recognition is thus utilised in commercial circles to circumvent the problems of international movement of natural and juristic persons, goods and services inherent in different EU member countries.[368] With the globalisation of markets yet to constitute itself as a viable global system with a set of rules, and further compounded by multiple rules engendered by different regulatory regimes, the global system is rendered complex as far as transposing the engendered norms into substantive national laws are concerned hence the mutual recognition principle. This mutual recognition principle is hinged on the realization that the integration of financial markets in Europe did not necessarily mean a 'one-size-fits-all' approach, but unity in diversity and proposes the recognition by supervisory authorities of systems operated by other member states subject to the fulfilment of certain basic conditions, rather than the an emphasis on the convergence of the system.[369] The importance of inter-state cooperation cannot be over-emphasised, as it 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

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[366] *Case 120/78 (1979) ECR 1-64.*

[367] The exception can only be made to serve public interest.

[368] See Norman Mugarura. (2012) *The Global AML Framework and its Jurisdictional Limits*- A Thesis submitted in partial fulfilment of University of East London for the Degree of Doctor of Philosophy (PhD)

[369] Directive 89/646/EEC

the stability of the global economy. The lack of a common framework encourages both regulatory arbitrage and failure. A regulatory arbitrage indicates a phenomenon whereby regulated entities migrate to jurisdictions imposing lower regulatory burdens thereby exerting a downward pressure on those jurisdictions that want to retain the regulated activity within their borders.[370] Just like regulatory failures, it is a common feature of an uncoordinated international system.

Talking exclusively from a Nigerian standpoint however, the issues go beyond these factors. Money laundering being the derivative crime it is usually gets triggered by the commission of other crimes ranging from heists, drug dealings and the likes. In Nigeria however, and purposely for this work, corruption is treated as the primary predicate offence for the crime of money laundering, and as such, the main factor militating against a proper reception, implementation and application of global Anti-Money Laundering (AML) standards.

5.3.1 Corruption:

Nigeria is consistently rated as one of the most corrupt nations in the world, and money laundering is accurately regarded as a veritable companion of the corruption virus which has permeated every segment of the Nigerian society.[371] Money laundering and corruption are endemic problems in Nigeria and the two go hand in hand.[372] From a less specific standpoint, it must be stated that any attempt to analyze the concept of corruption must contend with the fact that in English and other

[370] Licht, Amir, (1998) ''Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets,'' *Virginia Journal of International Law*, Vol 39, pp 563

[371] N. Okogbule, (2007) ''Combatting Money laundering in Nigeria': An appraisal of the Money laundering (Prohibition) Act 2004,'' *Statute Law Review*, 28(2) pp 156-164

[372] Chioma Amobi, (2010) ''Money Laundering Regulation in Nigeria: The problems with enforcement, the British connection and Global efforts,'' 21 *European Business Law Review*, Issue 6, pp. 827–855

languages the word ‘corruption’ has a history of vastly different meanings and connotations.[373] Corrupt practices, for example, can be systemic, pervasive, and routine or they can be petty, sporadic, trivial and rare. As such, questions have been asked as to how to theorize a phenomenon so diffuse?[374] Corruption inhibits the proper implementation of global AML regulations within the Nigerian society; therefore, if the country is to be successful in tackling money laundering, it is imperative that it simultaneously tackles corruption. Legislation to combat money laundering in Nigeria as discussed previously in this work, are for a few flaws, well grounded. However, the foremost obstacle to success lies within the realm of enforcement.[375] Corruption is both a precursor and facilitator to money laundering whilst frustrating efforts to combat it. Those individuals and officials who have been charged with the responsibility of providing good governance and policing the system are unfortunately the very individuals abusing the system and exploiting it.[376]At this juncture, it is important to identify the evolution of corruption into the Nigerian society, analyzing the form it takes and identifying the reasons for its entrenchment within the fabric of the Nigerian society.

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[373] See Carl J. Friedrich, (2002),‘’Corruption Concepts in Historical Perspective,’’ in Arnold J. Heidenheimer, Michael Johnston (Eds), *Political Corruption (Concepts and Contexts)* 3rd Edition, (New Brunswick NJ: Transaction Publishers) pp 15

[374] See Agbiboa, D.E. (2010) ‘’The corruption-underdevelopment nexus in Africa: Which way Nigeria?’ *Journal of Social, Political, and Economic Studies*, vol. 35, no. 4, pp. 474

[375] See Chioma Amobi, (2010) ‘’Money Laundering Regulation in Nigeria: The problems with enforcement, the British connection and Global efforts,’’ 21 *European Business Law Review,* Issue 6, pp. 827–855

[376] *Ibid*

5.3.2: Corruption within the Nigerian Body Polity (A Cultural Problem)

Corruption is neither culture specific nor system bound and to state that corruption abounds in Nigeria is only restating the obvious.[377] However, while corruption is prevalent in some degree in all societies, some societies are clearly more vulnerable to abusive political and economic opportunism than others. There is a historical perspective to this within the wider context of African states dating back to the colonial era with the seeming un-readiness of most African countries for independence culminating in post-independence opportunism. Post-independence social, political, and economic (mal) formations are identified to be a direct consequence of the state-building and economic integration processes begun under colonial rule.[378] This argument suggests that the colonies were built on economically faulty foundations. African leaders held the suspicious belief that the sole aim of colonialism was to extort resources from the colonies in order to profit the metropolitan economies hence institutions that improved the colonizers ability to exploit Africans and their resources were legitimized.[379] As a result, a vast majority of African constitutions were based on European models and were not quite sufficiently adjusted to reflect African realities to meet the needs of the people. Nevertheless, eager to gain independence, Africans were willing to forego effective constitutional discourse in an effort to accelerate the process and pace of decolonization. It has been argued that the constitutions most African countries adopted at independence were only products of political exigency.[380] The struggle for independence may therefore be seen as an effort by Africans to overthrow and rid their societies of

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[377] *Ibid*

[378] Falola, Toyin. (1998) ''Corruption in the Nigerian Public Service: 1945-1960'' in John Mukum Mbaku (Editor) *Corruption and the Crisis of Institutional Reforms in Africa,* Lewiston, N.Y: Edwin Mellen Press, pp 137-163

[379] *Ibid*

[380] Victor Theodore Le Vine. (1964) *The Cameroons: From Mandate to Independence*: (Berkeley: University of California Press).

the exploitative and oppressive colonial system; to establish more accountable, transparent, and participatory governance structures; and to provide economic infrastructures that maximize the participation of the indigenous people in national development. It may also have been a way to develop within each country, governance structures to allow for peaceful coexistence of all ethnic cleavages; ameliorate living conditions among the deprived and marginalized groups and communities.[381] At independence, many indigenous leaders argued that the institutions which their countries had inherited from Europeans were ill-suited for their new countries and as such subsequently adopted political and economic systems which they believed will allow the state to more effectively deal with the issues of poverty and deprivation.

The model of development intended to move the continent to greater heights following independence was *Statism*, a development model that emphasized government control of resource allocation, minimized the functions of the market, and granted the state significant power to intervene in private exchange. Government was also to own and control productive resources.[382] Such a development model was expected to (1) enhance the ability of the state to create the wealth that it needed to deal effectively mass poverty and deprivation; (2) provide the state with the tools to promote economic growth and development; (3) provide the state with the discretion it needed to advance critical societal goals; (4) assist the government in its efforts to eliminate economic dependence; and (5) significantly improve the governments legacy of discrimination and marginalization of certain groups.[383] However, this framework of development failed to improve standards of living for a greater number of the population or foster and boost the economy. *Statism*,

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[381] *Ibid*

[382] See Mbaku, J.M. 2003, ‘’Entrenching economic freedom in Africa,’’ *The Cato Journal*, vol. 23, no. 2, pp. 217.

[383] Julius Omozuanvbo Ihonvbere, John Mukum Mbaku, (Eds) (2003) *Political Liberalization and Democratization in Africa: Lessons from Country Experiences*, 1st Edition, Praeger Publishers

rather than enhance development and alleviate poverty in many African countries, actually exacerbated many of the problems that plagued the continent since colonialism.[384] And as the years have shown, very few African countries have succeeded in significantly improving national standards of living. Instead, many countries are today pervaded by high levels of poverty and material deprivation, bureaucratic corruption, nepotism and political violence with few individuals enriching themselves and perpetrating themselves in power.[385] These state custodians occupied themselves primarily with private capital accumulation, subverting the national will, suffocating civil society, and generally impoverishing the people. Thus, what *statism* achieved in Africa was to enhance the ability of politicians and civil servants to turn governance structures into instruments of plunder and enrich themselves at the expense of society.[386] This is typical of contemporary Nigeria, and provides the linkage between corruption and the thematic underpinning of this particular research. Corruption in Nigeria does not end with public office holders diverting public funds to personal use. They utilize corrupt means in the laundering of such funds. It is therefore important to analyze the whole concept of corruption on a wider range, and then more specifically within the socio-cultural precincts of the Nigerian society.

5.4 Corruption Typologies

Political scientists have sought to understand the concept of corruption by suggesting typologies which indicate linkages between the incidences of corruption and other specific stages of political,

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[384] *Ibid*

[385] See Victor Theodore Le Vine. (1964) *The Cameroons: From Mandate to Independence:* (Berkeley: University of California Press).

[386] See Mbaku, J.M. (2003), ‘’Entrenching Economic Freedom in Africa,’’ *The Cato Journal*, vol. 23, no. 2, pp. 217

economic and social development.[387] Here, a categorization of corruption into three frameworks of *incidental corruption*, *systematic corruption*, and *systemic corruption* suffice for a proper understanding of the workings of every stage of the process. Under incidental corruption, the *particeps criminis* are petty/ interested officials and opportunistic individuals who engage in small size embezzlement, misappropriation, bribes, favoritism and discrimination. Corruption here is the exception rather than the rule, and the high level private sector actors seldom bother with such theft.[388] Systematic corruption on the other hand, whilst not necessarily institutionalized or pervasive, is recurrent. Here, the transgressors are public officials, politicians, representatives of donor and recipient countries, bureaucratic elites, business men and middle men who engage in bribery and kickbacks, collusion to defraud the public, large scale embezzlement and misappropriation of through public tender and disposal of public property, economic privileges accorded to special interests, large political donations and bribes. Usually involving high gains which are often subject to popular scandals, it originates from high level civil servants that recognize and exploit illegal ventures and opportunities in Government department and agencies whilst being entrenched within the system. This practice is a direct violation of the rule of law.[389] Systemic corruption on its part is pervasive, institutionalized and built into the economic and political institutions. This institutionalization does not necessarily connote acceptance or approval, but nevertheless signifies an occurrence and flourish in situations where public sector wages fall below a living wage. In contrast to systematic corruption, it involves all levels of employment. The transgressors here consist of bureaucratic elites, politicians, business men and white collar workers

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[387] Kpundeh, S.J. (1998) ‘’Political will in fighting corruption,’’ in S. Kpundeh, and I. Hors (Editors) *Corruption & Integrity Improvement Initiatives in Developing Countries*, pp 91-110, United Nations Development Programme, New York

[388] Asongu, S.A. (2013), ‘’Fighting corruption in Africa: Do existing corruption-control levels matter?’, *International Journal of Development Issues*, vol. 12, no. 1, pp. 36-52.

[389] *Ibid*

whose modes of operation include large scale embezzlement through ''ghost workers'' on Government payroll, embezzling Government funds through false procurement and payment of non-existent goods, large scale disbursement of public property to special and privileged interest under the pretext of 'national interest', favoritism and discrimination exercised in favor of ruling parties in exchange for political contributions. Ultimately, corruption if left unchecked, eventually results in a softness of state, comprising all manner of social indiscipline that prevents effective government and impedes national development.[390] Nigeria highlights a perfect example, as corruption is deep seated, institutionalized, and chiefly militate against proper implementation of the well thought out AML laws in place. This is due amongst other factors, to the lack of transparency, probity, justice and fair play within the system. A natural consequence of such deficiencies is a prevalent decay in societal strata occasioning things such as a lack of social security for citizens and inaccessibility to facilities that are needed to guarantee a decent livelihood. The relevance of these factors to money laundering activities is that dissipating illicit funds goes through a chain of processes dependent on the launderers preferred method. To smuggle a stash of cash out of the country for instance, will mean going through airport security manned by agents who are a product of incidental corruption, affected by the ills brought upon the society by systematic corruption, and living with the consequences of systemic corruption. The same is true for a bank staff that may be approached with bribes to turn a blind eye on accounts which should raise red flags due to the nature of activities on the accounts. There is agreement within researchers that individuals subjected to such conditions are quite vulnerable to corruption and are likely to actively engage in corrupt practices in order to secure the resources they need to meet their basic needs.[391] Far too often, even the most ethical public servants in Nigeria readily mortgage their

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[390] Myrdal, Gunnar. (1970)*The Challenge of World Poverty: A World Anti-Poverty Program in Outline*. Random House Trade Paperbacks.

[391] Gould D.J., Mukendi T.B (1989) ''Bureaucratic Corruption in Africa: Causes, Consequences and Remedies,'' *International Journal of Public Administration* 12(3): 427-52

consciences and succumb to the pull to do whatever it takes to avoid the almost certain life of misery.[392] These instances are reactionary examples of the possible role corruption plays in money laundering activity. However, corruption plays a more deep seated role than being a mere reactionary vice. Without illicit funds, there would be no need for cleaning or obliterating the trail of funds, and in the context of this work, official Government corruption has been identified as the primary source of illicit funds. The task now is to determine why Nigerian public officials divert public funds into personal use.

Prevailing cultures and settings make African leaders more corrupt than their counterparts in mature democracies. This is traced to the cultural norms in many African societies where the rights of individuals are usually subordinated to those of the ethnic group or extended family.[393] Family and loyalty to it are considered more important than individual rights or personal accountability.[394] The African civil servant thus may become engaged in corrupt activities to generate the additional resources he needs to meet his obligations to members of his immediate and extended family. In Nigeria, loyalty to one's ethnic group is celebrated and is often far more important than legal rules in shaping behaviors.[395] The obligation to an ethnic group often overrides obligations of public office and this causes civil servants to deviate from established rules proscribing corruption. This cultural pull means that everyone has obligations towards his community, and the higher one

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[392] Agbiboa, D. E. ''Serving the Few, Starving the Many: How Corruption Under develops Nigeria and How There Is an Alternative Perspective to Corruption Clean-ups.'' *Africa Today* 58.4 (2012): 110-132. Project MUSE. <https://muse.jhu.edu/ > Accessed 17 September 2016

[393] See Agbiboa, D. E. (2010) 'The Corruption-Underdevelopment Nexus in Africa: Which way Nigeria?' *Journal of Social, political and Economic Studies* 34(5):79-93

[394] Mbaku J M (2000) *Bureaucratic and Political Corruption in Africa: The Public Choice Perspective*. Krieger Publishing Company

[395] See Agbiboa, D. E. (2010) ''The Corruption-Underdevelopment Nexus in Africa: Which way Nigeria?'' *Journal of Social, political and Economic Studies* 34(5):79-93

ascends the social ladder, the more one is expected of him from his people. A highly placed Government official or politician is constantly under pressure from his people for gifts of money, for jobs, and for securing the provision of amenities for his area.[396] The culture condones corruption so much so, it encourages it. No Nigerian official would be irreparably ashamed, let alone condemned by his people because he or she is accused of corruption or corrupt practices. The same applies to outright stealing of government or public money or property, and any government official or politician who in a position to enrich himself corruptly but fails to do so may, in fact, be ostracized by his people upon leaving office. He would be regarded as a fool, or selfish, or both.''[397]

5.4.1 The Theory of Two Publics

Over time, various theories have been developed that has helped in understanding the predicament of corruption in Africa and more importantly, the issue of endemic corruption. The *theory of two publics* argues that one of the most striking impacts of colonialism was the emergence of two public realms, the *primordial* and *civic public* realms which related differently with the private realm in terms of morality.[398] This 'acme of dialectics' suggests that most educated Africans are citizens of two publics in the same society. On the one hand, they belong to a civic public from which they gain materially but to which they give only grudgingly, whilst on the other hand they belong to a primordial public from which they derive little or no material benefits but to which they are expected to give generously and do give materially. To make

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[396] Madunagu, Edwin. (1982). *Problems of Socialism: The Nigerian Challenge*. London: Zed Books

[397] *Ibid*

[398] Ekeh, P (1975) ''Colonialism and the Two Publics: A Theoretical Statement.'' *Comparative Studies in Society and History,* 17(1): 91-112

matters more complicated, their relationship to the primordial public is moral, while that to the civic public is amoral.[399] This amoral conception of the duties of the government means ‘everybody expects the government to provide modern social amenities (but few) expect the Government to provide sound moral leadership.[400] Two forms of corruption are associated with the dialectics. The first is what is regarded as embezzlement of funds from the civic public, (from the Government, to be more specific), while the second is the solicitation and acceptance of bribes from individuals seeking services provided by the civic public by those who administer these services. Both carry little moral sanction and may well receive great moral approbation from members of one's primordial public.[401] The result is that as the same actors operate in two realms, the state apparatus is employed to fatten the nest of the primordial public, thereby making corruption, nepotism and ethnicity a hallmark of the civic public.[402] Cheating the public is thus considered a patriotic duty.[403] On the other hand however, these forms of corruption are completely absent in the primordial public. Strange is the Nigerian who demands bribes from individuals or who engages in embezzlement in the performance of his duties to his primordial public. On the other hand, he may risk serious sanctions from members of his own primordial public if he seeks to extend the honesty and integrity with which he performs his duties in the primordial public to his duties in the civic public by employing universalistic criteria of impartiality. This somewhat describes the Nigerian society and this is further elucidated upon by

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[399] *Ibid*

[400] Arikpo, Okoi (1967) *The Development of Modern Nigeria*. Baltimore: Penguin Books.

[401] Ekeh, P (1975) ‘‘Colonialism and the Two Publics: A Theoretical Statement.’’ *Comparative Studies in Society and History*, 17(1): 91-112

[402] Osaghae E.E (1988) ‘‘The Character of the State, Legitimacy Crisis and social Mobilisation in Africa: An Explanation of Form and Character.’’ *African Development*, 14(2) pp 27-48

[403] Ifidon E.A (1996) ‘‘Citizenship, Statehood and the Problem of Democratization in Nigeria.’’*African Development*, XXI(4): 93-107

Wraith[404]who contrasts the integrity with which Nigerians handled matters of primordial ethnic character with 'the dragging footsteps and exiguous achievements of the local [government] authorities'. Wraith notes that, while the local government authorities, with their civic structure, have 'a sad record of muddle, corruption and strife', the 'ethnic unions are handling sums of money comparable to those of many local authorities; that they are spending it constructively, and that they are handling it honestly'. What this means in essence is that *‘‘to put your fingers in the till of the local authority will not unduly burden your conscience, and people may well think you are a smart fellow and envy you your opportunities, but to steal the funds of the union would offend the public conscience and ostracize you from society.’’*[405] The ‘*two public’* thesis despite both providing a sound frame work for understanding the impact of colonialism in Africa and the endemic corruption permeating the fabric of the African continent, has its shortcomings. The robbery in the civic public was not, neither is it currently employed to strengthen the primordial public but rather to further pauperize it.[406] The primordial sentiment could in fact be viewed as nothing but an instrument of political deception by the privileged political elite for personal aggrandizement and less for group benefits.[407] This argument is further backed up by the fact that most of the stolen wealth has been siphoned abroad by the political class to developed countries, and even if some of it were to trickle down to the primordial public, such will be of little

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[404] Wraith, Ronald and Edgar Simpkins (1963) *Corruption in Developing Countries*. London: George Allen & Unwin Ltd.

[405] *Ibid*

[406] Ilufoye Sarafa Ogundiya, (2009) ‘‘Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations.’’ *Anthropologist*, 11(4): 281-292

[407] *Ibid*

significance to strengthen the public especially talking from a social, political or economic developmental perspective.[408]

5.4.2 Prebendalism

According to the theory of *prebendalism* popularized by Richard Joseph,[409] state offices are regarded as prebends that can be appropriated by officeholders, who use them to generate material benefits for themselves and their constituents and kin groups."[410] *Prebendalisation* reflects the shared expectations about the appropriation of state offices and the use of revenues accruing to them. In specifically adapting it to the concept of Nigerian politics, Joseph linked corruption to the fall of the Nigerian second republic and uses the term *prebendal* to refer to political behavior which reflect as their justifying principle that the offices of the existing state may be competed for and then utilized for the benefit of office-holders and that of their reference or support group. To a significant extent, the 'state' in such a context is perceived as a congeries of offices susceptible to individual cum communal appropriation. The statutory purposes of such offices become a matter of secondary concern, however much that purpose might have been codified in law or other regulations or even periodically cited during competitions to fill them.[411] *Prebendal* relations are usually characterized by widespread appropriation of nominally 'public' resources for personal or parochial gain; allocations patterned by ethnically-delineated patron-client networks; and a

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[408] *Ibid*

[409] Richard A. Joseph is usually credited with first using the term prebendalism to describe patron-client or neopatrimonialism in Nigeria. Since then the term has commonly been used in scholarly literature and textbooks

[410] Richard Joseph, (1987) *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic.* New York: Cambridge University Press.

[411] See Richard Joseph, (1993) ''Class, State, and Prebendal Politics in Nigeria'' *Journal of Commonwealth and Comparative Politics*, Vol. 21, No. 3

distributive arena that is largely decentralized and in which clientelist relations are diffuse.[412]This theory of *prebendalism* has related terms of patrimonialism and predation *(sultanism)*. *Patrimonialism* means that the distinctions between the public and private domains have become blurred and power, which has become a major source of wealth, has become personalized.[413] In patrimonial political systems, an individual rules by dint of personal prestige and power; ordinary folk are treated as extensions of the 'big man's' household, with no rights or privileges other than those bestowed by the ruler. Authority is entirely personalized, shaped by the ruler's preferences rather than any codified system of laws. The ruler ensures the political stability of the regime and personal political survival by providing a zone of security in an uncertain environment and by selectively distributing favors and material benefits to loyal followers who are not citizens of the polity so much as the ruler's clients.[414] The Nigerian state has very glaring traits of patrimonialism and neopatrimonialism (a related term to prebendalism and a new form of patrimonialism). It is used to describe and explain state failures in Africa describing patrons using state resources in order to secure the loyalty of clients in the general population. It is indicative of informal patron-client relationships that can reach from the very high up in the state structures down to individuals in the lower levels.[415]

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[412] Lewis, P. 1996, ‘’From Prebendalism to Predation: The Political Economy of Decline in Nigeria,’’*The Journal of Modern African Studies*, vol. 34, no. 1, pp. 79-103.

[413] See Ilufoye Sarafa Ogundiya, (2009) ‘’Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations.’’ *Anthropologist,* 11(4): 281-292

[414] See Bratton, Michael, Nicolas Van de Walle (1997) *Democratic experiments in Africa: regime transitions in comparative perspective*. Cambridge University Press, Cambridge.

[415] See Ilufoye Sarafa Ogundiya, (2009) ‘’Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations,’’ *Anthropologist*, 11(4): 281-292

Predation[416] on the other hand is a special form of political and economic domination where state economic tutelage moves from a pattern of diffuse *clientelism*[417]under comparatively stable (though weak) institutional auspices, to more arbitrary and debilitating control by a single ruler.[418] Peter Lewis coined the term ‘predation’ as he sought to eschew the word ‘sultanism’ used previously by Max Weber to characterize the personalized and predatory form of patrimonial rule because within a Nigerian context, this raises the particular connotation of Northern sultans or emirs.[419] Predatory rule in the sense used by Lewis denotes a personalist regime ruling through coercion and material inducement. This type of regime tends to degrade the institutional foundations of the state, as well as the economy. Since predatory rule as an analytic category is not associated with any particular region, ethnic group or religion, Weber’s original usage will be misleading.[420] Lewis’ term was thus used to describe the leadership of Nigeria post-second republic and specifically the military regime of General Ibrahim Babangida which highlighted the shift from prebendalism, or decentralized patrimonial rule towards predation, the consolidation of avaricious dictatorship. This predatory order had three essential features: (1) concentration of

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[416] See Lewis, P. (1996), ‘’From Prebendalism to Predation: The Political Economy of Decline in Nigeria,’’*The Journal of Modern African Studies*, vol. 34, no. 1, pp. 79-103. Here, Peter Lewis coined the term ‘predation’ as he sought to eschew the word '*sultanism*', used by Max Weber in *Economy and Society* (Berkeley, I978), vol. I, pp. 23I-2, to characterize the personalised and predatory form of patrimonial rule, because in the Nigerian context this raises the particular connotation of northern 'sultans' or emirs. Predatory rule, in the sense used in the authors article, denotes a personalist regime ruling through coercion and material inducement. This type of regime tends to degrade the institutional foundations of the state, as well as the economy. Since predatory rule as an analytic category is not associated with any particular region, ethnic group, or religion, Weber's original usage would be misleading.

[417] Refers to the nature of individual and group relationships within the broader social and political space

[418] Lewis, P. (1996), ‘’From Prebendalism to Predation: The Political Economy of Decline in Nigeria,’’ *The Journal of Modern African Studies*, vol. 34, no. 1, pp. 79-103.

[419] See Max Weber, (1978) *Economy and Society*, Berkeley, Vol. I, pp. 23I-2

[420] See Lewis, P. (1996), ‘’From Prebendalism to Predation: The Political Economy of Decline in Nigeria,’’ *The Journal of Modern African Studies*, vol. 34, no. 1, pp. 79-103.

power under coercive auspices; (2) the augmenting of repression by material inducement, requiring close discretion over public resources and (3) an enormous diversion of public resources for discretionary use by an elite stratum of loyalist officers, civilian cronies, and acquiescent politicians."[421] Post-second republic Nigeria depicted a regime of a predatory control of state and this reflected developments in other peripheral capitalist nations but suffice it is to ask at this juncture if predatory rule is in itself a distinctive political system, and in the case of Nigeria, if its consolidation in Nigeria had ended the salience of prebendalism. The contention is that predation has always been a feature of Nigerian prebendalism, and this is despite a succession of Governments even under democratic dispensations that had the opportunity of moving Nigeria towards a modern political system in which states would gradually cease to be prebends exploited to generate material resources for office holders, their sectional clients, and their cronies. Rather, the Nigerian Federal system operates almost exclusively as a mechanism for intergovernmental distribution and ethno-political appropriation of centrally collected oil revenues. Predation in Nigeria is undiminished, but prebendal mechanisms keep the system going because there is always a queue of political aspirants for whom the path to personal wealth goes through the temporary control of state resources. There is also the politicization of primordial rivalries which gives the political class a safe sanctuary to embezzle and squander state resources. Thus, the problem of corruption has an inextricable link with the problem of identity and the problem of citizenship in Nigeria. This deep rooted psycho-political perception of Nigeria by the average Nigerian is deep rooted in history and was clearly outlined by two of Nigeria's pre-independence founding fathers. Speaking in 1947, Chief Obafemi Awolowo stated that ''*Nigeria is not a nation. It is a mere geographical expression. There are no Nigerians as there are English, Welsh or French. The word Nigeria is merely a distinctive appellation to distinguish those who live within*

[421] *Ibid*

the boundaries of Nigeria from those who do not.''[422] Sir Abubakar Tafawa Balewa on his part speaking in similar lines said ''*since 1914, the British Government has been trying to make Nigeria into one country, but the Nigerian people themselves are historically different in their backgrounds, in their religious beliefs and customs and do not show themselves any signs of willingness to unite. Nigerian unity is only a British intention for the country.''*[423] These lines of thought points towards an absence of a genuine nationalistic sentiment and may have contributed largely to the idea of the Federal Character principle enshrined in the Nigerian constitution where it is explicitly stated that *''the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote unity, and also to command National loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or sectional groups in that Government or in any of its agencies.''*[424] There is a similar provision as regards each state of the Federation.[425] It seeks to ensure the appointment to public service institutions fairly reflect the linguistic, ethnic, religious and geographical diversity of the country. As well intended as it may be, its application in the Federal Civil Service usually amounts to a confused balancing of the merit principle which in turn has an adverse consequence on such institutions in terms of discipline, morale and overall effectiveness as well as efficiency. The Federal Character provisions are both a confirmation of the pessimism of the aforementioned Nigerian founding fathers and a reaction towards fixing those fears. It is a principle that aims to engender a sense of belonging and national integration within citizens from all parts of the country. The good intentions of the federal character principle notwithstanding, issues of the

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[422] Coleman J S (1958) *Nigeria: Background to Nationalism*, University of California Press

[423] *Ibid*

[424] S.*14(3) Constitution of the Federal Republic of Nigeria 1999*

[425] *S.14(4) Constitution of the Federal Republic of Nigeria 1999*

cultural, ethnic and religious dichotomy of the Nigerian nation remain apparent within its workings and it is this insistence on equal representation and individual rights that further rocks the boat of national integration.[426] To those from the Northern parts of the country federal character is synonymous with quota system and means therefore a proportional absorption into federal institutions, while to those from the southern parts of the country, it means an attempt by the "North" to infiltrate into areas which they hitherto regarded as "theirs" by right.[427] The crux of the matter is that the principle was not genuinely invoked in the first place, and there are arguments that it was designed to differentiate rather than integrate because it was an ideology of the minority ruling class aimed at protecting their interest.[428] Whilst emphasizing the need for ethnic balancing, the Federal Character principle invariably enthrones ethnicity and deemphasizes the nation.[429] As a consequence, in Nigeria today, the success of an ethnic group or a politician is synonymous with the level of access of such group to state resources, therefore to steal from the commonwealth becomes an acceptable norm.[430] This ethnic and religious card has been used by the elites to exploit the Nigerian public to damaging extents, and when various acts of corruption are under probe, it is common place in Nigeria to hear agitations from a group against a perceived

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[426] M.L. Bello (2012) ''Federal Character as a Principle for National Integration: The Nigerian Paradox.*''International Journal of Politics and Good Governance* Volume 3, No. 3

[427] Suberu, R.I. (2001) *Federalism and Ethnic Conflict in Nigeria*. Washington DC: United States Institute of Peace.

[428] Olugbemi S. O. (1987) "The Nigerian Civil Service and National Development" in Olugbemi S. O. (ed) *Alternative Political Futures for Nigerian*. A Publication of the Nigeria Political Science Association, Lagos Nigeria. (1987)

[429] See M.L. Bello (2012) ''Federal Character as a Principle for National Integration: The Nigerian Paradox.'' *International Journal of Politics and Good Governance* Volume 3, No. 3

[430] See Ilufoye Sarafa Ogundiya, (2009) ''Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations,'' *Anthropologist*, 11(4): 281-292

vendetta against one of their own and vice-versa. To them, the Federal Character Principle opens up the treasury for equal looting without repercussions.

Contextually, *''in Nigeria there is no accountability at all, and that is why Nigerian corruption is worse than corruption in many parts of the world, because it is the worst type of corruption, it is stealing.''*[431] With Nigeria being consistently rated as one of the most corrupt nations in the world, and money laundering accurately regarded as its veritable companion, the two are endemic problems in Nigeria and go hand in hand.[432] How transparent is the Government of Nigeria's fight against the ills of corruption, and by implication, Money Laundering? This question is fundamental, as it is somewhat rhetorical. To tackle money laundering, it is imperative to simultaneously tackle corruption. The suspension and subsequent sack of the immediate past Governor of Nigeria's apex bank the Central Bank of Nigeria provides a peek into the intrigues associated with fighting corruption in Nigeria. Appointed in 2009 in the midst of a debt crisis, the Governor is credited with cleaning up a banking industry near collapse, kept interest rates at a record in the face of calls from businesses for lower borrowing costs, and brought inflation down below 10%. The Governor was sacked by the Nigerian Government of the day for 'financial recklessness and misconduct,' and although well within the rights of the Nigerian President to carry out such a suspension, preceding events somewhat depicts a more sinister plot than the official reason given. The Governor's problems started with a letter he wrote to the President asking for a probe into the finances of the Nigerian National Petroleum Corporation. This was not taken lightly by the President who was reportedly very angry and even asked the Governor to

[431] In the words of the former Governor of Nigeria's apex bank the Central bank of Nigeria, Mr Lamido Sanusi

[432] Chioma Amobi,(2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' *European Business Law review* Issue 6, pp. 827–855

resign over the letter.[433] The Governor contended that as the Federal Government's Chief Economic Adviser, mandatorily required to bring issues of critical economic importance to the attention of the president, he had done a patriotic duty to his country. The Governor alleged that Nigeria lost about a Billion Dollars a month on a consistent basis under the immediate past Nigerian Government. The NNPC on its part vehemently denied the allegations and went further to accuse the CBN governor of not only playing politics but also of being ignorant of the operations of the oil and gas sector. Subsequent deliberations between the members of the Nigerian economic team revealed that it was not $49.8 billion that had not been repatriated to the Federation Account but $10.8 billion. Notwithstanding the disparity between the sums, $10.8 billion is still a huge sum by any stretch of the imagination and a proper investigation into the Governor's claims should have sufficed. However, there was no known official investigation by the Government, just an outright outrage against the Governor and this fueled speculations in large parts that the Government were either complicit in the scandal or shielded political allies who were fingered out in the allegations. The Governor subsequently made a submission to the Nigerian senate, a report detailing the failure of the Nigerian National Petroleum Corporation (NNPC) to transfer US$20BN to the Nigerian Government. It is pertinent to note that most of Nigeria's roughly $30BN annual budget comes from oil revenue that filters through the somewhat opaque NNPC and anyone who challenges the oil sector is striking at the heart of vested interests that control the Nigerian state and should be ready to face the consequences. It may seem that the Governor did face these consequences, and his suspension/sack drew a lot of criticisms to the Nigerian Government and depicted an insolent attitude towards the fight against Money Laundering and allied offences. It also betrayed a seeming complicity of the Government with the impunity of corruption. It was described as *''a disruptive move, which indicated that the Central*

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[433] See 'Nigeria bank chief Sanusi told to resign by Goodluck Jonathan' <http://www.bbc.co.uk/news/world-africa-25670614> Accessed January 23, 2015

Bank of Nigeria had de facto lost much of its independence, as well as being driven by political motives given the governor's vocal criticism of oil revenue leakages and the opaque fiscal system in Nigeria.''[434] The sack came with its attendant costs because the Governor was held in high esteem by foreign investors who admired his solid track record fighting corruption and safeguarding financial stability, and were as a result, understandably unnerved by the dismissal. It led to increased market volatility within the country with the Naira while trading in the domestic bond market was halted and the benchmark stock index fell to its lowest level in three months. At this point in time too, the spill-over effects of the tapering of the United States Federal Reserve were already an issue to contend with, and as such the CBN faced additional pressure on its currency. It halted bond trading and sent the Naira to a record low. The Naira weakened as much as 3 to 168.90 per dollar.[435] Nigeria's benchmark equities gauge slid 1.5 percent and yields on the nation's Eurobonds due July 2023 jumped 11 basis points to 6.32 percent, the highest since September 11.[436] The Government through its Finance minister did assure Nigerians that the effects will be short-lived, but the main problem here was the failure on the part of the Nigerian Government to realize that a Central Bank not subordinated to political demands is a key tool in establishing strong economic fundamentals. An independent central bank can help fight inflation effectively, ensure predictability, anchor investors' expectations, and, in bad times, resist printing money to fund the budget. Moreover, if Nigeria is to play a leading role in fostering regional economic integration, it has to continue leading the way in building an effective monetary institution.[437] The official Government line regarding the sack was financial recklessness but at

[434] Samir Gadio- An emerging markets strategist at Standard Bank Group Ltd. London

[435] The lowest since Bloomberg began compiling data in 1999

[436] <http://www.bloomberg.com/news/articles/2014-02-20/nigerian-central-bank-governor-sanusi-suspended-by-president> Accessed January 2nd 2016

[437] Amadou Sy is a senior fellow and director of the Africa Growth Initiative and currently serves as a member of the Editorial Board of the Global Credit Review. His research focuses on banking,

the end of it all, neither was the Governor prosecuted for this allegation nor his claim against the NNPC officially investigated. By providence however, Nigeria found itself in 'new hands' in no time with the ascension to power of a new President who was elected into office at the expense of the incumbent riding on the wave of a tough anti-corruption stance. And true to those beliefs, and in a move that may ultimately vindicate the erstwhile Governor of the Central bank, the new Nigerian President in liaison with the British metropolitan police got the former Minister for petroleum Mrs. Diezani Alison Madueke arrested in London in October 2015 on charges of corruption, money laundering and embezzlement of funds.[438]

Another clear pointer as to the level of unchecked corruption that goes on in Nigeria is the ongoing case of the National Security Adviser to the immediate past Nigerian Government who is alleged to have diverted $2BN meant to purchase arms for the military to aid the fight against insurgency.[439] The money has been traced to several top officials of that Government and the then ruling party's chieftains most of whom have been charged to court by the Economic and Financial crimes Commission. This was revealed after the new Nigerian administration set up a committee auditing the procurement of arms and equipment from 2007-date. The committee noted that contracts awarded at huge sums of money were actually failed contracts and that there were payments worth millions of Nigerian Naira made to companies by the former National Security Adviser without documentary evidence of contractual agreements or fulfilment of tax obligations to the Federal Government of Nigeria. Further findings revealed that between March 2012 and March 2015, the erstwhile National Security Adviser awarded fictitious and phantom contracts and allegedly directed the Central Bank of Nigeria to transfer huge sums of money to various bank accounts in

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capital markets, and macroeconomics in Africa and emerging markets <http://www.brookings.edu/blogs/africa-in-focus/posts/2014/02/24-nigeria-central-bank-sanusi-sy> Accessed November 2nd, 2015

[438] See <http://www.bbc.co.uk/news/world-africa-34430597 > Accessed 22 January 2016

[439] See <http://www.bbc.co.uk/news/world-africa-34855695 > Accessed 10 March 2016

West Africa, United Kingdom and United States of America without any form of documentation. Further investigations also allege amongst others, that a former chairman of the ruling party under the past administration received 300 Million Naira from the National Security Adviser's account at the Central Bank through BAM's account at Sterling bank. Also, 2.1 BN Naira was allegedly paid into the account of DAAR Investment and holding company for the funding of media activities, a further 1.45 BN Naira to Acacia Holdings Ltd and 750 Million Naira to Reliance Hospital Ltd. The erstwhile NSA also admitted to handing 10 BN Naira to the delegates of the former ruling party and varying other sums to different other individuals for varying reasons. According to a report by American news channel, PBS News Hour, $47M was taken out in cash from the Central Bank of Nigeria (CBN) in one night.[440] According to the report, a Nigerian official says the money left the Central Bank in cash at night in armored vans. Charges have since been filed by EFCC (the Nigerian Anti-Graft agency) over these aforementioned cases. However, considering Nigeria's internationally accepted Anti-Money laundering regulations, it is difficult to understand how these transactions were made without detection. This juxtaposes the question if Nigeria was indeed worthy of the all-clear the FATF gave it in the year 2013?

While arguments may be advanced that the country satisfied the requirements asked of it, it could also be argued that the practicalities of the everyday Nigerian society were not properly contextually examined before the conclusion was made. The uniqueness of Money laundering is its derivative pull from other crimes or to some other transgression. Without the commission of a predicate offence (and in the case of Nigeria, corruption) there will be no funds to launder. Nigeria having not rid itself of that practice should never have been viewed as capable of putting a stop to the crime of money laundering. Corruption has been embedded in the Nigerian state and has always been. The current investigations are a direct result of the hitherto opposition party defeating the incumbent party at the 2015 General elections because all the alleged offences were committed

[440] This was disclosed by the network's Special Correspondent, Nick Schifrin

directly under the supervision of the former Government who definitely were not going to turn around to prosecute itself had they emerged victorious in the elections. The moneys would have dissolved into their personal bank accounts and subsequently moved abroad through various means. While it has also been argued that the laws governing money laundering regulation in Nigeria are generally satisfactory, the core problems subsist within the area of implementation and enforcement in Nigeria, as well as the political will and the inability of foreign nation's financial institutions to detect the laundering of these funds within their jurisdiction.[441] As has been stated earlier, corruption is the main predicate offence in Nigeria as far as money laundering is concerned, and as such, how the country has dealt with the scourge is directly linked to the success or otherwise of its Anti-Money laundering policies. The societies that have been able to move ahead are those that put the statutes in place to criminalize corruption and ensure that the enforcement mechanisms are proper and ready for action.[442] Unfortunately, Nigeria's enforcement mechanism has grossly failed to propel it to this level. This is not to adjudge that any one country has completely eradicated corruption, rather some have taken concrete action and obvious steps to ensure that the effects of corruption have become increasingly limited.[443]

Beyond this however, the Anti-Money laundering regulations in place in Nigeria may not have taken cognizance of contemporary Nigerian issues. Nigeria operates cash based economy- *''an economy in which more than 50 percent of the economic transactions in all sectors are conducted*

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[441] See Chioma Amobi,(2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' *European Business Law Review* Issue 6, pp. 827–855

[442] Former EFCC Chairman, Nuhu Ribadu in testimony before the United States House Financial Services Committee; entitled ''Capital Loss and Corruption: The example of Nigeria'' (19 May 2009).

[443] See Chioma Amobi,(2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' European Business Law review Issue 6, pp. 827–855

in cash, and in which the majority of the population are un-bankable.''[444] Juxtaposing this with the provisions of the Nigerian Money Laundering Act, and specifically as it relates to the concept of limits to financial transactions reveals an almost unrealistic scenario. The Act states that ''No person or body corporate shall, except in a transaction through a financial institution, make or accept cash payment of a sum exceeding N5,000,000.00 or its equivalent, in the case of an individual; or N10,000,000.00 or its equivalent in the case of a body corporate.[445] Despite being a very important provision due to the fact that it seeks to check the activities of money launderers by encouraging businesses to be suspicious of people dealing with huge sums, it is somewhat unrealistic for a country where many citizens do not hold bank accounts, and with a less than a fifth of the population keeping their money in banks.[446] Speaking in the year 2004 at a Special Meeting of the Bankers' Committee, the erstwhile Governor of Nigeria's Central Bank did state that an estimated 400 Million Naira was being held outside the banking system.[447] A major criticism of this section of the Act previously was that the triggering sum was set too low considering the cash based nature of the Nigerian economy where the use of other forms of transactions such as debit cards and credit cards were practically non-existent.[448] The amended Act clearly sought to eliminate this weakness and the triggering sum was increased subsequently.

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[444] Moshi, H(2012), ''Implications of cash dominated transactions for money laundering'' [Online] <http://www.issafrica.org >Accessed 12 February 2013]

[445] *Money Laundering (Prohibition) ACT, 2011*

[446] ''Are the banks as shiny as they look? Doubts persist about Nigeria's banks.''(The Economist: Aug 21st 2008 | LAGOS | From the print edition) <http://www.economist.com/node/11975488> Accessed 27/07/2016

[447] See ''Consolidating the Nigerian banking industry to meet the development challenges of the 21st century.'' (An address by Charles Chukwuma Soludo, Governor of the Central Bank of Nigeria, at the Special Meeting of the Bankers' Committee, Abuja, 6 July 2004. <http://www.bis.org/review/r040727g.pdf> Accessed January 22, 2016

[448] See Chioma Amobi, (2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' *European Business Law Review* Issue 6, pp. 827–855

However, the current sum, considering the points previously stated, still does not necessarily achieve the main purport of the Act. Transactions such as those for cattle and livestock go into millions of Naira, and those farmers are predominantly in the rural areas of Nigeria with little access to banking facilities and an even less desire to use banking facilities. This then means that the provision of the Act regarding transactions over the threshold is negated since it is common place to see transactions as those cited here. Furthermore, many businesses view the process of deferring customers to financial institutions instead of receiving cash as cumbersome and burdensome.[449] Talking of financial institutions and banks in particular, the importance of their role in combatting the scourge of money laundering cannot be overstated, but their input in Nigeria leaves a lot to be desired. Corruption is not just done by the dictator who has control of revenues. He needs a willing bank to process the money.[450] Banks are usually the first point of contact for intending launderers due to the safety and ease of transaction the banking facilities offer. These attractions are why strict regulations are in place to guide banks and at the same time guard against those who wish to transform the dirty variety of their illicit gains. However, the exact opposite seems to be the case as the aforementioned case involving the illegal disbursement of moneys meant for arms by the immediate past Nigerian Government depicts. How moneys were clearly above the reporting thresholds and yet wired through banks without those banks making the requisite suspicious transaction reports clearly mandated by the Nigerian Money laundering Act clearly shows the failings of the country's Anti Money laundering laws. Similarly, some of the sums being reported in the ongoing investigation into the arms deal reveals figures that banks should have deemed as irregular and/or unusual which should hence have been reported. Under the KYC rule, customers are to be profiled as a requirement and any transaction that falls out of a regular routine of a customer's previous transactions is deemed unusual. In one

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[449] *Ibid*

[450] See Global Witness, Undue Diligence: *How Banks do Business with Corrupt regimes*, (March 2009) pp 4

of the cases currently being investigated- that involving the spokesman of the former ruling party, the Economic and Financial Crimes have charged him to court over allegations that the sum of N1.4 BN transferred from the office of the former National Security Adviser was traced to a company linked to him. From the US$2.1 BN missing arms fund being investigated, it was learnt that N400M was transferred to the company in November 2014 which previously had a balance of N6, 676,576.06. While the accused remains innocent till proven guilty in this case, this sudden plunge in balance certainly should have qualified as both a suspicious transaction as well as an irregular one and should have been reported by whichever bank that was involved. The law is explicit under the suspicious transaction reporting requirement over the powers it grants the Chairman of the Economic and Financial crimes Commission and the Governor of the Central Bank of Nigeria over bank accounts which have been reported as suspicious.[451] This is consequent upon a report by the financial institution in question who in turn face the punishment of a fine on conviction for failure to comply with the requirements.[452] Did the banks turn a blind eye to the humongous transactions or did they actually file the reports with the regulatory authorities who failed to act? Either way, there seems to be more incentives for non-compliance than there are repercussions for non-compliance. These failings are all intrinsically linked to the anathema that is corruption. No matter how cogent the AML laws are, the absence of a strong desire to eliminate corrupt practices is bound to have a nullifying effect. It is the absence of this will that accounts for why the moneys are stolen successfully in the first place, and without repercussions, the chances are they will be laundered with success without any repercussions too because the same way the transgressors have gone about corrupting the system to enable them steal public funds is the same way they will navigate ways round Anti Money laundering measures too. Without the illicit funds there would be no money to launder, and with the illicit

[451] *S.6 MLA*

[452] *S.6 (9) MLA*

funds, ways must be found to launder them, and in a society as condoning to the vice as Nigeria, it has proved as easy as it could get. The lack of proper or non-implementation of the laws in place is the main issue here and particularly instructive in this regard is the theory of the soft state thesis propounded by Gurnal Mydral.

5.4.4 The Soft State Thesis

This theory was propounded by Mydral within the context of development in his monumental work on post-independence South Asia[453]which highlights the paradox of the post-colonial state and its predicaments most precisely as it relates to the problem of corruption. Soft States are dominated by powerful interests that exploit the power of the State or government to serve their own interests rather than the interests of their citizens. It signifies the discrepancy between authority and control[454] Policies decided on are often not enforced, if they are enacted at all, and in that the authorities, even when framing policies are reluctant to place obligations on people especially in matters of corruption. There is a general lack of social discipline, deficiencies in law enforcement, disregard of the rules by public officials at all levels, and their collusion with persons whose conduct it was their duty to regulate.[455] This conscious inability to enforce social reforms coupled with the lack of desire to institute reforms ensures that the legal system and its paraphernalia are moribund or at least ineffective.[456] Relating this theory to the Nigerian state could not have been better captured than with the meaning of the theory given by the definition

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[453] Myrdal, G., King, S.S. & Twentieth Century Fund (1977), *Asian drama: an inquiry into the poverty of nations*, Penguin, Harmondsworth

[454] J. E. Goldthorpe (1975) *The Sociology of the Third world: Disparity and Involvement*. New York: Cambridge University Press.

[455] J. E. Goldthorpe (1996) *The Sociology of Post-Colonial Societies: Economic Disparity, Cultural Diversity and Development*, Cambridge University Press

[456] See Ilufoye Sarafa Ogundiya, (2009) ‘’Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations,’’ *Anthropologist*, 11(4): 281-292

which stated that a soft state is *"one which formal rules (laws, officially stated administrative rules and practices etc.) are applied copiously and in a lax manner rather than vigorously and consistently. It is one in which private advantage can be gained and private bargains struck concerning the enforcement or non-enforcement of the rules, as when a business man bribes a tax official.'*'[457] These are all pertinent features of the Nigerian state, and even more symptomatic of a wider societal problem are other variables of a soft state such as forms of enticement other than money, and in this case, kinship settlement and favour from superiors. An example of this within the Nigerian context is the politics of god fathers wherein individual(s) are supported onto the ascension of public offices by an individual or a group of individuals in return for favours of varying degrees. An apt description of what a godfather is can be perfectly understood by this quote wherein the modus operandi of a godfather is perfectly captured*…''The godfather is not in the business of philanthropy. The godfather gives support to install the godson oftentimes by devious means. They are merchants of fear. They dispense violence freely and fully on those who stand in their way. In this, they play the additional role of warlord. They establish, train, and maintain a standing personal 'army' which they ostensibly supplement with sprinkling of official police detachment. In order to effect electoral change, they bribe election officials to deliver the winning election figures. They also bribe the police and other security agents to look the other way when they traffic in ballot boxes and sack opponents strongholds. The godson having taken office returns the gesture hundredfold to the point that the godfather becomes an intractable parasite on Government. The initial support given by the godfather then becomes an investment with a colossal rate of returns…*[458]*"* With such comes the absence of any will to initiate the fight against corruption because the political elites who use corruption as an instrument and as a means

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[457] J. E. Goldthorpe (1975) *The Sociology of the Third world: Disparity and Involvement*. New York: Cambridge University Press

[458] Ayoade J.A.A. (2006): ''God-father Politics in Nigeria'' in *Money, Politics and corruption in Nigeria*, A publication of International Federation for Electoral Systems (IFES) pp78-87

to political domination do everything within their means to maintain the status-quo due to the indispensability of the relevance of corruption to such politicians.

5.5 A Nigerian Conundrum

Corruption has been a huge challenge in the public administration of Nigeria and it has seriously impeded the growth and effective utilization of resources in Africa in general.[459] It remains a daunting challenge for most African countries, and in Nigeria's case, thick within the fabric of the society. The intrinsic link between effective Anti-Money laundering regulations and successful implementation of Anti-Corruption policies has already been discussed in this work, and several factors have accounted for the comfortable abode the Nigerian state provides for corruption to thrive. Nigerian leaders have variously been blamed, with the country having suffered from leaders that looted the resources of the state, and would not deliver services to the people.[460] The trouble with Nigeria was simply and squarely a problem of leadership.[461] Between 1960 and 1999 alone, Nigerian leaders siphoned more than $440BN out of the economy. This is six times the Marshall plan, the sum total needed to rebuild devastated Europe in the aftermath of the 2nd world war.[462] There have been initiatives to curb corruption by successive Nigerian Governments and this has been extensively discussed in earlier parts of this work, but it is fair to say that the desired results have not been achieved. In a country where an estimated 100 Million people live below the poverty line, economic hardship within a vast number of Nigerians presents the perfect platform for corrupt practices due to the amenability of such impoverished individuals to corrupt

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[459] Egbue N G (2006) ''Africa: Cultural Dimensions of Corruption and Possibilities for change.'' *Journal for Social Sciences* 12(2): 83-91

[460] Commission for Africa (2005) *Our common Interest: Report of the Commission of Africa*. (London: DFID)

[461] Achebe C. (1983) '*An image of Africa'* (London, Penguin Books)

[462] See Special Report: *Big men, big fraud and big trouble - Nigeria's elections; to come*. (2007)The Economist, 383(8526), pp. 69.

practices, and in this case by being recipients of bribes for favours. Corruption is both a symptom and a consequence, in that it breeds poverty and poverty aids corruption to flourish.[463] The absence of a genuine political will to initiate fights against corruption is also another factor, as the elites who occupy the political positions with the powers to carry out initiatives against corruption are not in any way inclined to do so. There is no reason why leaders will want to change a corrupt system from which they earn massive rents.[464] The short termism and inconsistent unsustainability's of tackling corruption has also been another huge factor as to why anti-corruption policies have failed. Tackling corruption is a challenging long term undertaking, not a one-shot affair.[465] It requires a high level of commitment and continuity in policies but the policy discontinuations and political instability that have been the hallmark of most of Nigeria's history is not a conducive base for any serious anti-corruption policy to hold sway. This was perfectly summed up by a former Nigerian leader who stated thus: *''I have not seen the will of persistency and consistency in Nigeria [to fight corruption] because the people that are involved in corruption are strongly entrenched and unless you are ready to confront them at the point of even giving your life for it, then you will give in, that is the end of it.''*[466]

The current Nigerian Government has set itself a zero tolerance to corruption agenda, and in doing so has initiated probes into the activities of the immediate past Government with the President stating in unequivocal terms that his government would recover all the money stolen from

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[463] See Ilufoye Sarafa Ogundiya, (2009) ''Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations.'' *Anthropologist*, 11(4): 281-292

[464] Agbiboa, D. E. (2012) 'Serving the few, starving the many: How Corruption Under-develops Nigeria and How There is an Alternative Perspective to Corruption Clean-ups.'' Africa Today 58(4), 110-132. Indiana University Press

[465] See Ilufoye Sarafa Ogundiya, (2009) ''Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations'' *Anthropologist* 11(4): 281-292

[466] See Igbinovia, P.E., Edobor-Igbinovia, B. (2014), *The Economic and Financial Crimes Commission in Nigeria: An Appraisal* pp 92. Safari Books Ltd, Oxford.

Nigeria’s coffers “no matter where it is hidden and no matter how long it will take.’’ And in one of a number of moves put in place already was the signing of a memorandum of understanding between the Government of the Federal Republic of Nigeria and the United Arab Emirates, UAE, to enable the extradition of corrupt Nigerians hiding stolen funds in Dubai. This agreement was signed in January 2016 due to the perception that Nigerians, especially the politically exposed persons have in the last decade seen and used Dubai as a safe haven for enjoying their looted wealth. The pact also covers Mutual Legal Assistance on Criminal Matters, as well as Commercial Matters, including the recovery and repatriation of stolen wealth, and this aspect of the pact holds the potential to trap billions of dollars in bank deposits and choice property suspected to have been acquired with proceeds of fraud. The pact would enable such funds to be frozen pending the prosecution and conviction of offenders and the repatriation of what they stole in Nigeria. It could also block fraudulent transfer of funds to Dubai, which has lax laws unlike Europe and the United States. Going further, Nigeria is a signatory to the 2003 United Nations Convention against Corruption (UNCAC) which is a multilateral convention negotiated by members of the United Nations and is the first global legally binding international anti-corruption instrument. This instrument obliges countries to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. It also provides for the return of assets to countries of origin as a fundamental principle.[467] Nigeria will benefit from these provisions because there seems to be a genuine desire to tackle corruption in Nigeria today but the government of the day is on a four year mandate, which brings to bear the issue whether a new regime that succeeds it on completion of its tenure will carry on the initiatives in like manner. Already, there are allegations of bias and a political witch hunt by members of the immediate past regime who view the Anti-Corruption

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[467] Article 51

moves of the current Government as a way of settling political scores. In the event that the opposition get back in government in 2019 when the next general elections come around, it is fair to say that all those who have been affected by the strong stance of this Government will be left off the hook. This is irrespective of the genuineness or otherwise of the initiatives in the first place. There is precedent for this in Nigeria, and ironically, with the current President when he was ousted as military head of state in a bloodless coup in 1985. Operating a tough stance against corruption as today, the then Military ruler had jailed a large number of corrupt politicians after unseating a democratically elected Government in 1983 but once overthrown by his fellow officers in the army and put in custody, the new Government went ahead to review a lot of the cases. This led to a lot of the politicians released from prison and their loot mostly returned to them.[468] This Government will go ahead to be viewed as one of the most corrupt in the history of Nigeria, showing that rescinding the decision of the preceding Government regarding the corrupt politicians was not done in good faith as was postulated but rather another way of settling old scores. This stop-start approach towards fighting corruption has a huge nullifying effect on the potency of the initiatives.

Conclusion

Based on factors discussed extensively in this chapter, compliance with international AML standards seemed to be an academic one rather than practical. It was on paper, not on the field, and the practicability's of the theoretical compliance has left a lot to be desired. The failure of anti-corruption policies means there will perpetually be illicit funds in circulation being proceeds of corrupt practices, which in natural turn and instinctively on the part of the holders of such funds will need to be laundered. The Anti-Money regulations in place notwithstanding, the prevalence of corruption means that such funds have usually been found to go through Nigerian financial institutions without detection. Also of particular concern is the fact that these funds get across

[468] To attain some legitimacy, this was done under the Forfeiture of Assets (Release of certain Forfeited Properties) Decrees N0 24 and 50 of 1993

international borders to the safe confines of banks in Nations as developed and as technologically sophisticated as the United Kingdom and the United States of America. These are countries that are at the forefront of the international initiatives against money laundering, and the fact that they escape any form of significant censure from appropriate bodies' calls into question, the genuineness of the international drive against money laundering.

Chapter Six

Anti-Money Laundering Initiatives: International Commitment and/or Culpability?

6.0 Introduction:

To state that money laundering has become a global phenomenon is merely stating the obvious, and the ever increasing connectivity that technological advancements offer with the global financial system being increasingly based on digital or ''megabyte'' money means funds are moved rapidly and anonymously, traded, exchanged, and cleaned or legitimized via an array of financial instruments such as derivatives and futures.[469] This means there is an upsurge in the magnitude of illicit money circulating the world economy due to the ease with which criminals may launder illicit gains without detection these days. This transnational dimension to the crime of money laundering means that the crime cannot be fought in isolation hence the International initiatives aimed at containing it. London for instance, is one of the world's largest and most important financial hubs. Unfortunately, this strategic position is accompanied by undesirable consequences of which money laundering is one.[470] Nigeria, being a former British colony enjoys a harmonious relationship with Britain, and this relationship has been exploited by Nigerian politically exposed persons to launder illicit funds. Other countries like the United States of America (USA) have equally been utilised by such persons. The factors that militate against successful implementation of AML laws in less developed countries like Nigeria are not particularly apparent in the developed nations. Therefore, with international cooperation as one of the cardinal principles of international AML initiatives, it is perplexing somewhat how illicit funds from foreign countries get successfully immersed into their financial institutions. This begs the

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[469] Joel Kurtzman, (1993) *The Death of Money: How the Electronic Economy Has Destabilized the World's Markets and Created Financial Chaos*. (Simon & Schuster Ltd)

[470] See Chioma Amobi, (2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' *European Business Law Review* Issue 6

question if it is it naïve to think that the Western countries should help Nigeria police the theft of its patrimony? Or do they in many ways benefit from Nigeria's corruption?

This chapter seeks to (i) analyse the commitment of the international community (specifically Britain and the USA) towards stemming the flow of illicit funds to their respective jurisdictions; (ii) appraise the culpability of banks and financial institutions within these stated jurisdictions as regards the regulatory standards demanded of them; and (iii) examine the deterrence efficiency of sanctions for breaching regulatory standards by the banks and financial institutions within these jurisdictions.

6.1United Kingdom Anti Money Laundering Framework

The United Kingdom adopts a tripartite system in its fight against money laundering consisting of its civil, criminal and regulatory regimes. The Government is responsible for passing money laundering legislation which contains and defines the applicable money laundering offences. The Financial Services authority (FSA) is the main body responsible for regulatory oversight while the Joint Money Laundering Steering group (JMLSG) issues important guidelines on money laundering regulation.[471] The requirements of the UK anti-money laundering regime are set out in: The Proceeds of Crime Act 2002 (as amended by the Crime and Courts Act 2013 and the Serious Crime Act 2015); The Money Laundering Regulations 2007; The Terrorism Act 2000 (as amended by the Anti-Terrorism, Crime and Security Act 2001, the Terrorism Act 2006 and the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007

[471] Angela Veng Mei Leong, (2007) ''Anti-Money Laundering Measures in the United Kingdom: A review of recent legislation and the FSA's Risk Based Approach,'' 28 *Company Lawyer* 35-42

6.1.1 The Proceeds of Crime Act

The Proceeds of Crime Act 2002 (POCA) set out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power.[472] It sought to *''establish the Assets Recovery Agency … to provide for confiscation orders in relation to persons who benefit from criminal conduct and for restraint orders to prohibit dealing with property, to allow the recovery of property which is or represents property obtained through unlawful conduct or which is intended to be used in unlawful conduct, to make provision about money laundering.''*[473] Prior to this Act, confiscation proceedings had been limited to the powers under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. The Proceeds of Crime act extended the confiscation powers to financial crime and gave the Courts wide ranging powers to confiscate assets and to make 'assumptions' as to how certain assets had been obtained. With this came an upsurge in confiscation proceedings wherein anyone convicted of a crime could be ordered to pay with the court calculating how much they were required to hand over, and the person may face imprisonment if they failed to pay. Any money earned as a result of or in connection with an offence can be recovered under the terms of the Act, and this includes assets bought with the proceeds of crime. Confiscations occurs after conviction but other means of recovering the proceeds of crime which do not require a conviction are provided for in the Act, namely civil recovery, cash seizure and taxation powers. The Police could for instance seize £1,000 in cash or more if there is a reasonable suspicion that such was earned through criminal/illegal activity. The Act expands the law on money laundering to cover any crime rather than just drug-related offences. It applies a single set of guidance on money laundering offences and targets the proceeds of any criminal conduct that would be an offence in Britain.

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[472] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317904/Fact_Sheet_-_Overview_of_POCA__2_.pdf

[473] *Ibid*

The money laundering provisions were contained in Part 7 of the Act wherein a person is deemed to have committed an offence if he or she conceals, disguises, converts or transfers criminal property or removes it from England and Wales or Scotland or Northern Ireland; enters into or becomes concerned in an arrangement which he or she knows or suspects facilitates the acquisition, retention, use or control of criminal property; acquires, uses or has possession of criminal property. The Act also introduced a negligence test, meaning a professional working in a sector regulated by money laundering regulations (such as banks and other financial institutions) can commit a criminal offence for failing to report money laundering if there are reasonable grounds for knowing or suspecting that it is taking place. This was a paramount requirement even where a person was not in the regulated sector, as they must report any suspicious activity through their trade, business or profession. Failure to report could result in a five-year prison term. In summary, the Act sought to *‘‘provide wide ranging powers to deprive these criminals of their main motivation – their money and the property they have accumulated through their illegal activities.’’*[474]

6.1.2The Serious Crime Act (2015)

This Act amended the POCA with the key changes being (i) Increase prison sentences for failure to pay confiscation orders; (ii) Ensure that criminal assets cannot be hidden with spouses, associates or other third parties; (iii) Require courts to consider imposing an overseas travel ban for the purpose of ensuring that a confiscation order is effective; (iv) Enable assets to be restrained more quickly and earlier in investigations; (v) Reduce the defendant’s time to pay confiscation orders; and (vi) Extend investigative powers so that they are available to trace assets once a confiscation order is made. The changes to confiscation orders emanated from the criticism of the POCA

[474] Bob Ainsworth (Home Office Minister) http://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/proceeds-crime-act Accessed 23rd January 2016

regarding the gulf that existed between the orders made and the amount of money recovered by authorities on behalf of the Government. This was in part due to the fact that the determination of an offender’s benefit, for the purposes of the Act, is his criminal turnover rather than his criminal profit, so in hidden assets cases the order may well exceed what an offender could in fact pay, even if he was so inclined. To remedy this, the new Act increased the term of default sentences; decreased the amount of time available to repay; mandate the consideration of travel restrictions; take money directly from bank accounts and more efficient consideration of third party interests. In decreasing the number of default sentences, the SCA slashed from 12 under the POCA, to four the range of default sentences, with a maximum of fourteen years for a failure to pay an order of more than £1 million and a minimum of 6 months for a failure to pay an order of more than £10,000.[475] Similarly, in relation to the changes in time available to repay, the SCA stipulates that where a defendant cannot pay immediately he or she can be given up to three months to repay; in exceptional circumstances this can be extended up to six months.[476] This extension of time is only granted where Court is satisfied that the offender is unable to pay the full amount due on the day the order was made and if more time is required to realise funds from a specific asset, e.g. the sale of a vehicle or house. The deadlines under the previous regime were six and twelve months respectively.[477]

Specifically, the amendment relates to money laundering via the suspicious activity reports whereby certain professionals are obliged to make Suspicious Activity Reports (often referred to as SARs) to the National Crime Agency (“the NCA”) where they have reasonable grounds to know or suspect that their client is engaged in money laundering. It is a criminal offence not to

[475] S.10 *Serious Crime Act (2015)*

[476] S.5 *Serious Crime Act (2015)*

[477] S.11 *Proceeds of Crime Act (2002)*

report in these circumstances. The difficulty with this provision comes about with situations where if a disclosure is made, the maker may be at risk of liability from the subject of the disclosure for failure to carry out the transaction or for a breach of confidence, whereas, if a disclosure is not made those carrying out the transaction could be guilty of a money laundering offence. The POCA gives protection against breach of confidence by stating explicitly that *"authorised disclosure is not to be taken to breach any restriction on the disclosure of information (however imposed).''*[478] However, there has been extensive litigation by customers of banks disgruntled by bank refusal to carry out transaction in accordance with their instructions. The courts have refused to impose civil liability on the banks where to do so would in effect be to require them to commit an offence by carrying out the transaction whilst suspecting it to involve criminal property.[479] The Act has therefore introduced a welcome protection for those who report suspicions of money laundering in good faith by providing that *''where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it was made."*[480] The effect is to make it clear that provided only that the maker is acting in good faith; persons who make disclosures to relevant authorities are protected from civil liability for doing so. This ensures that the UK complies with the obligation to this effect under the third money laundering directive. The amendment is a clear recognition of the importance of reporting money laundering suspicion and of a consideration that reporting genuinely held suspicions of money laundering, which the law requires, should not place institutions at risk of civil liability. Lord Bates stated, when presenting the amendment, that: *"While the Government recognise the concerns of customers, we believe that where an institution has suspicions regarding the transaction and report those to law enforcement authorities in good*

[478] S.338 *Proceeds of Crime Act*

[479] See *Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154*

[480] S.37 *Serious Crime Act (2015)*

faith, as the law requires it to do, that institution should not be liable for civil claims for damages."[481]

6.1.3 Money Laundering Regulations (MLR) (2007)

This is the most essential piece of legislation enacted thus far and it implements, in part, Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (The Third Directive). The Regulations require the financial, accountancy, legal and other sectors to apply risk-based customer due diligence measures and take other steps to prevent their services being used for money laundering or terrorist financing. This third directive builds on the obligations imposed on member states by the First Directive (91/308/EEC) which came into force on 01.01.1993 as amended by the Second Directive (2001/97/EC).[482] The third directive sought to update European legislation on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing so that it better reflects the 40 Recommendations on money laundering made by the Financial Action Task Force.[483]As well as ensuring a level playing field for firms across the EU, the Third Directive also protects the EU Anti-Money laundering/counter terrorist financing defences by preventing criminals from taking advantage of weaker regimes. A major improvement upon the earlier directives here is that this third directive challenges corrupt Government officials from countries such as Nigeria, who had essentially been left free to filter their stolen funds through British banks and institutions by designating such people as politically exposed persons

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[481] See *Serious Crime Bill [HL]* [02 March 2015] Volume 760 <https://hansard.parliament.uk/Lords/2015-0302/debates/15030227000659/SeriousCrimeBill(HL)> Accessed 20 March 2016

[482] In force on 28.12.2001

[483] See < http://www.fatf-gafi.org/ >

(PEPs).[484]The previous directives contained no such caveats. In ensuring this, the law[485] explicitly states that the process of due diligence involves the following- (a) Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source; (b) Identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and (c) Obtaining information on the purpose and intended nature of the business relationship. Here, businesses must be mindful of forgeries in the documents although there is nothing to suggest that such must be carried out by experts in forged documents. This customer due diligence requirement must be carried out when establishing a business relationship, carrying out an occasional transaction, where there is a suspicion of money laundering or terrorist financing or in the case of any doubt about the veracity or adequacy of documents, data or information previously obtained for the purpose of customer due diligence.[486] Of particular importance in this regard is the distinction between occasional transactions and long-lasting business relationships because of its relevance to the timing of customer due diligence and the storage of records. In an occasional transaction likely to increase in value or develop into a business relationship, an early conduct of customer due diligence will avoid delays later in the retainer. There shall also be an on-going monitoring of a business relationship and this means 'scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are

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[484] See Chioma Amobi,(2010) ''Money laundering regulation in Nigeria: The problems with enforcement, the British connection and global efforts.'' *European Business Law Review* Issue 6

[485] *Regulation 5 (a-c) Money Laundering Regulations 2007*

[486] Regulation 7

consistent with the relevant person's knowledge of the customer, his business and risk profile; and keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.[487] There is also a clear-cut distinction between two types of diligence the law advances, namely the simplified due diligence as well as enhanced due diligence. The law regarding the former sets out the terms where the application of the customer due diligence requirement could be waived under explicitly stated circumstances,[488] but more imperative to the scope of this work is the terms of the latter wherein relevant persons are mandated to apply risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring. Here the law mandates a relevant person who proposes to have a business relationship or carry out an occasional transaction with a politically exposed person to have approval from senior management for establishing the business relationship with that person; take adequate measures to establish the source of wealth and source of funds which are involved in the proposed business relationship or occasional transaction; and where the business relationship is entered into, conduct enhanced ongoing monitoring of the relationship.[489]

A politically exposed person in this sense is defined as (a) an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by— (i) a state other than the United Kingdom; (ii) a Community institution; or (iii) an international body, including a person who falls in any of the categories listed in paragraph 4(1)(a) of Schedule 2; (b) an immediate family member of a person referred to in sub-paragraph (a), including a person who falls in any of the categories listed in paragraph 4(1)(c) of Schedule 2; or (c) a known close associate of a person referred to in sub-paragraph (a), including a person who falls in either of the categories listed in paragraph 4(1)(d) of Schedule 2. For the purpose of deciding whether a person is a known close

[487] Regulation 8

[488] Regulation 13

[489] Regulation 14(4)

associate of a person referred to in paragraph (5), a relevant person need only have regard to information which is in his possession or is publicly known. For the purposes of regulation 14(5), and specifically for the identification of a PEP, they are — (a) individuals who are or have been entrusted with prominent public functions include the following— (i) heads of state, heads of government, ministers and deputy or assistant ministers; (ii) members of parliaments; (iii) members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not generally subject to further appeal, other than in exceptional circumstances; (iv) members of courts of auditors or of the boards of central banks; (v) ambassadors, chargés d'affaires and high-ranking officers in the armed forces; and (vi) members of the administrative, management or supervisory bodies of state-owned enterprises; (b) the categories set out in paragraphs (i) to (vi) of sub-paragraph (a) do not include middle-ranking or more junior officials; (c) immediate family members include the following— (i) a spouse; (ii) a partner; (iii) children and their spouses or partners; and (iv) parents; (d) persons known to be close associates include the following— (i) any individual who is known to have joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a person referred to in regulation 14(5)(a); and (ii) any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a person referred to in regulation 14(5)(a).[490]

6.2 Regulatory Application; Complicity or Compliance?

The takings from the legal and regulatory framework of the British AML regulations reveals sufficient efforts when put through academic analysis. However, formal compliance and actual compliance represent two distinct scenarios especially with suggestions in some quarters that the

[490] See <http://www.legislation.gov.uk/uksi/2007/2157/regulation/14/made > Accessed 29 August 2016

British regulations have never been effectively enforced by financial regulators and banks.[491] This is supported by notions that financial institutions know they can get away with paying lip service to the rules.[492] The purpose of the rules is to impose a burden on banks and financial institutions to ensure they have a clear picture of the provenance of any money they receive from a client, as well as knowing as much as possible about such clients, their businesses, source of funds, and in the case of politically exposed persons, ensure that the monies been deposited are not in fact the proceeds which have been stolen from another country's treasury.[493] Before discussing the level of compliance practiced by banks and financial institutions, it is important to analyse the attendant risks that comes with the adherence to obligations under AML regulations. There is the potential for banks overstepping their AML obligations, thereby exposing them to the possibility of civil cases by aggrieved customers. As a result, there exists a potential of risk involved in both non-compliance and compliance and this was highlighted in the case of *Hosni Tayeb v HSBC Bank PLC.*[494] Although decided under the Criminal Justice Act 1988, it enunciated the creed that banks must exercise caution when observing compliance to regulations because excessive zeal in compliance has the potential of exposing such banks to civil litigation by customers. The facts in the case involved a customer who sold database to an overseas buyer who agreed to make payments from a Barclays Bank account held in London. The account to be credited was in the name of the claimant at an account he held at a *HSBC* branch in Derby. The sum of £944,114.23 was subsequently paid into this account by the buyer through a *CHAPS* transfer. However, the claimant was not successful in drawing any part of this money when he attempted to do so because

[491] See Rowan Hastings, 'How London became the money laundering capital of the world' http://www.ianfraser.org/how-london-became-the-money-laundering-capital-of-the-world/ Accessed July 15th, 2012

[492] *Ibid*

[493] *Ibid*

[494] *[2004] EWHC 1529; [2004] 4 All E.R. 1024*

the manager of the *HSBC* branch upon receipt of the funds found the transaction to be of a suspicious nature. This prompted a meeting between the manager and the claimant after which the manager remained unconvinced as to the legitimacy of the transaction. The main aim of this meeting was for the claimant to explain the origin of the transfer and to provide supporting evidence as to the legitimacy of the transaction. The manager however, still held a strong suspicion about the transaction, as a result of which the funds were returned to the payee bank after consultations with the fraud unit of the bank. One fundamental issue the bank manager failed to realise however was the rules that govern *CHAPS* transactions which relies upon absolute finality in payments. Such transactions usually require real-time settlement of payments by the receiving bank and that a transfer of funds be finalised in favour of the payee on the same day as the account of the payer is debited. And in the event that transactions cannot be completed, payments are required to be returned to the originating bank by the following day.

In the instant case, after two years of not doing anything about the case, the claimant brought action against the defendant bank seeking to recover the debt that he claimed existed in his favour from the bank following its receipt of the *CHAPS* transfer and also claimed damages for breach of contract. It was held Per *Colman J*. that a bank was obliged by the implied terms of its contract with an existing customer to accept all incoming CHAPS credits to an account capable of receiving them and to apply them in accordance with the rules governing such transactions. S.93 (A) of the CJA made it a criminal offence for a bank to act on a customer’s instruction where it knew or suspected that the relevant assets were the proceeds of criminal conduct. This may have been the thinking behind the managers’ refusal to honour the transaction, but the provisions of the law did not release a bank from liability if it declined to accept a transfer because the credit of the funds into the claimants account created a subsisting debt from the bank to its customer and the return of those funds by the bank did not stop the claimants entitlement to them. The proper course of action the manager should have taken once any amount of suspicion was entertained was to either apply to court without notice, with the serious fraud office as a party, for a declaration.[495] This would have shielded the bank from any subsequent action brought by the customer. The main risk with compliance is the propensity of the banks to go ultra vires and this was the case with the defendant bank here. Despite being bound by the then Criminal Justice Act to report transactions,[496] this obligation only operated to limit the banks civil liability to its customer only to the extent that the civil liability arose from complying with the statute. By returning the money to the payee bank despite the *CHAPS* transfer, the bank had acted without recourse to legislation and was therefore in breach of terms of agreement with the complainant because the CJA did not operate to remove liability from a bank if it declined to accept a transfer. A clear case in contrast however, is that of *Squirrel Ltd v National Westminster Bank Plc, HM Customs and Excise (Intervenor).*[497] And although decided under a different legislation, it highlights a case where a bank took the requisite steps and stayed well within legal realms in reporting what it felt was suspicious. Here, the applicant (a mobile telecommunications business) found that its bank had ceased accepting instructions relating to its account and had in fact frozen the account without stating any reasons. The bank suspected that the account may have been used to carry out a VAT fraud, but whether or not the customer was guilty of this was held not to be material. The fact that the bank entertained a reasonable ground for suspicion sufficed as long as it also followed up by complying with the provisions of the Proceeds of Crime Act regarding obtaining appropriate consent, [498]making an authorised disclosure[499]as well as complying with the anti-tip-off provisions which specifically

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[495] *Bank of Scotland Ltd v A Ltd and others (Serious Fraud Office, Interested Party [2001] 1 WLR 754, [2001] EWCA Civ 52*

[496] S.93(A)

[497] *[2005] EWHC 664 (Ch)*

[498] S.335 *POCA*

[499] S.338 *POCA*

states that banks are prohibited from notifying a customer that an investigation is taking place on such a person's account. At this point, it becomes an obligation incumbent upon the bank to block such an account until such time as the relevant authority has given its directions for complying with its obligations under *POCA* or until such time for the relevant authority to do so has expired. It was held in this case that the conduct of the bank despite the blunt outlook as well as causing serious financial detriment to the applicant company, was ''unimpeachable'' and completely aligned with the intents and purposes of the legislation.[500]

What however, justifies suspicion, and how is a balance struck between suspicions with the breach of a customer's rights? Forming the suspicion is one thing, justifying it another. Suspicion in this regard must not be based on reasonable grounds. In *Ahmad v HM Advocate*[501] it was stated that there is nothing in the language of the Proceeds of Crimes Act which states or requires that money laundering is in fact taking place.[502] It is plain that the obligation thereunder can arise if a person suspects or has reasonable cause for suspecting that it is. In *Iraj Parvizi v Barclays Bank Plc*[503] Mr Parvizi, a professional gambler, sought to bring a claim against Barclays for breach of contract. He argued that the bank, in freezing his account at a critical time, had caused him to suffer considerable financial losses, namely by preventing him from making significant gambling gains. Barclays' contrarily, justified its actions on the fact that it detected suspicious activity on the account and then carried out an analytical review of the account following an internal report from the Holborn branch of Barclays bank. The officer in charge based the suspicion on several large transfers of money to gaming companies and the inability to link Mr Parvizi to the source of

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[500] Per Ladie J

[501] *[2009] HCJAC 60; [2009] SCL1093 at [30]*.

[502] s.330 (2) provides the conditions under which it becomes an obligation to make a suspicious transaction report.

[503] *[2014] EWHC B2 (QB)*

funds in relation to four particular transactions, subsequent upon which a Suspicious Activity Report was sent to the National Crime Agency (then the Serious Organised Crime Agency) seeking permission to carry out the claimants instructions. Mr Parvizi contended that there was no reasonable ground for the suspicion in the first place, but the onus was on him to establish, at trial, that the officer in charge did not have a relevant suspicion that was *more than fanciful*. And to argue this, he contended that the officer in charges' statement lacked coherence and gave no indication of how the suspicion that his gambling constituted money laundering was formed. He submitted that, as a professional gambler, the transactions were all with reputable bookmakers. The defendant bank on its part urged the court to strike the action out, and in agreeing to that, the High Court concluded that, despite the fact that Mr Parvizi had probably suffered financial loss as a result of his account having been frozen, he had no real prospect of success at trial. There was no real prospect of him establishing that Miss Walley [officer in charge] did not have a relevant suspicion that was *"more than fanciful."* In arriving at its decision, the High Court stated that suspicion must be more than *"a vague feeling of unease"* and the law *"does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based upon 'reasonable grounds."* Suspicion must be *"more than fanciful"* but it is for the party alleging suspicion, i.e. the bank, to prove the existence of suspicion to the extent that it provides justification for not following client instructions.[504] The Court did concede that there was arguably a lack of reasoning in some of what Miss Walley had said in support of her suspicion. In particular, it highlighted that it was difficult to understand why she did not make an inquiry of Mr Parvizi's relationship manager at the bank and why the details in the witness statement did not appear precisely to match those in the SAR. However, it was satisfied that the evidence established that her suspicion was more than merely fanciful. The case was duly struck out. This

[504] This was based on precedent from the earlier cases of *R v Da Silva [2007]1 WLR 303; and Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154*

means in essence that a bank can freeze the account of a customer where it has a genuine of suspicion of money laundering without fear that it will be breaking its contractual obligations towards that customer by not following its instructions. However, it will be for the bank to establish the primary fact of suspicion in order to justify not following customer instruction. The bank must also ensure that there is in place, a structured process for dealing with such suspicions. A careful written record should be made of the suspicions, the reasons behind those suspicions, the discussions with any relevant persons, and an appendix of any relevant documentary evidence. The SAR should be produced carefully and with sufficient detail on the assumption that it may be subject to examination in Court on a later date. Particular caution must also be exercised by the bank in this process to guard against tipping off. A person is guilty of an offence [of tipping off] if: (a) he knows or suspects that a constable is acting or is proposing to act in connection with an investigation which is being or is about to be conducted into money laundering; and (b) he discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation. This has been a massive challenge to financial institutions because as discussed earlier, if the bank pays the money out after holding suspicions about a transaction, such bank is held as a constructive trustee to the money paid. Prudent banks can be caught between possible equitable liability or liability for contempt on the one side and serious criminal liability on the other--or, indeed, between criminal liability for assisting (if they pay a money laundering customer) and criminal liability for tipping off (if they do not pay). If it stops payments, it may well tip off the suspect. So it is a case of *''damned if you do, damned if you don't.''*[505] This dilemma played out in the case of *Governor and Company of the Bank of Scotland v A Ltd, B & C*[506]where the bank was torn between its suspicions that some individuals involved in a transaction were involved in fraud, as such obliged to report, and its

[505] Michael Isaacs, (2008) ''Money Laundering Dilemmas for Banks'' *(J.I.B.L.R.)* 19(8), 284-288]

[506] *[2001] All E.R. (D)81.*

fears of not falling foul of a tipping off. The facts of the case here were that a company, A, opened and operated an account to which substantial sums of money were transferred. Worried that there may have been links to fraudulent activities by the operators of the account, the bank notified the police who then notified the bank that a person who appeared to be closely involved with the company was being investigated. Considering that a Bank could face either criminal or civil liabilities if it declined a customer's transactions or actually went ahead with it, it is "unthinkable that the law should put an honest institution in such a position"[507] In the instant case, the Bank of Scotland sought directions from the court, in private and without notice to its customer. However, it was hampered in giving information to the court, because the Metropolitan Police told it in strong terms that they did not wish the information resulting from the bank's inquiries to be revealed, even to the court. At the hearing, it was the Judges' suggestion that an order should be made freezing A Ltd.'s account, to which the bank complied. The freezing order however turned out to be a very unusual one as it was being covered in secrecy even to the customer as well as omitting normal safeguards for the customer. As a result, A Ltd, unable to obtain its money and even to discover why not, became increasingly angry. Eventually, and predictably, it realised that it was the subject of a serious criminal investigation--in other words, it had been tipped off, by deed rather than word. By the time of the hearing before Laddie J., there had been a number of hearings, by which the order had been denuded of its force, and most of the funds had been unfrozen. However, the bank still needed clarity as to which party bears the considerable cost of proceedings and guidance as to what steps banks should take in the future. It was the contention of the bank that the costs should be bore by the customer --if liability in equity had been proved, indeed, the bank could plausibly have claimed that the customer's frozen accounts amounted to a *trust fund* from which the costs could be paid, but when it became clear, as it did, that there was no reason to believe that the customer had been guilty of any fraud, the

[507] Per Ladie J in *Bank of Scotland Ltd v A Ltd and others (Serious Fraud Office, Interested Party [2001] 1 WLR 754, [2001] EWCA Civ 52*

account could not be considered in that light. There was no doubt in the judges' mind that the despite the banks fighting attempt to show that *true* innocence was not the same as *not having been proved guilty,* which it maintained was the case here, that the customer was innocent and should not bear the cost. The thinking behind this was that it would be oppressive for innocent customers to have to bear the costs of litigation in these circumstances. The court duly ruled that the bank was liable for costs. The bank felt aggrieved because it felt it was being made to pay for being scrupulous and as thorough as the law demands, but the appellate court per Lord Woolf CJ agreed with the lower court on this count albeit with some sympathy, that although the bank had been in a genuinely difficult situation, it had tried to get assistance in the wrong way. The court stated that there should have been an investigation with the police (by now the Serious Fraud Office (SFO) as to the information which could be disclosed, and, if the police were uncooperative, it was the SFO which should have been the correct defendant in proceedings for directions by the bank--in which case the customer would not have needed to know about the hearing. However, on the authority of *K Ltd v NatWest,*[508] it is now settled law that the courts will not order a bank to act where to do so would result in criminal liability under POCA.[509] In the instant case, Longmore LJ stated that *''the 'temporary illegality' of performing the mandated transaction 'suspended' the bank's obligations: If the law of the land makes it a criminal offence to honour the customer's mandate in these circumstances there can, in my judgment, be no breach of contract for the Bank to refuse to honour its mandate.''*[510]

On paper, the United kingdom has some of the strictest anti-money laundering legislation in the world so it comes as a surprise somewhat that London is in some quarters referred to as the *'money*

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[508] *[2006] EWCA Civ 1039*

[509] See Isaacs, M. & Wilding, R. 2007, ''Banks and money laundering - certainty at last?'' *Law and Financial Markets Review*, vol. 1, no. 5, pp. 427.

[510] *[2006] EWCA Civ 1039*

laundering capital of the world.'[511] This insinuation becomes the more pertinent when it is put into perspective that the British capital for instance, has become the default destination for wealthy Russians in trouble from home thereby accounting for a large number of Russian oligarchs who live and work in Britain. Russia is acclaimed to be controlled by a 'gangster culture' and these oligarchs (many of them with political baggage) for good reasons and bad, view London as a safe haven.[512] There is an apparent presence of complicity and culpabilities in the practices of some of the world's biggest financial institutions and this is all the more disturbing when the Financial Services Authority's own investigation into London banks revealed that a third of the banks appeared willing to accept very high levels of money-laundering risk. Over a half of those banks failed to use meaningful due diligence in higher risk situations, a third dismissing serious allegations about their clientele without adequate review, a third failing to properly identify politically exposed persons and importantly, three-quarters failing to affect sufficient measures to establish the sources of some of their clientele's sources of wealth.[513] The paucity of money laundering cases being successfully prosecuted when rules are routinely flouted by financial institutions suggest that the pertinent financial rules and regulations are largely treated by a lip service and box-ticking mentality towards compliance procedures.[514]

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[511] Rowan Hastings: How London became the money laundering capital of the world- http://www.ianfraser.org/how-london-became-the-money-laundering-capital-of-the-world/

[512] *Ibid*

[513] Financial Services Authority (FSA) Report (2011), "Banks' management of high money laundering risk situations: How banks deal with high-risk customers (including politically exposed persons), correspondent banking relationship and wire transfers."

[514] Yeoh, P. (2014). ''Enhancing effectiveness of anti-money laundering laws through whistleblowing.'' *Journal of Money Laundering Control*, 17(3), pp. 327.

6.3 The 'Invincibility' of Financial Institutions. (The case of the HSBC Bank)

A threat assessment study carried out by the National Crime Agency in July 2015 found that *''…hundreds of billions of Dollars of criminal money almost certainly continue to be laundered through UK banks, including their subsidiaries, each year.''*[515] The same agency had previously warned that despite the UK's role in developing international standards to tackle money laundering, the same money-laundering networks used by organised crime were being used by terrorists as well, thereby constituting a 'strategic threat to the UK's economy and reputation.'[516] There exists, a sense of feeling that UK banks and financial institutions have cultivated a habit of circumventing the *Know your customer* rules designed to curb criminals' abilities to launder the proceeds of crime, and a notion that the British 'treat it as not their problem because there are no corpses on the streets.[517] In 2012, a number of UK-domiciled banks attracted extensive media attention when US authorities charged and later settled with them out of court for alleged money-laundering activities across border. UK regulators followed with appropriate enforcement actions subsequently, and the HSBC was one of those banks. Firstly, it is worth noting that the HSBC's international network comprises around 7,500 offices in over 80 countries and territories in Europe, the Asia-Pacific region, the Americas, the Middle East and Africa.[518] This dramatic development at HSBC was not sudden or new, as way back in April 2003, the Federal Reserve

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[515] ''London is now the global money-laundering centre for the drug trade,'' Available online at <http://www.independent.co.uk/news/uk/crime/london-is-now-the-global-money-laundering-centre-for-the-drug-trade-says-crime-expert-10366262.html > Accessed 20 July, 2016

[516] *Ibid*

[517] This view is held by Mr Saviano, author of the international bestseller Gomorrah, which exposed the workings of the Neapolitan crime organisation Camorra. <http://www.independent.co.uk/news/uk/crime/london-is-now-the-global-money-laundering-centre-for-the-drug-trade-says-crime-expert-10366262.html > Accessed 20 July 2016

[518] Leigh et al., ''HSBC files: How secret Swiss account data detailing misconduct came to light'' (February 8, 2015), Guardian, http://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions?CMP=share_btn_tw [Accessed June 9, 2015].

Bank of New York and New York state regulators had issued warnings of suspicious money flows at the bank which led to the overseeing and installation of AML initiatives in the bank by an appointed federal public prosecutor. These revelations coming almost a decade after the aforementioned warnings suggested a failure of these initiatives and particularly the office of the Controller of the Currency (OCC), its US regulator which failed to initiate a single enforcement despite being aware of multiple severe AML deficiencies at the bank ranging from failure to conduct AML due diligence before opening accounts for HSBC affiliates, large backlogs of un-reviewed accounts of suspicious transactions and the failure to monitor some US$60 Trillion in wire transfer and account activity.[519] The bank through its head of group compliance (who was to resign dramatically in the centre of a congressional enquiry)[520] admitted that the bank fell short of both its own as well as regulators expectations despite its apparent compliance with AML laws like the Foreign Corrupt Practices Act as well as the Bank Secrecy Act. Between the years 2007 and 2008, there was a transaction involving the transfer of US$ 7 Billion from the bank's Mexican affiliate into its US operations which ultimately led to the assertion that the bank used its US bank as a conduit to feed the needs of its affiliates for US dollar services around the world which the OCC did not effectively question. In the face of fines from the Mexican authorities for noncompliance with AML systems and controls and late reporting of suspicious and unusual transactions and others forthcoming from other jurisdictions, the bank reportedly set aside some US$ 1.5 billion to cover a potential fine for breaching AML laws.[521] In the end, this was

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[519] O'Brien, J. and Dixon, O. (2013), "The common link in failures and scandals at the world's leading banks,'' *Seattle University Law Review*, Vol. 19, pp. 941-972.

[520] Foley, S. (2012), "Top HSBC boss David Bagley quits over money laundering", The Independent, 18 July, available at: < www.independent.co.uk/news/business/news/top-hsbc-boss-davidbagley-quits-over-money-laundering > Accessed 10 April 2013

[521] CNBC (2012), "HSBC Might pay $1.8 billion money laundering fine: sources", CNBC.com, 5 December, available at: <www.cnbc.com/id/100282569 > Accessed 10 April 2013

subsequently settled with American regulators at US$ 1.9 billion together with a deferred prosecution agreement.

Considering the seriousness of this massive scandal across borders, one may argue that it should have brought about the criminal prosecution of senior officials of the bank and not just a mere fine which the HSBC could effectively offset with weeks of profit. It does seem that the HSBC have been serial offenders on the money laundering score but have also repeatedly received the friendliest of nudges from the hammers that should have hit hardest. In April 2003, with 9/11 still fresh in the minds of American regulators, the Federal Reserve sent HSBC's American subsidiary a cease-and-desist- letter, ordering it to clean up its act and make a better effort to keep criminals and terrorists from opening accounts at its bank. Instead of punishing the bank, though, the government's response was to send it more angry letters. Typically, those came in the form of so-called 'MRA' (Matters Requiring Attention) letters sent by the OCC. Most of these touched upon the same theme, i.e., HSBC failing to do due diligence on the shady characters who might be depositing money in its accounts or using its branches to wire money. In just one brief stretch between 2005 and 2006, the HSBC received 30 different formal warnings.[522] HSBC affiliates frequently discussed processing Iranian U.S. dollar transactions for various Iranian financial institutions and entities through their HBUS correspondent accounts. At the same time, HSBC Group, HBEU and HBME bankers were pushing to expand contacts with Iran.[523] Similarly, during this period, one of the banks biggest customers was Saudi Arabia's Al Rajhi Bank which had one of its founders previously listed by the CIA as one of the early financiers of the Al Qaeda network, and by extension, a financier for terrorism. This made the HSBC through its American arm the

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[522] See ''U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History,'' *Majority and Minority Staff Report, Permanent Subcommittee on Investigations, United States Senate* (July 17, 2012) <https://www.hsgac.senate.gov/subcommittees/investigations > Accessed September 19th 2016

[523] *Ibid*

HBUS sever all ties with the Saudi Arabian bank albeit temporarily, because upon the threat by Al Rajhi to pull out all its businesses from HSBC worldwide, HBUS resumed the supply of US Dollars to the same bank in 2006. This, the subsidiary claimed was due to pressure from HSBC. There was also the case of HSBC reportedly laundering money for Iranian terrorists; a revelation that came about after an internal audit commissioned by the bank stated that HBUS carried out 28,000 undisclosed sensitive transactions worth US$19.7BN between 2001 and 2007, the vast majority of which involved Iran. aside non-compliance, there was distinct intent and a well thought out plan towards circumventing the noose of authorities too, and in this instant case, the HSBC did this by its affiliates using a method called 'stripping,' where references to Iran were deleted from records. HSBC affiliates also characterized the transactions as transfers between banks without disclosing the tie to Iran.[524] For more than half a decade, a whopping $19 billion in transactions involving Iran went through the American financial system, with the Iranian connection kept hidden in 75 to 90 percent of those transactions. In this age of international terrorism, drug violence on the streets and organised crime, stopping illicit money flows that aid and abet those atrocities is a serious national security imperative but HSBC's compliance culture has been ''pervasively polluted to say the least.''[525] This brings into perspective, the effectiveness of deterrent measures against institutions that flaunt AML regulations.

6.4 Punishments: How deterring?

The banking industry has somewhat proved to be inherently criminogenic thereby necessitating deterrent action, and without discountenancing the punishments that have been handed down to the HSBC by regulators over time, there is the contention that those punishments have not been austere enough to serve as deterrent against further misdemeanours. From a strict criminal law standpoint,

[524] *Ibid*

[525] *Ibid*

the punishment of wrongdoings is usually classified under the justification of *retribution*, *deterrence*, *rehabilitation* and *incapacitation* (societal protection). There is also discussion and promotion of additional criminological tactics such as restorative justice and therapeutic jurisprudence as new and innovative responses to traditional punishment responses.[526] Understanding what constitutes punishment, they must involve pain or unpleasant consequences, must be a sanction for an offense against a specific rule or law, and it must be executed upon the specific offender who has allegedly or actually committed the crime. Punishment must also be administered intentionally by someone other than the offender and be imposed and administered by an authority constituted by a legal system against which the offense is committed.[527] The deductions from these definitions of punishment is that they bear the same central themes i.e. punishment must be considered unpleasant to the offender, must be a direct action taken upon the defender for an actual or alleged crime, and it must be imposed and administered by an authority within a legal system. This notwithstanding, the rationale behind punishing offenders is often littered with philosophical and criminological debate with the four traditional principles of retribution, deterrence, rehabilitation and incapacitation advanced as explanations.

6.4.1 The Retributive Principle

The classic retributive principle of ‘‘*let the punishment fit the crime’’* was the primary basis for criminal sentencing practices in much of Western Europe in the 19th century. Often considered as the oldest form of punishment, it is a principle hinged on punishment being justified simply because it is deserved. Here, “punishment restores an equilibrium that was upset by the crime.’’[528]

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[526] Marson, Jennifer (2015) ‘’The History of Punishment: What Works for State Crime?’’ *The Hilltop Review*: Vol. 7: Issue 2, Article 4. http://scholarworks.wmich.edu/hilltopreview/vol7/iss2/4

[527] Newman, Graeme. (2008). *The Punishment Response*, 2nd edition. Albany, NY: Harrow and Heston

[528] *Ibid*

The thinking is that criminal behaviour upsets the peaceful balance of society, and punishment helps to restore the balance hence the retributive theory focuses on the crime itself as the reason for imposing punishment. Proponents of this theory argue that its main benefit is the effect it will have on the offender and suggests that punishment for the specific offence will reflect the communal values they have broken and will eventually be determined to act according to those values.[529] This theory also recognises the fact that some offenders who commit similar offences may be less blameworthy or culpable than others due to factors outside of their control e.g. diminished responsibility, mental illness etc. This is based on the just desserts theory where punishment should fit primarily the moral gravity of the crime and to a lesser extent, the characteristics of the offender.

6.4.2 The Deterrence Theory

This maintains that people act rationally and are self-interested, thus deterrence works because the punishment is more painful than the crime is pleasurable. Proponents of deterrence believe that people choose to obey or violate the law after calculating the gains and consequences of their actions. The difference between the deterrence theory and the previously discussed retributive theory is that while the latter focuses more retrospectively, the former is futuristic in its thinking believing that punishment suffices if it has a deterrent effect on both the transgressor and the society as a whole. Adherents of the deterrence theory have consistently favoured policies such as "*three strikes*" laws, establishment of more prisons, increased penalties, longer sentencing severity, certainty of conviction and sentencing, and the hiring of more police officers. Together, these policies would control and reduce the recidivism (a return to the life of crime) of offenders who have been convicted, and curtail the participation in crime by future offenders. The theory of deterrence relies on three individual components: severity, certainty, and celerity, the three having

[529] Marson, Jennifer (2015) ''The History of Punishment: What Works for State Crime?''The Hilltop Review: Vol. 7: Issue 2, Article 4. http://scholarworks.wmich.edu/hilltopreview/vol7/iss2/4

been propounded as the most effective way to administer punishment because it sends a message to society that the crime will not be tolerated.[530] The more severe a punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts. To prevent crime, therefore, criminal law must emphasize penalties to encourage citizens to obey the law by the use of punishments that are comparatively less pleasant than the commission of the crime is pleasurable. Deterrence seeks to make crime more costly so less crime will occur. One rationale for the principle of proportionality is that any excess punishment is unjust and represents little more than an act of societal violence.[531] Punishment that is too severe is unjust, and punishment that is not severe enough will not deter criminals from committing crimes. One major drawback of this theory however, is its assumption of complete rationality on the part of individuals to think through their actions before the commission of offences. This assumption becomes a naivety when it is considered for instance, that half of state prisoners were under the influence of drugs and/or alcohol[532] at the time they committed an offence thereby negating the assumption they could have been deterred by either severity or certainty of punishment due to the fact they were not in full control of their faculties.

6.4.3 The Rehabilitative Theory

This theory on its part, in contrast to the retributive theory where the punishment fitted the crime, hinges on the principle of *''let the punishment fit the criminal.''* Here the emphasis is on changing the criminal through correctional facilities. Strictly from a criminological angle, taking away the desire to offend is the aim of reformist or rehabilitative punishment. The objective of reform or

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[530] Gary S. Becker, (1968) "Crime and Punishment: An Economic Approach," *Journal of Political Economy,* Vol. 76, No. 2, pp 169–217.

[531] See Anthony J. Draper (2000) ''Cesare Beccaria's influence on English discussions of punishment, 1764–1789'' *History of European Ideas,* 26, pp 177–199

[532] Christopher Mumola. "Substance Abuse and Treatment, State and Federal Prisoners, 1997." Bureau of Justice Statistics Special Report, 1999.

rehabilitation is to reintegrate the offender into society after a period of punishment, and to design the content of the punishment so as to achieve this.[533] The notion of rehabilitation encompasses a deterrent effect, as it is suspected that with rehabilitation the offender will be less likely to commit crimes in the future.[534] Rehabilitation models tend to include programs specifically designed towards the problems that an offender personally faces.

6.4.4 The Incapacitation Theory

Here the simple aim is to remove an offender from the society without necessarily trying to change behaviour through raising costs. While based on utilitarianism-like deterrence, the incapacitation model does not require any assumptions about the criminal's rationalism or "root causes" of the criminal's behaviour. This theory rests on the presumption that for offenders to be prevented from continuing further crimes, their removal from the society is of paramount importance. This removal could either be temporary or permanent or by any other form or means that restricts the physical ability to reoffend in either the same or another way. The view is that incarceration is beneficial because the physical restraint of incarceration prevents the commission of further crimes against society during the duration of the sentence. Under criminal law, the most severe and permanent form of incapacitation is the capital punishment, and this is justified as being a deterrent, but how much it deters prospective offenders cannot be calculated with the accuracy of arithmetic. What is easily discernible and justified although, is that the individual who has directly paid the ultimate price by way of capital punishment is permanently removed from the society and as such, unable to commit further crimes. Other less severe forms of incapacitation involves *restricting*, rather than completely *disabling* offenders, and punishments such as driving bans and electronic tags on offenders fall under this category. Punishment under this theory hence is justified by the futuristic

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[533] Hudson, B. (2003) *Understanding Justice: an introduction to ideas, perspectives and controversies in modern penal theory,* 2nd Edition, Open University Press, Buckingham.

[534] *Ibid*

risks individuals possess towards the society rather than the nature of the offender as with the rehabilitative theory, or that of the nature of offence as postulated by the retributive theory.

6.4.5 The Relevance of the HSBC Punishments

It is important to note at this juncture that the aforementioned theories of punishment relates to the punishment of criminals as individuals, and not of institutions like banks. However, this researcher has decided to use these theories as parameters to gauge the punitive effect the penalties regulators have handed out over the years could possibly have had on the HSBC. Each theory of punishment attempts to answer the questions relating to why we should punish an offender, and the extent to which we should punish an offender. As was stated earlier, the HSBC was fined in 2012 to the tune of US$1.9M after ‘‘being held accountable for stunning failures of oversight (and worse) that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries.”[535] *It was a record fine at the time but considering the humongous offence the bank was deemed to have committed, whether or not such a fine served the purpose of the punishment it sought was severally debunked by critics who believed that the long arm of the law struck rather too lightly. There were criticisms from far and wide and no less than the United States Senate Banking Committee when officials from the US treasury department and US Federal reserve were made to explain the way they had handled the HSBC affair. They were quizzed as to why no one individual staff of the bank went to trial, or was banned from banking, or as to why there was no hearing to consider shutting down HSBC's activities.*[536] *This they defended by stating that they had 'imposed on HSBC the largest penalties' that they ever imposed on any financial*

[535] As stated by Lanny A. Breuer - the head of the Justice Department's criminal division

[536] Officials quizzed by Senator Elizabeth Warren (Democrat-Massachusetts)

institution having looked at the facts and determined that the most appropriate response was a very significant penalty against the institution.''[537]

Analysing this along the lines of the retributive theory of punishment, this particular fine could be justified as punishment simply because it is deserved. However, does the punishment fit the crime or the equilibrium upset by the crime get restored by this punishment? Under the 'just desserts' theory of retribution, the core principle is proportionality wherein *''if one asks how severely a wrongdoer deserves to be punished, a familiar principle comes to mind: severity of punishment should be commensurate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishment. Disproportionate penalties are undeserved-severe sanctions for minor wrongs or vice versa.''*[538] As huge as the fine handed down to HSBC may have been, considerations must be given to the fact that an institution as storied as the HSBC may be capable of making more sums than that in profit turnovers in a matter of weeks. This completely negates the doctrine of proportionality that the theory of retribution proposes when consideration is given to the fact that Billions of Dollars were laundered over the years by the bank, with some of those moneys being for Iranian terrorists and Mexican drug cartels. In the ever dangerous and vicious world of terrorism and drugs, it is fair to say that the HSBC have contributed in part to the death of every victim on the drug streets of Mexico or from any act of terror perpetrated by the terror suspects the HSBC admitted to dealing with. When this is taken into consideration, the fine imposed by the regulatory authorities is hardly commensurate to the offence committed by the bank. It is hereby submitted that were the punishment aimed at being retributive, the ends of punishment wouldn't have been met in the instant case.

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[537] Treasury Under Secretary for Terrorism and Financial Intelligence David S. Cohen appearing at United States Senate Banking Committee.

[538] The theory of Just Desserts

Through the prism of the deterrence theory on the other hand, the suggestion is that the punishment served should be more painful than the offence pleasurable. The offender may choose to obey or to violate laid down regulations after considerations as to the gains or consequences of their actions. Where a transgressor feels there is more gain in not complying than there are consequences, the chances are that such a transgressor may make an opportunity cost of the consequences of not complying knowing that they stand little or nothing to lose as a consequence. It must be noted at this point that in the immediate aftermath of the 9/11 terrorists attacks on the United States, the Federal reserve sent ‘cease-and-desist’ letters ordering the bank to clean up its acts and make more concerted efforts at keeping criminals and terrorists away from opening accounts with any of its branches. Despite repeated failings, the regulators persisted with these orders culminating in over thirty different warnings between 2003 and 2005. This is akin to an individual violating a parole order repeatedly without facing any consequences other than another order not to violate again. The fact here is the HSBC must have felt there was a lot more to gain by continuously flaunting the regulations than there was gain in compliance and this was perfectly summed up by Elizabeth Warren while appearing at the United States Senate Banking Committee in 2013 in the following words- *‘’if you’re caught with an ounce of cocaine, the chances are good you’re going to go to jail. If it happens repeatedly, you may go to jail for the rest of your life. But evidently, if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night, every single individual associated with this.’’* Deterrence involves both an individual and general connotations, with the former demanding the punishment of offenders to the extent that they stop committing crime, and the latter revolving around deterring not only the primary offenders, but to the extent that other members of society may be deterred from committing the same crime or another crime, for the first time or otherwise, to reduce further crime by the threat or example of punishment. It is worthy of note that the HSBC had prior punishments, and there is no evidence to suggest that previous punishments deterred it from future misdemeanours let alone other financial institutions. Relating the incapacitation theory of punishment to the HSBC punishment presents a more delicate scenario. Going by the dictates of this theory, the removal from society of offenders either by permanent or temporary means does constitute the most reliable way of keeping offenders from committing further crimes. This ‘removal from the society’ could only have played out with the HSBC losing its banking licence either permanently, or temporarily (suspension), and this was asked of the regulators by Senator Warren in the following words- *‘’what does it take — how many billions do you have to launder for drug lords and how many economic sanctions do you have to violate — before someone will consider shutting down a financial institution like this?’’* This was at the Senate Banking Committee where the Senator questioned officials from the U.S. Treasury Department and the U.S. Federal Reserve over why criminal charges were not pressed on HSBC or any HSBC official who helped to launder hundreds of millions of dollars for Mexican drug cartels. This was an option the United states Justice Department was not ready to take because it was worried that anything more than a slap on the wrist for HSBC might undermine the world economy. Had the U.S. authorities decided to press criminal charges, said Assistant Attorney General Lanny Breuer at a press conference to announce the settlement, *‘‘HSBC would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat and the entire banking system would have been destabilized.’’* This seeming allocution statement by the Justice Department portrays in no uncertain terms that the big financial institutions like the HSBC may never face the full wrath of the law irrespective of offences committed. An allocution statement is a direct address between the judge and the convicted defendant prior to sentencing. It provides an opportunity for defendants to accept responsibility, to humanize themselves and their transgressions, and to mitigate their sentences, thus ensuring that the sentences are tailored to fit both the crime and the person who committed it. In the instant case however, the HSBC did not even put forward the defence in mitigation, it was done on its behalf by the regulators thereby highlighting more apprehension on the part of regulators to punish the bank rather than the will to do so. This juxtaposes the question whether a common man on the streets of America or Britain would be accorded the same leverage if he breaks into a bank vault at night because he is unemployed, impoverished and helpless then advances a plea that he committed the crime because he had to fend for his family. As 'justifiable' as that may sound, there is no chance it extricates such an offender from criminal liability. Many are serving time in prisons all over the world for offences that translate far less to those committed by the HSBC. Perhaps the reality is that white collar crimes pay? The argument advanced in certain quarters is that if banks like the HSBC were to fail, *''the effects would be felt throughout the global economy as the ripple out effects spread through the global banking system, due to the high levels of interconnectedness between all the major banks.''*[539] This may be a factual statement but also a flawed one in all ramifications because it dresses the bank in robes of invincibility, which should not be the case.

Furthermore, if the stature and spread of the bank as stated above means its failure may potentially have reverberating ripple effects on the global financial markets as well as work force, other means of punishing culpability could be exploited. The bank is manned by individuals and headed by executive officers who are responsible for the day to day running of its affairs. HSBC paid a fine, but no single individual went to trial, nobody was banned from banking, and there was no hearing to consider shutting down HSBC's activities.[540] Money bills do not walk or travel across seas and transnational jurisdictions on their own; they do not wire themselves between accounts. For every illicit money wired across the world and in essence laundered for drug lords or terrorists as the case may be, there is an individual behind the computers effecting these transfers, and ahead of that

[539] Michael Hewson is a chief market analyst at CMC Markets. <http://www.express.co.uk/finance/city/616616/The-global-banks-considered-TOO-BIG-to-fail-by-the-Financial-Stability-Board > Accessed 12 January 2015

[540] Senator Warren asking questions of regulators at the US Senate Committee on Banking in 2013

individual in hierarchy will be an executive at the top not only aware of the transfer, but also most definitely sanctioned same. And considering the litany of wrongdoings that have gone on, it is either the management of the bank were fully aware of what was going on or they were completely unaware, either way which they still remain liable for complicity or incompetence. As such, there is no tangible reason why no bank official has faced criminal charges on such counts till date. Among those dismissed, very few have been banned from the field for the future, as for the fines, they have been paid by the shareholders, not by the perpetrators. No doubt some executives see this as a cost of doing business; and politicians – a handy source of revenue. Few believe them to be an effective deterrent. Perhaps it provides a perverse incentive.[541] Considering this, the punishments imposed by regulators on the HSBC do not satisfy the ends of punishment as far as the punishment theory of incapacitation is concerned.

Conclusion

An official of the United Nations Office on Drugs and crime recently stated that banks were welcoming dirty money because of their need for cash, liquidity during the financial crisis and the figures being too big to be rejected.[542] Some authors have also wondered why during election campaigns for instance, no one ever comes out with strong views on money laundering, and the theory behind that it is the assumption that a good part of the money that comes from money laundering goes into the election campaign (not illegally, but legally because it can come in due to lack of regulation).[543] In decades past, drug money was laundered offshore because the banks were

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[541] A speech given at the Finance Watch conference in Brussels by Robert Jenkins — a former member of the Bank of England's financial policy committee. Available online at <http://www.ianfraser.org/why-well-all-end-up-paying-for-the-feeble-response-to-the-banking-crisis/ > Accessed 19 September 2016

[542] See ''London is now the global money-laundering centre for the drug trade,'' Available online: <http://www.independent.co.uk/news/uk/crime/london-is-now-the-global-money-laundering-centre-for-the-drug-trade-says-crime-expert-10366262.html > Accessed 20 July, 2016

[543] Mr Robert Saviano holds this view albeit with no proof.

not ready to risk opening their doors to dirty money, a far cry from what seems to be obtainable today where the banks are seemingly more than ready to open their doors to the mafia organisations.[544] As it stands today, there is very little public trust of financial services and institutions as far as the crime of money laundering is concerned, and to sum this all up, the following quotes from Robert Jenkins exactly depicts what this researcher believes is the current state of Anti-Money laundering regulations......

''There has been a lot of breast beating on the topic. Hearings have been held. Commissions have been commissioned. Investigations have been legion. Large fines are frequent. But no bank has lost its banking license. No senior has gone to jail. No management team has been prosecuted. No board or supervising executive has been financially ruined. Many have kept their jobs, their salaries, their pensions and their perks….''

''The disturbing fact is that laws have been broken but law breaking has not touched senior management. In the US "deferred prosecution agreements" is the order-of-the-day. Although such "settlements" are announced with fines and fanfare, the detailed evidence and findings that lead to such agreements often remain hidden from the public eye.''

''Without better behaviour we cannot have faith in the market that underpins it. Without penalizing the perpetrators and their seniors we will not get better behaviour. And without greater courage from policy makers and regulators, we will get none of the above and more of the same.''[545]

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[544] *Ibid*

[545] From 2011-13 Robert Jenkins was a member of the Bank of England's Financial Policy Committee. He is a senior fellow at Better Markets and adjunct professor of finance at London Business School, where he teaches investment management and chairs the AQR Asset Management Institute. He is a former banker, fund manager and policymaker, and was latterly chief executive and then chairman of F&C Asset Management. Prior to his appointment to the Bank of England's financial policy committee, he was CEO and managing partner of New York-based hedge fund Combinatorics Capital. He has chaired the Investment Management Association, co-chaired the chancellor's task force on the Future of the UK Investment Industry and served on the Takeover Panel. See <http://www.ianfraser.org/why-well-all-end-up-paying-for-the-feeble-response-to-the-banking-crisis/> Accessed 19 September 2016

As a corollary, the United Kingdom has very recently set out to make the most significant changes to the UK's AML and terrorist finance regime in over a decade.[546] In what the Government has termed an 'action plan for anti-money laundering and counter-terrorist finance' the initiative is hinged on three pertinent priorities bordering on an enhanced law enforcement response to the threats the UK faces (and that means building new capabilities in the law enforcement agencies and creating tough new legal powers to enable the relentless disruption of criminals and terrorists); the reform of the supervisory regime to ensure that it is consistent, effective and brings those few companies who facilitate or enable money laundering to task; and then to also increase the international reach of law enforcement agencies and international information sharing to tackle money laundering and terrorist financing threats.[547] This initiative is motivated by the British Government's admission that its world leading financial system is at risk of being undermined by money laundering, illicit finance and the funding of terrorism because the laundering of proceeds of crime through UK institutions is not only a financial crime, it fuels political instability around the world, supports terrorists and extremism and poses a direct and immediate threat to Britain's domestic security as well as its overseas interests. The action plan is designed to send a clear message that the country will not tolerate such activities in its financial institutions and to forge a new partnership with the financial industry to improve suspicious activity reporting, deliver deeper information-sharing and take joint action on enforcement. It is a well-intentioned move determined to act vigorously against the criminals and terrorists responsible, to protect the security and prosperity of British citizens, and safeguard the integrity of Britain's financial economy.[548]

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[546] Home Office: ''Action Plan for anti-money laundering and counter-terrorist finance'' (April 2016) Available online: <https://www.gov.uk/government/publications> Accessed 18 September, 2016

[547] *Ibid*

[548] *Ibid*

The dilemma now is whether more time should be accorded the current state of affairs regarding the fight against money laundering or a different approach engaged, especially in the face of the harsh international economic climate and the rising threat of global terrorism.

Chapter Seven

Conclusion: Where is The Bite in the Bark?

7.0 Introduction

Impelled by the recurrence of transnational flight of Nigerian moneys in the last decade and beyond, this research sought to examine the relevance of contemporary AML standards, the ineffectiveness of the preventive and punitive measures in place, and the reasons that have occasioned a below par outcome in the fight against the crime of money laundering. Having examined the various factors that underpin these factors, this chapter seeks to arrive at reasoned conclusions by generating recommendations/suggestions on ways of reform based on the considered findings of this research. This shall be briefly analysed under three AML indices- (1) regulation; (2) criminalisation; and (3) international cooperation.

7.1 Regulation

Theories have been propounded explaining the lack of overwhelming success of anti-money laundering activities. Authors have had varying views and suggestions have also been proffered. Among some of the commonly held views is that specific money laundering regulation may not be effective because it may be targeting the wrong area: money laundering is only the outcome of illegal activities; a symptom, but not the cause.[549] This position is premised on the view that the feeder activities are the ones who should be regulated as their effective monitoring and control will naturally lead to a reduction in money laundering.[550] The reasoning is that the reputational concerns of financial institutions means that they will be wary of indulging in the laundering of illicit funds which then means that money laundering is kept under control. The view believes in

[549] Chong, A. & Lopez-De-Silanes, F. (2015), ‘‘Money Laundering and Its Regulation,’’ *Economics & Politics*, vol. 27, no. 1, pp 78-123.

[550] *Ibid*

the irrelevance of specific AML regulation to combat money laundering. A similar view holds that, similar to the prohibition era, AML may be a classic case of *''police creating increased demand for their services by inventing new crimes, which in turn creates a new criminal industry to evade the new laws.''*[551] There is thus, the insinuation not only that specific regulation of money laundering could be thought of as either irrelevant or detrimental, but also in the extreme, that regulation cannot curtail money laundering in the current environment of financial markets liberalization.[552] On the other side of the divide are those who believe that law actually matters as far as AML is concerned. This group suggests a regulatory framework and emphasises the power of the enforcer and calls for the criminalisation of offences, better confiscation rules and increased international cooperation and intervention to curtail money laundering. They argue that several of the feeder activities to money laundering are not considered criminal acts in some countries; hence the belief is that criminalisation would raise the stakes for the criminal and would deter action and/or facilitate the work of courts. This theory also believes in the benefits of the use of a specialized agency, specifically empowered to go after launderers. There are valid arguments to both sides, but there is no intention at this stage of this research to critique the pros and cons of these views. This research maintained a critical analysis of the historical development and evolution of AML regulations at an international level through to national levels with an aim to picking out areas where the law could have been better couched to meet set-out aims. It must also be noted that the two sides of the argument are effectively covered at both global and national levels. Dealing with the first view which holds that AML laws may not be effective because it addresses a wrong area by not targeting the feeder activities to money laundering, this researcher begs to differ because there have been as much sufficient initiatives against money laundering predicate offences as there have been against money laundering itself. Within the Nigerian context,

[551] *Ibid*

[552] *Ibid*

the main predicate offence to the crime of money laundering has been identified in the course of this work as corruption. The diversity of the crime of corruption notwithstanding, the most common form it takes in Nigeria is official corruption by Government officials in public positions. These are people classified as Politically Exposed Persons and as such, (required to be) subject to more rigorous checks by financial institutions both within and outside the country. However, as already discussed, millions of Nigerian moneys have filtered through Nigerian financial institutions and found ways into foreign jurisdictions with relative ease. The laws are in place, so are the regulations. Banks are required to train their staff to identify suspicious transactions no matter how deceptive the launderers try to be. The duty to report suspicious transactions are explicitly stated, so are the penalties for default. At the international front, there have been sufficient initiatives aimed at dealing with money laundering predicate offences as well, which nullifies the claim that the wrong crime is being targeted by AML regulations. On the second leg of the argument that the criminalisation of the feeder crimes and the establishment of specialized agencies to go after the launderers, there is sufficient proof as has been elaborated upon in this work that the criminalisation of predicate offences as well as the establishment of specific AML agencies is one of the recommendations of the FATF. Nigeria has in place the Economic and Financial Crimes Commission charged specifically with dealing with money laundering cases. There are other allied agencies that have been specifically identified in the course of this research too.

7.2 Criminalisation

The Financial Action Task Force through its recommendations enjoins countries to criminalise money laundering on the basis of the Vienna and Palermo Conventions. Countries are to apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.[553]As discussed in chapter 4 of this work, Nigeria took the necessary steps towards complying with the FATF recommendations and this resulted in her name being struck off

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[553] Recommendation 1

the blacklist it had previously found itself. The crime of money laundering is criminalised under the Nigerian Money Laundering Act. The international criminalisation of the crime of corruption which this work has identified as the main predicate offence to the crime of money laundering in Nigeria is covered in main by the United Nations Convention against Corruption (UNCAC), to which Nigeria is a signatory. Nigeria has availed itself the benefit of all the aforementioned fundamental principles of the convention. The establishment of anti-corruption agencies such as the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) gives credence to this. Together with the Code of Conduct Bureau, these bodies are all aimed at the promotion of effective practices aimed at the prevention of corruption. The criminalisation of basic forms of corruption and the laundering of the proceeds of corruption is also incorporated within Nigerian laws.

7.3 International Cooperation

The discussion of international cooperation here is limited to the already identified main predicate crime to the crime of money laundering within the Nigerian context. Corruption is usually used to facilitate the process of placing tainted money into the mainstream financial system and to get it sent out of the country as legitimate. This means the International community is enjoined to work together, in formulating a framework to facilitate the repatriation of plundered wealth and thus reverse some of the damage afflicted on societies by corrupt politicians or officials.[554] The transnational mode of most corruption cases means that Mutual Legal Assistance is critical for prosecution and deterrence of corrupt practices and a variety of instruments have been developed in recent years. Nigeria has equally benefitted immensely from the cooperation and mutual legal assistance of member countries in tracing the trail of looted funds. The same is true for recovery of assets and in this case, the repatriation of stolen funds siphoned from Nigeria and stashed in bank

[554] See Mugarura, N. (2010) ‘‘The effect of corruption factor in harnessing global anti-money laundering regimes,’’ *Journal of Money Laundering Control*, vol. 13, no. 3, pp. 272-281

accounts in various parts of the world. Very recently, Nigeria and Switzerland signed an agreement that paves way for the return of $300M confiscated from the family of Nigeria's former military ruler, General Sani Abacha. These funds were initially deposited in Luxembourg and confiscated by the Judiciary of the Republic and Canton of Geneva pursuant to a Forfeiture order dated 11th December 2014. The Nigerian Government has since stated its guarantee to use the funds once returned in the interest of the Nigerian country and its people.

7.4 Research Findings.

Before itemising the findings of this study, this researcher seeks to state a psychological theory initiated by an American Psychologist Martin Seligman. And although not related to the scope of this work, the findings of the experiment largely resonate with the findings of this research. As an extension of his interest in depression, Seligman propounded the theory of *learned helplessness* when he set about electrocuting dogs.[555] In the classic experiment, working with 150 dogs specifically divided into three groups, Seligman placed some of them in a harness apparatus from which there was no escape, before proceeding to provide a shock to the animals' paws, a painful stimulus which the dogs could not terminate. The dogs in group one were subjected to painful electric shocks but could easily avoid them by a simple action, the second group received jolts of the same intensity at the same time but their pain was impossible to escape from no matter what they did. The third group had no jolts in electrocution at all. Seligman then proceed to transferring the dogs into a shuttle avoidance box in which the animals could escape pain by leaping over a divided barrier to the non-electrified side when a buzzer sounded or the room lights dimmed. Dogs from groups one and three jumped over the barrier and to the safe confines of non-electrocution as soon as the sounds and/or lights went off. The dogs from group two on the other hand made no attempt to escape even after hearing the buzzer. The experience from the first procedure had taught

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[555] Seligman, M.E. (1992) *On Depression, Development and Death,* W.H.Freeman & Co Ltd; 2nd Revised Edition

the dogs in this group that there was nothing they could do to avoid the electrocution and as such, just withdrew to the corner of the cage helpless and dysphoric. It was an experiment understood from a cognitive psychological viewpoint as a model for explaining depression in human behaviour in that depressed people feel that whatever they do will be futile hence they have learnt to be helpless. There is equally a human analogue to this animal experiment.[556] Here, college student volunteers were assigned to one of three groups of contrasting noise levels. In the controllable noise group, subjects received loud but terminable noises where all they had to do to stop it was to press a button four times. The subjects assigned to the uncontrollable noise group on the other hand, received noise that terminated independently of the response by the subjects. The third and final group on their part were subjected to no noise at all. A hand shuttle box was then introduced in the second phase of the interview whereby noise termination was controllable to all the subjects in the three groups by the mere action of moving a lever from one side of the box to the other. The results were that the first and third groups readily learned to shuttle, but the second group with subjects who received prior uncontrollable noise failed to escape. They listened passively to the noise. This is strikingly similar to the animal experiment because, just like with the animals in Seligman's experiment, the subjects in the second group had formed a notion of helplessness in that whatever they did, they had no control over the noise levels and as such, were not interested in making any escapes.

In relating these two experiments to this particular study, I have tried to visualise contemporary international Anti-Money Laundering efforts as being one of the group of dogs in the first experiment, and/or one of the group of students in the second experiment. I have aligned myself and this research to the group that passed up the opportunity of escape despite the opportunity to do so. Upon hearing the buzzer, the dogs in the first experiment opted to retreat into a dysphoric state

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[556] Hiroto, Donald S.; Seligman, Martin E. (1975) ''Generality of learned helplessness in man,'' *Journal of Personality and Social Psychology*, Vol 31(2), 311-327

of despair and making no move to escape the electrocution. Experience from the first procedure had taught them that the buzzer only precedes the pain of electric shock. The hypothesis from Seligman and his colleagues was that frequent experience with a lack of contingency between outcome and response (i.e. between a cessation of shock or an escape from pain and the animal's effort to escape an inescapable harness) led the organism to assume that escape attempts (and ultimately other actions) were futile. The same was true for the students who saw no need to attempt an escape from the noise, choosing instead to listen passively to the noise. It is my considered submission therefore, that international AML initiatives are as helpless as the guinea pigs used in the two experiments here. I submit with a considerably high degree of fairness that the fight against money laundering has reached a point where whatever laws are passed, and whichever measures are taken, success will remain far-fetched, hence the feeling of *helplessness.* However, in the psychological experiments, there were avenues of escape. And albeit reacting to prior experience, the assumption of helplessness formed by the two passive groups proved in fact to be misguided in part. This puts into perspective, my earlier notion of the *'helplessness'* of Anti Money Laundering measures. As such, should today's Anti-Money laundering efforts, given the debilitating factors against it, assume the passive stance of the dogs in Seligman's experiment or remain in the helpless trance of the subjects in Hitoro's? This researcher disagrees in part. It is my considered opinion that anti-money laundering regulations are itself an admission on the part of the international community of a failure in other initiatives. It is trite that the war against drug-trafficking had a major influence on the emergence of the anti-money laundering regime, and the cardinal principle in this regard is to deprive the traffickers the proceeds of their illicit funds. The same is true for other predicate crimes like corruption. The aim is to make it more difficult for terrorists to finance terrorist acts, to stop drug traffickers or to frustrate looters of country treasuries. However, as cogent as the reasons for going after money laundering may seem, an alternative approach may have been to be more vigorous in the channelling of efforts towards ‘nipping’ money laundering predicate crimes in the bud, rather than ‘hitting them where it hurts.’ This view is not an overall condemnation of global Anti-Money Laundering efforts, but rather a dispirited one based on the prevalence of money laundering activity despite what seems to be a lot of efforts towards curbing the scourge. A critical question will be if this researcher is suggesting that global Anti-Money Laundering efforts should be discontinued and as such let the launderers have a field day. This is not the case, but Anti-Money Laundering compliance is expensive especially for developing economies, thereby making it a case of double jeopardy to comply and still fall victim to laundering activity as has persistently been the case with Nigeria. A juxtapose of Nigerian Anti-Money laundering laws with the recommendations of the Financial Action Task Force does not reveal any shortcomings with the Nigerian reception of global AML standards. However, the flight of public funds from Nigerian jurisdiction abroad, and the use of local financial institutions to perpetrate the laundering of public funds have continued unabated. Similarly, as examined in-depth in chapter 4 of this work, the British AML laws are well grounded too, but that has not stopped transnational inflow of illicit funds into the country. And as the case of the HSBC discussed in this work depicts, there seems to be a genuine reluctance to punish offenders especially when the sums involved are much. If the developed countries genuinely want to lead the pursuit of AML standards with any credibility, they must begin to assist the smaller nations by not letting banking and financial institutions within their jurisdictions to be used as safe havens. Contemporarily, it may suffice to state that the fight against money laundering has reached a point where whatever laws are passed, and whichever measures are taken, an eerie feeling of helplessness abounds. For reasons advanced in chapters 5 and 6 of this research, Nigeria’s compliance with global AML standards resonates with this researcher to be an academic exercise. The issue is much deeper lying than in mere compliance.

The key findings which emerge from this research therefore are drawn from chapters 4, 5, 6 and are adumbrated as follows:

1) The very presence of Anti-Money Laundering laws and regime is in itself symptomatic of a failure of anti-corruption laws/regimes or efforts at combatting other money laundering predicate crimes. *(Chapter 5)*

2) The reception, transposition and promulgation of Anti-Money Laundering laws have little bearing on the effectiveness and success of Anti-Money Laundering initiatives. Anti-Money Laundering laws are a theoretical means to an illusory end. *(Chapter 4)*

3) Compliance with International Anti-Money Laundering standards especially with the developing countries are largely an academic exercise done only for the sake of compliance.

4) The genuineness of efforts of the countries at the forefront of the fight against money laundering leaves a lot to be desired. *(Chapter 5)*

Having identified these problems, the natural step to take next is to proffer solutions at circumventing them. When laws and regulations fail to achieve their intended results, the natural instinct is to hold that the laws may be defective and/or not properly couched. However, laws fail for a variety of reasons ranging from lack of proper implementation and the absence of a genuine desire on the part of stakeholders to see to the proper implementation and application of such laws. This researcher has perused Nigerian Anti-Money Laundering laws and despite not being an expert in drafting of laws, finds no major flaws with Nigerian laws but this is strictly from an academic perspective. Implementation however goes beyond having well-constructed laws and regulations neatly written down in books. No case highlights the problem of Nigerian implementation of laws as much as the inglorious case of Mr James Ibori who was accused by Nigeria's anti-corruption agency of stealing more than $290m (£196m) of state funds while in office in the oil-rich Delta state. British investigators say he channelled much of the money into banks in the UK. In 2005 the authorities in Nigeria in conjunction with the Metropolitan Police began to investigate James Ibori in relation to corruption and theft whilst he was in office.[557] In 2007 a London court froze UK assets worth $35m allegedly belonging to him.[558] This sum was in no way commensurate to his legitimate earnings which were at that time reportedly pegged at an annual income of less than $25,000.[559]After serving as Governor of Delta State over two terms of four years each (1999-2007), Mr Ibori was charged by the Nigerian Anti-Corruption unit on 170 charges for various offences of embezzlement, corruption and money laundering. However, all charges were quashed and dismissed by a Nigerian law court. By providence however, foreign investigators had been following the activities of African politicians and Mr Ibori happened to be one of those under the radar. The investigation revealed huge amounts of money being transacted, transfers coming in from Nigerian companies, and huge amounts of cash being paid into the accounts of prominent Nigerian Politically Exposed Persons who were living extortionate lives. According to the Metropolitan Police of the United Kingdom, their investigations revealed in part $180,000 per calendar month being spent on credit cards in the name of Mr Ibori.[560] After a failed attempt to arrest him in Nigeria which was thwarted by his supporters physically barricading him and fighting the Nigerian Police off, Mr Ibori was arrested in the United Arab Emirates and extradited to London to face trial. He pleaded guilty to 10 of the 23 counts on the indictment, which pleas were accepted by the Crown.[561] Mr James Ibori was subsequently sentenced to a 13 year custodial term.

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[557] *See R. v Ibori (James Onanefe) [2013] EWCA Crim 815; [2014] 1 Cr. App. R. (S.) 15;*

[558] 'Nigeria Ex-Governor James Ibori faces extradition to UK'- Available online at http://www.bbc.co.uk/news/world-africa-11986056 (Accessed 02/11/2015)

[559] *Ibid*

[560] This was according to Det. Const. Peter Clark of the Metropolitan Police speaking on the BBC programme 'Newsnight.'

[561] See *R. v Ibori (James Onanefe) [2013] EWCA Crim 815; [2014] 1 Cr. App. R. (S.) 15;*

The James Ibori case is particularly instructive here because it provides a unique case where an individual who was found not guilty in Nigeria was actually jailed in another country on identical charges. This begs the question if Nigeria's implementation of the international Anti-Money Laundering laws was not a mere case of transposition of laws. Recently, the Nigerian Government moved in on Federal Judges who were deemed to be corrupt and *'selling justice'* to the *highest bidder*. In the course of the operation, the Nigerian Department of State Services (DSS) claimed it recovered $800,000 (£645,200) in cash in raids targeting senior judges suspected of corruption.[562] Juxtaposing this event with the James Ibori case referred to earlier presents a gloomy picture and an indication as to why *implementation, not the law*, is the bane of the Nigerian state as far as the fight against money laundering and allied offences are concerned.

7.5 Recommendations

Despite my assertion that the issues with Nigerian AML laws go beyond mere laws and more to do with the lack of will power to implement the beautifully couched laws, *the privilege of constitutional immunity accorded a certain category of public office holders is counter-productive.* This researcher believes *expunging this provision of immunity* from the constitution of the Federal Republic of Nigeria will set the country on a better pedestal to fight the crime of money laundering and its attendant predicate offences. The constitution of the Federal Republic of Nigeria holds that *"Notwithstanding anything to the contrary in this Constitution, subject to subsection (e) of this section -(a) no civil or criminal proceeding shall be instituted or continued against a person to whom this section applies during his period of office; (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining*

[562] 'Nigeria seizes $800,000 in 'anti-corruption raids' on Judges' Available online at: http://www.bbc.co.uk/news/world-africa-37603857 (Accessed 02/11/2016)

whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office."[563] This provision means a legal immunity from prosecution for the category of office holders during the span of their terms in office. This concept finds its roots in the doctrine of 'rex non potest peccare' *(the King can do no wrong).* The thinking behind the immunity clause is that any public office holder who falls within the definition of the provision should enjoy absolute immunity to enable them carry out their official duties with no distractions whatsoever, be it in the form of civil or criminal litigation. With the evident unrepentant manner with which most Nigerian public office holders divert public funds into private use, this well thought out provision of the law is a disservice to the Nigerian state. While they lose this immunity once they are out of office, what the clause gives them is the time to obliterate the trail of any illicit funds before the immunity lapses. Nothing stops an office holder from defending himself in court on allegations of corruption if such arises. If there is no theft, there will be no court case in the first place. It is my considered opinion therefore, that the *immunity clause serves the purpose of only the public office holders and should be expunged* from the Nigerian constitution.

On an international level, considering the insidious and universal effects of corruption and money laundering and in view of the negative consequences on developing countries (including devastating long term/generational impacts) it is my humble submission that consideration be given to the thoughts of *making money laundering predicate offences such as corruption and the drug trade count as crimes against humanity*? Adopting this approach would attract the application of the concept of universal jurisdiction which means that any country on trial regardless of whether or not the prosecuting country is directly or indirectly affected by the crime (similar to war crimes, genocide or maritime piracy). Alternatively, once declared a crime against humanity, the next step could be the development of an international institutional framework similar to the International

[563] S.308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

Criminal Court of Justice with specialist jurisdiction in prosecuting the crimes of corruption, drug trafficking and money laundering. A crime against humanity is defined to include *''any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.''*[564] Crimes such as corruption and illicit drug trade despite not being explicitly stated within the wordings of this definition can easily be categorised under '*other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.'* Similarly, corruption could in fact be the root cause of most of the offences listed in the definition of a crime against humanity. As discussed in earlier parts of this work, the devastating effects of corruption on the developmental structure of Nation States cannot be overstated. A crime against humanity is not necessarily only of physical violence, and to avoid the vagueness of interpretation, an explicit mention of such crimes within the definition of a crime against humanity may have sufficed. The most important denominator as to what constitutes crimes against humanity is the grave affront to human security and dignity. Nigeria has recently been contending with a brutal insurgency that almost especially crippled the North-Eastern part of the country. Terrorist insurgents were at a time speculated to have been in control of Nigerian territories commensurate to the size of Belgium. Lives were lost in high numbers, citizens displaced in droves, and a fair number kidnapped. Nigerian soldiers were being overrun by the insurgents on a daily basis and

564 <https://www.icccpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx >

many of them abandoned duty posts at the sight of the terrorists. This they claimed was due to being ill-equipped with the requisite military hard ware enough to quell attacks, an allegation which the Government of the day always denied. Subsequent investigation by a new administration revealed afterwards that the moneys budgeted for and approved by the Government for the purchase of military hardware and gear were in fact criminally diverted to personal use by top officials of Government especially within the office of the National Security Officer. An enquiry conducted by the Presidential Panel on arms procurement had established that the bulk of the sum of $2.1 billion and N643 billion ($4 billion) earmarked for the purchase of military hardware to fight terrorism was criminally diverted by senior officials of the immediate past Government through the office of the National Security Adviser. The enquiry also alleged that the said National Security Adviser colluded with some serving and retired military officers and civilians to divert the sum of $2 billion and N29 billion set aside for the procurement of fighter jets and other equipment for the Nigeria Air Force. As stated earlier, the development of an International court akin to the International Criminal Court will force blatantly corrupt countries like Nigeria to extradite offenders, and by doing so, take the criminals out of their comfort zones where justice may never be served.

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