

Institute of Advanced Legal Studies
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The Commercial Corruption and Money Laundering:
How adequate are the Regulatory Mechanisms?

LLM 2011-2012
**International Corporate Governance, Financial Regulation and
Economic Law (ICGFREL)**

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Abstract

The symbiotic nexus, between commercial corruption and money laundering, has become significant concern in the role they play at their intersection points, in commercial activities, in both private and public sectors. The negativities they emit to the financial systems and general well-being of the citizenry have triggered various reactions that emanate from international bodies which are geared towards combating or reducing these to the barest minimum. Measures are in different forms. They are either in form of international soft law mechanisms or convention based, usually geared to have a positive effect on different polities. The soft laws are usually backed by other international organisations that give them indirectly 'conformity or compliance' status which are adhered by the members of the various soft law bodies. Notable examples are the Financial Action Task Force (FATF) and Organization for Economic Corporation and Development (OECD) that are backed by both the International Monetary Fund (IMF) and World Bank, via their surveillance and conditionality requirements, to tackle the issues involved at the intersection points of commercial corruption and money laundering. The adequacy or inadequacy of the regulatory mechanisms have as a result, been put under the microscope as there are differences in jurisdictional frameworks. This work will examine the various initiatives, plus the theoretical reasons given as to why the twin-like menace is embarked on, emphasising on the intersection points.

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Table of Abbreviations

ADB	Asian Development Bank
AML	Anti-money laundering
APEC	Asia Pacific Economic Co-operation
AU	African Union
BIS	Bank for International Settlements
CDD	Customer due diligence
COE	Council of Europe
CPI	Transparency International's Corruption Perception Index
DFS	Department of Financial Services (New York)
DoJ	USA's Department of Justice
ESAAMLG	Eastern and South African Anti-money laundering Group
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act 1997 (US)
FIU	Financial Intelligence Units
FIU's	Egmont Group of Financial Intelligence Units
FRSB	FATF Style Regional Bodies
FSF	Financial Stability Forum
GDP	Gross Domestic Product
GIABA	Action Group Money Laundering in West Africa
GRECO	Group of States against Corruption

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GPAC	Global Programme against Corruption
ICC	International Chamber of Commerce
IMF	International Monetary Fund
KYC	Know Your Customer
MLA	Mutual Legal Assistance
NGO	Non-Governmental Organisation
ODA	Official Development Assistance
OECD	Organization for Economic Co-operation and Development
OGBS	Offshore Group of Banking Supervisors
PEPs	Politically Exposed Persons
POCA 2002	Proceeds of Crime Act 2002
SEC	Securities and Exchange Commission (US)
StAR	Stolen Assets Recovery Initiatives
STRs	Suspicious Transaction Reports
SOCA	Serious Organised Crime Agency (UK)
TI	Transparency International
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNTOC	United Nations Convention against Organised Transnational Crime
WGB	Working Group on Bribery (OECD)

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CHAPTER 1

INTRODUCTION

The issues of commercial corruption and money laundering are long standing phenomena that have presented very difficult problems in their containment. It has to be taken into account that arguably, it is an acceptable fact that even before the advent of trade liberalization and globalisation, there have been unaccountable massive internal and cross-border capital flights which are fall-outs of commercial interactions; albeit more noticeably from the less developed and emerging economies to the developed ones.

However in both domestic and international commercial interactions, there is nothing probably wrong with the above phenomena provided the pattern of the capital movements and mannerisms of acquiring these were done in a very lawful and commercial way. But this is not so as the participants in the above venture do often operate under the official radar and do short-change the system in which they are supposed to be effective guardians and participants to oil the smooth running of their respective institutions.

This thesis will highlight the definitional approach of corruption and money laundering and will progress to indicate that there had been different definitions of the term corruption and that commercial corruption is also a form of corruption which in itself is also an economic crime.¹

In view of the fact that commercial corruption and money laundering have been big problems at their intersection points; the international reactions to these would be highlighted. Notable among this would be the International Chamber of Commerce (ICC) reactions and views. This respectable Non-Governmental Organisation (NGO) had been battling this since 1997. It would also be highlighted why in ICC views there should not be any difference

¹ Collin Nicholls et al, Corruption and Misuse of Public Office, 2nd Edition Oxford University Press 2011 p1

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between commercial corruption and other types of corruption as this dichotomy has become opaque in the modern period.

Other notable instruments against commercial corruption and money laundering focussing on the intersection points will be highlighted. These include, The United Nations Convention Against Corruption (UNCAC), especially the provisions of Article 12 which recognise the importance of prevention and penalisation of corruption in the private sector. Article 21 of the above provision will be discussed as it is in line with ICC's provisions. There is also the Council of Europe Criminal Law Convention on Corruption 1999 entered into force July, 2002² and Council of Europe Civil Law Convention on Corruption 1999 entered into force November 1 2005.³The African Union Convention on Preventing and Combating Corruption 2003⁴ will be looked into. There is also the United Nations Convention against Transnational Organised (UNTOC) Crime 2000,⁵ European Union Directives against money laundering, Strasbourg Convention 1990, EU Convention on Mutual Legal Assistance in Criminal Matters and Europol. They also contain AML provisions.

There are various views on the likely causes of corruption and money laundering particularly in the developing countries. It has been argued that there could be different perspectives as to why individuals get themselves entangled in corrupt practices which are inclusive of money laundering. In point of fact, this could be seen from various angles. There is the public choice angle, the organisational culture, clashing moral values, the ethos of public administration and the correlation theories.⁶These would be elucidated in this thesis plus the dilemma of quantifying these.

It is also a recognisable fact that the intersection of corruption and money laundering can have very devastating effects or consequences on the society notably in developing economies on the economic wellbeing of the citizens and distortion of the financial markets. It is noted that surprisingly, some writers feel that corruption still has a positive connotation.

² Articles 7 and 8 of Council of Europe Criminal Law Convention on Corruption 1999.

³ Articles 1 and 2 of Council Europe Civil Law Convention on Corruption 1999.

⁴ Articles 4-5 of African Union Convention on Preventing and Combating Corruption 2003.

⁵ Articles 8(2) United Nations Convention Against Organised Transnational Crime 2000

⁶Olatunde Julius Otusanya, Corruption as an Obstacle to Development in Developing Countries: A Review of Literature. *Journal of Money Laundering and Control* 2011 Vol.14(4) pp.387-422

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The fact remains that both corruption and money laundering are intricately linked together and that in most cases, it is very difficult to separate the two. It is the proceeds of various corrupt activities that the culprits would want to launder. It generates enormous profits to be laundered. It does facilitate money laundering and terrorist financing methods and do support predicate criminal activities. In fact, the World Bank did note that both corruption and money laundering are closely linked and that this would effectively render a country's Anti money laundering laws very ineffective.⁷ But it is not in all cases that this twin-like relationship occurs.⁸ The IMF recognises this problem as well and is fully aware of the disruptive effects that the linkage between corruption and money laundering can have on the financial systems of national, regional and global economy.⁹ The manner in which corruption facilitates the process of money laundering will be explained, including the corruptive elements on how the term came about.

It would also be seen, that in most jurisdictions presently, the predicate offences have been brought in line with international conventions, to help fight the crime of corruption and money laundering. But there still exists some jurisdictional differences on classification and linkage.

More so, this dissertation, will proceed to indicate that in view of the problems of corruption and money laundering, there has been the issue of whether the mechanisms put in place are adequate for the problem at the various intersection points. It has to be taken into account that most of the conventions do contain provisions for the problems of corruption and AML. More significantly, some of the mechanisms are what one will call 'soft law'.

It is noted that these soft laws are not mandatory from international law perspective. But within the comity of nations, these soft laws are given '*compliance credence*' by both the World Bank and IMF, through their surveillance and conditionality approaches in disbursement of funds and development aids. They employ what can be termed a '*carrot and stick*' approach in backing the soft laws.

⁷ World Bank 2007, *Strengthening Engagements* p. 68

⁸ David Chaikin, Commercial Corruption and Money Laundering: A Preliminary Analysis, *Journal of Financial Crime* Vol. 15 No 3 2008.

⁹ IMF 2001a

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Perhaps the most vibrant soft law organisation, in the fight against money laundering is the Financial Action Task Force (FATF), that is based in Paris and shares the same office with another popular soft law organisation called Organisation For Economic Cooperation and Development (OECD). Since FATF formation in 1989, it has gone through various transformative processes to help fight money laundering and by implication corruption. It does this through its recommendations, which as of February 12 2012 has been condensed to only 40 recommendations, with the inclusion of proliferation of weapons of mass destruction. Notable AML recommendations will be mentioned.

In addressing the adequacies or inadequacies of the regulations for both corruption and money laundering at their intersection areas, the followings will also be looked into; The European Union Directives, Wolfsburg Principles, Egmont Group, Basel Committee Principles of Customer Due Diligence, Offshore Group of Banking Supervisors (OGBS), Financial Stability Forum (FSF) and The Commonwealth Secretariat. Both the applicable parts of Palermo Convention which had earlier been pointed out and Vienna Conventions are to be discussed. World Bank and IMF contain significant literatures and these would be looked into to ascertain how adequate or inadequate they are in the fight against corruption and money laundering.

The thesis will also focus on two prominent national jurisdictions' approach to the problem of corruption and money laundering; notably the United Kingdom's Bribery Act 2010, the United States Foreign Corrupt Practices Act 1977 (FCPA). The flavour that both contribute to addressing the problems will be assessed. It will be good to point out that the dissertation would surmise that in view of the regulatory mechanisms, the problem can only be minimised or reduced and that the authorities should continue to evolve their respective tools to keep pace with the scourge as evidenced by the recent changes in FATF. It will be argued that irrespective of the regulatory mechanisms, the interaction of corruption and money laundering still has very significant negativity in the society.

CHAPTER II

THE CONCEPT OF CORRUPTION AND MONEY LAUNDERING

The concept of corruption and money laundering has attracted various interests from divergent sources. The definition of corruption inclusive of the term 'commercial corruption' has over the years undergone various changes. It is interesting to note, that there had been also various international responses to the issue of corruption and money laundering which are both persuasive and conventionally engineered. This chapter does not lay claim to having exhausted the international responses to the intersection between the two. It is a basis for subsequent chapters.

2.1 Definitional Issues of the Term 'Corruption' and 'Money Laundering'

With reference to the study of origins of words, otherwise referred to as etymology, it is accepted that the word 'corruption' is a derivative of the Latin word called '*corruptus*', which simply means to break. This derivation is another way of laying emphasis on the destructive effect of the word on the societal fabrics and the fact that its popular meaning encapsulates the situation where agents and public officers do break the confidence that is entrusted on them.¹⁰

The *Oxford English Dictionary* defines corruption as the perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, especially in a state, public corporations etc'. It also defines the adjective 'corrupt' as '*perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like; venal*'. The verb 'corrupt' is defined in a similar manner except that it did extend it to any duties irrespective of these being public or not and gave a

¹⁰ G Moody-Stuart, 'The Costs of Grand Corruption, in G Moody-Stuart (ed) *Grand Corruption in Third World Development*, prepared for the UNDP Human Development 1994 Report (Berlin: Transparency International, 1994)

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further definition: *'to induce to act dishonestly or unfaithfully, to make venal; to bribe'*. The verb 'bribe' is defined as *'to influence corruptly, by reward or consideration, the action of (a person), to pervert the judgement or corrupt the conduct by a gift'*¹¹

In fact, in above definitions one can say, do correctly and arguably emphasis the essence of corruption in its legal sense. There is the demonstration of the use of the word to cover acts other than what is popularly termed bribery. But suffice to say that in this day and age, the restriction of the definition of corruption to public duties no longer reflect the state of English law,¹² or most modern states.

Arguably, the most concise and acceptable definition is the one given by Transparency International (TI); an anti-corruption global organisation with its headquarters in Berlin Germany that was set up in 1993 with the initiative of Mr Peter Eigen a former World Bank regional director. It defines corruption as *'the misuse of entrusted power for private gain.'*¹³ This definition seems very simple, although it excludes bribery which happens wholly in private sector. Perhaps, it includes other facets of the offences of corruption strictly so called and bribery plus other related offences which could be committed in the corruption process. But generically, corruption is the abuse of a position of trust to gain an unfair advantage¹⁴.

Money laundering, which is intricately linked and is a conveyor belt of corruption, is the process whereby criminals must give their money an apparently legal origin.¹⁵ In fact, it is a process whereby in order to get back the earnings that are generated by participating in illegal activities into a form of legal business, a kind of acquitting has to be done prior to reusing the funds.¹⁶

In point of fact, money laundering is the practice of engaging in a series of financial transactions in order to conceal the ownership, source, control or destination of illegally gained money. It is a process by which the proceeds of

¹¹ 1989 edition

¹² The Bribery Act 2010 completely removes the distinction between public and private sector bribery.

¹³ http://www.cpi.transparency.org/cpi2011/in_detail Accessed 14/06/2012

¹⁴ TI (2006) *Global Corruption Report*, Transparency International, Berlin.

¹⁵ Levi, M and Reuter, P (2006) 'Money Laundering', *Crime and Justice: A Review of Research*, Vol. 34 pp. 289-375

¹⁶ Friedrich Schneider* Ursular Windischbaur, Money Laundering: Some Facts. *Eur J Law* (2008) 26: p389

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crime are made to appear to have a legitimate origin. The crime proceeds can be generated by a number of criminal acts, including drug dealing, corruption, accounting and other types of fraud and inclusive of tax evasion.¹⁷

Most major jurisdictions, define money laundering as any financial transaction that involves the proceeds of an underlying criminal offence.¹⁸ The definitional problems could arguably be as a result of different systems of law. We have to be in the know, that we have the common law and civil law systems in Europe. But a bold attempt to the unified definition of the term 'money laundering' and the first European Union legal piece of legislation that brought money laundering into the legal agenda can be found in the Council Directive.¹⁹

2.2 What is Commercial Corruption?

In order to have an intrusive understanding of what commercial corruption simply stands for, it is arguably good to have a conceptualisation of the meaning. This is sometimes referred to as a private corruption. In public corruption, the illegal payment is usually directed or made to someone that is a recognisable public official. But in commercial corruption, this same illegal payment is made to a private party. Put differently, commercial corruption can probably be defined as a process whereby illicit payments are made to private parties.

The term commercial corruption is often used interchangeably with other terms such as "private corruption," "private-to-private corruption," "commercial private bribery" and "non-official corruption". It is often characterised by the payment to or acceptance of a kickback or commission by an individual that is in a non-government sector. The object is simply to make the individual that receives the bribe to act in a manner that is favourable to the briber without proper consideration to the interests of his/her employer, principal, fiduciary or client.²⁰ The fact still remains that since this bribery or commercial corruption could be very massive, the recipients would most likely

¹⁷Financial Action Task Force, Money Laundering FAQ' <http://www.fatf-gafi.org/document>. Accessed 10/06/2012.

¹⁸Kern Alexander et al 2006 *Global Governance of Financial Systems. The International Regulation of Systemic Risks*. Oxford University Press p67

¹⁹ 91/308/EEC of 10th June 1991

²⁰ Ibid, 8 p 270-271

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embark to launder the proceeds in order to disguise the origins, thereby reinforcing the connection between corruption and money laundering.

2.3 International Response against Commercial Corruption and Money Laundering

One of most notable international NGO that has assiduously voiced its concern against commercial corruption is ICC. It has consistently since 1997 been a noticeable vocal voice against commercial corruption. ICC has through its rules of conduct consistently urged different countries to take concerted action against private sector corruption. The reason it argued, is that this phenomenon usually distorts competition, in the same manner that public corruption emits incalculable injuries to the markets.²¹ ICC has been a very strong advocate of criminalization of private sector corruption.²²

Article 1 of ICC Rules of Conduct requires 'enterprises' to prohibit bribery and extortion at all times in any form, irrespective of whether it is direct or indirect. This provision is applicable to payments to public officials, political parties, directors, officers, employees and agents of a private enterprise, for the purpose of obtaining or retaining business or improper advantage. Article 2 indicates that agents and intermediaries are expected to comply with the enterprises anti-corruption policies.

More importantly, Article 8 deals with accurate financial recording, auditing and independent audit committees which are key rules that may prevent the misuse of corporations not only for very fraudulent corrupt conduct but also as very significant vehicles for the crime of money laundering. This Art 8 can rightly be seen as a sort of intersection rule between corruption and money laundering.

More so, ICC did sponsor a study of private commercial bribery laws simply to promote its Rules of Conduct.²³ One of its significant recommendations is that

²¹ APG/FATF Anti-Corruption/AML/CFT Research Paper prepared for the FATF/APG Project Group on Corruption and Money Laundering by Dr David Chaikin and Dr Jason Sharman. September 1977 p75

²² ICC Article 1 2005 edition

²³ See Gunter Heine and Thomas Rose, Private Commercial Bribery: A Comparison of National and Supranational Legal Structures, Max-Planck Institute for Foreign and International Criminal Law and ICC, Paris 2003.

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the prohibition of private-to-private corruption has to be incorporated into the relevant OECD instruments. In fact Transparency International is in full support of this. It is noted that ICC has consistently advocated that the dichotomy between private corruption and public corruption should be removed and that it is becoming very opaque to distinguish between the two due to privatization.

It is generally presently accepted that private-to-private corruption that culminates to money laundering is an international concern. As a result, since the 1990's, there has been incorporations of its prohibition in several international and regional instruments. In Europe for instance, there is the Council of Europe (COE) Criminal Law Convention on Corruption that did enter into force in July 2002, which as at 1 May 2011 has forty three ratifying states.²⁴

Another notable one is the Council of Europe Civil Law Convention on Corruption 1999 that entered into force November 1, 2005 and was ratified by 28 states.²⁵ There is the Framework Decision of the Council of European Union on Combating Corruption in Private Sector 2003.²⁶

In fact, the African Union (AU) Convention on Preventing and Combatting Corruption 2003 was signed by 21 parties. Its article 5 is indicative of the fact that it requires state parties to establish as offences the conducts that are within its article 4 which are simply conducts that are both active and passive corruption in the private sector.

Perhaps more significant piece of convention that contains various Articles that deal with private corruption and also money laundering is UNCAC. Article 12 (1) provides thus:

'Each state party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector and, enhance accounting and auditing standards in the private sector and,

²⁴ Articles 7-8 COE Criminal Law Convention on Corruption deal with both active and passive bribery in the private sector.

²⁵ Articles 1 and 2 COE Civil Law Convention on Corruption require state parties to provide remedies to victims of private corruption.

²⁶ Article 2 requires member states to criminalize both active and passive corruption in the private sector, within profit and non-profit entities.

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where appropriate provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.'

UNCAC's Article 12 has provisions that also facilitate AML objectives. An example is that it promotes transparency in the *'identity of both legal and natural persons involved in the establishment of cooperate entities.'*²⁷ It also deals with the imposition of an internal auditing control that would detect acts of corruption.²⁸ The prohibition of certain acts like the falsification and destruction of records is also dealt with.²⁹ It is noted that tax deductibility of private bribes is also forbidden. This is in tandem with its prohibition on public bribes.

More significantly, of UNCACs' provisions as per private sector bribery that could be arguably classified as the most important is Article 21. It states thus:

'Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

a. The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

b. The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private entity, for the person himself or another person, in order that he or she, in breach of his or her duties, act or refrain from acting'.

It can arguably rightly be said that UNCAC has simply mirrored the illegitimate practices that ICC condemned,³⁰ although it is not obligatory for state parties to criminalize private corruption as a result of the watering down of the wordings that was reached due to compromise. This is in contrast to the mandatory Article 16 on bribery of foreign public officials and Article 17 that treats embezzlement.

²⁷ Article 12(2)(d) UNCAC

²⁸ Article 12(2)(f) UNCAC

²⁹ Article 12(2)3 UNCAC

³⁰ Article 21 UNCAC wordings.

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UNCAC has demonstrated a good international response to the intersection points between corruption and money laundering by reiterating the close links between the two. For instance, it indicates that the signatories must set up AML supervisory arrangements that must include customer due diligence and establishing beneficial ownership and a suspicious transaction reporting system. They should also consider setting up arrangements to monitor the trans-border cash movements plus negotiable instruments. Relevant transaction information should be included in electronic transfers. Parties should also follow the standards of extant AML organisations. They should demonstrate cooperation amongst law enforcement, judicial and inclusive of financial regulatory bodies.³¹ Interestingly, it also called for mandatory criminalization of money laundering by the signatories.³²

Furthermore, UNCAC reacted to the intersection of corruption and money laundering in Article 52 by indicating that accounts of politically exposed persons (PEPs) have to undergo enhanced scrutiny with the financial institutions. There has not been a conflating view on who are PEPs. But the point being made here is that as ICC pointed out, the difference between private and public corruption should be disregarded. Private corruption can also involve the activities of PEPs. The corrupt proceeds would still be concealed in most cases and laundered, hence the intersection.

This chapter is probably inchoate without mentioning FATF response to money laundering that emanates from corruption. The organisation was formed in 1989 in recognition of the threats posed to global financial stability by money laundering. It has become the single most important international body, in terms of formulating AML policies and developing international standards, for disclosure and transparency for financial institutions through its Forty Recommendations (R), endorsed by over 180 countries.³³ The need for Special Recommendations now stands obviated on account of its incorporation into the latest forty R. FATF has been evolving since its formation to combat

³¹ Article 14 UNCAC

³² See Article 23 UNCAC

³³ Ibid 18 p150

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financial crimes and to keep pace with the intersection between corruption and money laundering.³⁴

In tandem with the call for criminalization of corruption and money laundering on the basis of the Vienna Convention and also Palermo Convention Articles 7-8, FATF R 3 called for countries to criminalize this and apply the crime of ML to all serious offences. This would be with a view to include a range of predicate offences.³⁵ Some notable R of FATF that deal with the corruption and ML intersection on account of the fact that most corrupt proceeds are normally laundered are recommendations;10,11,12,13,14,16,18,20 and 22.³⁶

There are some EU Initiatives against ML. The Tampere European Union Council in October 1999 stated thus:

“money laundering is at the heart of organized crime. It should be routed out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to freeze, seize and confiscate the proceeds of crime”

There is the European Union Convention on Mutual Assistance in Criminal Matters between the Member States of EU and the 2001 Protocol that came into force in 23 August 2005 and 5 October respectively. The Convention allows for spontaneous exchange of information between competent authorities of Member States and use of intercepted communications in their territories. The 2001 Protocol extended the scope to fiscal matters like money laundering. We have also had the first³⁷, second³⁸ and the Third EU ML Directives³⁹. The 3rd consolidated the first and second ones. Importantly, the directives and various conventions focused on the intersection points, for instance, the Customer Due Diligence (CDD) or Know Your Customer (KYC) aspects plus reporting obligations.

Note that the combined effect of the Convention, the 2001 Protocol and the 3rd Directive, is that tax advisers that are based in EU can now be subject to money laundering charges, if they aid their clients based in the EU to evade

³⁴ FATF 2012 R p 8

³⁵ Ibid p 12

³⁶ Ibid pp. 14-20

³⁷ 91/308/EEC

³⁸ 2001/97/EC

³⁹ 2005/60/EC

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their taxes. There is also the Europol Convention that came into force on 2 October 1998, while Europol started full activity in 1 July 1999. It now deals with all forms of International Crime.⁴⁰

The United Nations Political Declaration and Action Plan Against Money Laundering in 1998⁴¹ is vital. The UN Security Council Resolution 1373 (2001) and UN Security Council Resolution 1390 (2002) are also important steps. We also have the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (The Strasbourg Convention)⁴². Caribbean Financial Action Taskforce is also important with its 19 recommendations of 1990 and later the Kingston Declaration of 1992. Basel Committee on Banking Supervision's Preventing Criminal Use of Bank System (1988) and its Customer Due Diligence (2001) are very significant.

It has been seen that the concept of corruption in its different ramifications, including the term commercial corruption, did evolve slightly to take account the state of English law and other more modern states. The intersection of corruption and money laundering definitely pose a great threat to the stability of the international financial wellbeing, albeit their destabilising implications. This has resulted, in the various international responses to check the negative effects. Some of these responses are either conventionally based or in form of highly persuasive forms in which the international communities are not legally bound to follow, like ICC and the FATF. Notable features in both the convention and non-convention based are the inclusions/suggestions of criminalizing the offences of corruption and money laundering.

⁴⁰ See Annex to the Europol Convention

⁴¹ Resolution S-20/4D

⁴² Council of Europe, ETC No 141 Strasbourg, 8. X1 1990

CHAPTER III

THE IMPACT OF COMMERCIAL CORRUPTION AND MONEY LAUNDERING.

It is no longer a debatable issue that corruption in whatever manner it is done do in most cases use money laundering process to hide the proceeds. The proceeds from corruption are massive and in order for the culprits to get away with their illicit money, they have to call into play money laundering. Since the two usually interact, the result is that both cause significant impact in the process as a result of their intersection. Both are economic crimes and various reasons had been given for the phenomena in developing countries. This has also resulted in unpleasant consequences, albeit the difficulties associated in ascertaining the quantum of the damage.

3.1 The Probable Causes of Corruption and Money Laundering in Developing Countries.

In view of the fact that corruption and money laundering in developing countries are economic and financial crimes, it is probably right to look holistically on why individuals engage in crimes. The explanation for the causes and occurrence of corrupt activities that use the vehicles of money laundering can usually be located in the interaction of the person and the societal structures.⁴³ From the public choice theory, the person involved in corruption and money laundering, is seen as a very rational human being who is very calculative. But he has elected to deliberately become corrupt when the expected advantages in his calculation or perception do outweigh the expected disadvantages. In point of fact, this can be a combination of the resultant penalty and the likely chance of being nabbed or found out.⁴⁴

There is also the 'black apple' theory on why people or individuals engage in corruption which depending on the proceeds can also engage in money

⁴³ Ibid no 6 p6

⁴⁴ Rose-Ackerman, S (1978), *Corruption: A Study in Political Economy*, Academic Press, London pp.100-101

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laundering to hide the gains. Here people with very faulty character are identified. This seems to identify a causal chain from a very bad character to the said corrupt act. Differently put, the corruptive causative factors are ingrained in a very bad human character and a very sound predisposition towards the commission of crimes.⁴⁵

There is the organisational culture theory. In this, the focus is on the particular organisation and the culture in which the agent earns his livelihood. Here, there is the presence of an underlying assumption of a certain path or group culture in developing countries that would ultimately lead to a sort of mental state. This would influence the worker and it is this mental state that would eventually lead to corrupt attitudes.⁴⁶

Another probable cause of corruption and money laundering in developing countries can be traced to what one can call the clashing moral values theories. Here, this is based on certain moral values plus the norms of the society in developing world that can also directly influence the behaviour of people. In fact, it is this same moral values and norms that would have a direct influence on the individuals in both private and public sectors and ultimately make them to be involved in corruption and money laundering.⁴⁷

On a close perusal of another causative factor called the ethos of public administration theory, one will notice that it has the same similarity with the theories of the organisational structure. However there is a difference, in that there is a major concern as regards the culture that is within the public management in developing countries and the society in general.⁴⁸ Continuing, in correlation theories one can say do not commence from the theoretical explanation that has been mentioned above but rather from certain specific factors in developing countries.⁴⁹

⁴⁵ Punch, M (2000) "Police corruption and its Prevention", *European Journal of Criminal Policy and Research*, Vol. 8, pp. 301-24. Graaf, G.De (2003), *Tractable Morality, Customer Discourses of Bankers, Veterinerians and Charity Workers*, Eein, Rotterdam.

⁴⁶ Graaf, G. De (2007) 'Causes of Corruption towards A Contextual Theory of Corruption, *Public Administration Quarterly*, Spring, pp. 39-86.

⁴⁷ Rose-Ackerman, S. (1999), *Corruption and Government: Causes, Consequences and Reforms*, Cambridge University Press, Cambridge. pp. 2-4

⁴⁸ Heywood, P. (1997), 'Political Corruption: Problems and Perspectives', *Political Studies*, Vol. 45, pp 417-35

⁴⁹ Ibid 40

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Suffice to say that apart from the above earlier studies, the causes of corruption which in most cases lead to money laundering in developing world has also attracted notable work from academics and policy makers. It has been stated that corruption has been caused by a very poor institutional structures found in the society that is shaped in structural inequalities, morality plus state stability.⁵⁰

According to one writer:

*'In some senses most corruption requires individual moral choices and depends upon human capacity for avarice and evil; nevertheless, corruption of a state results from consequences of individual human nature interacting with systemic and enduring inequality in wealth, power and status. Under such inequality certain group of individuals have a de facto or legally sanctioned priority of access to wealth, power and status'*⁵¹

It has to be noted, that not all corrupt and money laundering activities are caused by inequality in developing countries. It can also be viewed on a wider terrace of randomly influenced individual acts, acquired from widely spread corruption acts evidently noticeable in a politics that is permeated with corruption. It does not matter if the individual is inside or outside government.

A writer has argued that in a society where the civil servants pay is low; there is the tendency for them to make this up with outside engagement. This could result in a very significant increase in bureaucratic corruption which perhaps leads to money laundering in developing countries.⁵² There was a time studies were conducted in some developing countries like Ghana in 1983, Peru (1991), Uganda (1992), Zambia (1994), Kenya (1995) and Tanzania (1996). The findings indicated a very strong positivity in revenue drive on account of improvements in tax reforms and enhanced remunerations.⁵³

⁵⁰ Ibid 6 p6

⁵¹ Dobel, J.P (1978), "The Corruption of A State", *The American Political Science Review*, Vol. 72 No. 3, p 961

⁵² Mbaku, J.M.(1991) 'Military Expenditures and Bureaucratic Competition for Rents', *Public Choice*, vol.71 No 2, pp19-31

⁵³ Van Rijckegham, C. and Weder, B. (2002), "Bureaucratic Corruption and Rate of Temptation: Do Wages in Civil Service Effect Corruption, and by How Much", in Abed, G.T and Gupta, S (Eds), *Governance, Corruption and Economic Performance*, International Monetary Fund, Washington, DC, PP59-88

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Certain other studies of corruption that also leads to money laundering from the proceeds have also linked corruption to the socio-ethno plus the linguistic closeness of certain set of individuals in a particular polity. This is so, on account of the fact, that the way people behave is also linked to their cultural background; including their value system. This in certain situations, do produce what one would call nepotisms which is very noticeable amongst bureaucrats.⁵⁴

One of the probable causes of corruption which we already know that would transform its proceeds through money laundering is modernisation. As one writer observed:

*'Corruption in developing countries is often believed to arise from the clash or conflict between traditional values and imported norms that accompany modernisation and socio-political developments'*⁵⁵

It can be posited, that it is the vacuum that has been created by this conflict that has opened up opportunities for individuals to start behaving in a manner that neither modern nor traditional norms would approve.⁵⁶ More so, it has been argued, that one of the causative factors of corruption and money laundering, has been the relationship between the market structure and the incidence of the corrupt activity.⁵⁷ It is perhaps, that it is the government intervention in the private sector activities that are the major causes of corrupt activities that ultimately embraces money laundering at their intersection points.

On the other hand, it can be argued that it is the neo-liberal attitude that is done through deregulations and liberalizations that has made Western donors to have that ideological assumption that political corruption was brought about as a result of increasing state intervention.⁵⁸ Thus market forces, through

⁵⁴ Akindele S.T (2005), "A Critical Analysis of Corruption and Its Problems in Nigeria", *Anthropologist*, vol.7 No 1, pp. 7-18

⁵⁵ Mbaku, J.M. (1996), "Bureaucratic Corruption in Africa: The Futility of Clean-Ups", *Cato Journal*, Vol.16 No 1 pp. 99-118.

⁵⁶ Alam, M.S (1989), "Anatomy of Corruption: An Approach To Political Economy of Underdevelopment", *American Journal of Economics and Sociology*, Vol. 48 No. 4 pp.441-56.

⁵⁷ Macrea, J. (1982), "Underdevelopment and The Economics of Corruption: A Game Theory Approach", *World Development*, Vol.10, pp.667-87.

⁵⁸ Szeftel, M. (1998), "Misunderstanding African Politics: Corruption And The Governance Agenda", *Review of African Political Economy*, Vol. 76, pp. 221-40.

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greater spectrum of competition, lead to low level of corruption and money laundering.⁵⁹

World Bank noted, *'Markets will generally discipline participants more effectively than the public sector can, and their power to do so is closely linked to sound economic policy. Enlarging the scope and improving the functioning of markets will strengthen competitive forces in the economy and curtail rents, thereby eliminating the bribes public officials may be offered (or may extort) to secure them.'*⁶⁰

It also has been argued, that it is the changes in the regulatory mechanisms that usually alter the overseeing function of the government in developing countries from the government hands. Independent organisations are then given the leeway and certain democratic interest groups like the trade unions are often excluded. It has then been suggested that at this point⁶¹, the corrupt entrepreneurs do exploit the uncertainty associated with the transition to the market. This leads to laundering of the proceeds. It is probable that it is the amalgam of the above causative factors that leads to the consequences of corruption and money laundering.

3.2 The Likely Consequences of Corruption and Money Laundering in Developing Countries.

The consequences of corrupt practices the proceeds of which are laundered have generated some heated debate as to the impact on developing countries. There is a body of opinion to the effect that corrupt practices that do sometimes lead to the proceeds being laundered, do institutionalise negative practises. This is done by the pushing up of costs and also by excluding very poor members of the society from societal activities.⁶²

But in early 1960s, it was opined by some writers that the above is not correct. It was contended that corruption which we know do lead to laundering process

⁵⁹ The World Bank 1997

⁶⁰ Ibid No 59

⁶¹ Varesa, F. (1997), *The Transition To Market and Corruption In Post-Socialist Russia*’, *Political Studies*, Vol. 45, pp.579-96

⁶² Sikka, P.(2008), *“Enterprise Culture and Accounting Firms: The New Master of Universe”*, *Accounting, Auditing and Accounting Journal*, Vol. 21 No. 2, pp.268-95.

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might possibly fulfil some societal needs. This could include a form of better economic choice and the promotion of the market economy which could with corruption could go un-headed.⁶³

There is also the argument that corruption and money laundering in developing countries can contribute to economic development on account of the fact that it can serve as an instrument for the allocation of scarce resources; can make investment possible and do strengthen the private sector by reducing uncertainty and even the negative effects of red tape.⁶⁴

It is the belief that corruption can in some cases possibly raise the economic growth by two ways. Firstly, '*grease money*' or '*speed money*' can make it possible to side tract delays in bureaucracy. Some employees that are allowed to extort bribes do work harder, particularly where bribes are allowed to act as a peace rate.⁶⁵

One of the consequences of corruption and money laundering in developing countries is that the AMLs are either weak or bribery is used to make them weak. The corrupt individuals go on to bribe the officials of the AML. The banks that are supposed to be positive vehicles of economic developments are sometimes acquired by the perpetrators in developing countries. What follows, is that they use the banks or other financial institutions to launder their illicit money to other safe havens.

Officials of financial institutions not directly owned by the corrupt members of the society are also bribed not to carry out proper customer due diligence. The result is that even suspicious transactions are not reported to the appropriate authorities. The corrupt money as a result is laundered, depleting the resources of the developing countries that are supposed to be invested in other social amenities.

Indeed, corruption and money laundering in their various manifestations have the corrosive capacities in the undermining of developing countries efforts in

⁶³ Gilleppe, K. and Okruhlik, G. (1991), " The Political Dimensions of Corruption Clean-Ups: A Framework For Analysis", Comparative Politics, Vol. 24 No. 1, pp. 77-95

⁶⁴ Ibid No 6 p.7,

⁶⁵ Muaro, P. (2002), "The Effect of Corruption on Growth and Public Expenditure", in Heidenheimer, A.J. and Johnston, M. (Eds), *Political Corruption Concepts and Contexts*, Transaction Publishers, New Brunswick, NJ, pp. 339-52

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harnessing the global framework that has been set up against M.L.⁶⁶ It is probably a good inference that in inherently corrupt systems found in developing countries, the laws, systems set up to fight corruption, ML and the underlining offences cannot function properly as a result of the weak institutional frameworks. Democratic progress is seriously impeded as well.

In Africa alone, it is estimated that the cost of corruption and money laundering is more than US\$ 148 billion a year. This is thought to represent 25% of Africa's GDP⁶⁷ and also do increase the cost of goods even as high as 20%.⁶⁸ Large sums are laundered from this corrupt process but the exact sum has not passed the empirical test and the reason is that it is very difficult to keep a tab on the exact sum. In both developed and developing countries, it was also estimated that the annual money paid on bribes that are also possibly laundered is about US\$1 trillion which has been classified as a conservative estimate.⁶⁹

Both corruption and money laundering in developing countries do slow down the rate of economic growth. In fact the World Bank has estimated that the proceeds of corruption of which much is laundered has equalled loses of 20% to 40% of the Official Development Assistance (ODA) in developing countries.⁷⁰ They also noted that there is a 0.5 to 1.0% point drag on economic growth on account of the fact that a widespread corruption and money laundering can create the above percentage gulf in comparison to a similar country that has little corrupt activities.⁷¹

Obviously, corruption and money laundering in developing countries do discourage investments. It has been noted that investments in a relatively corrupt country compared to an incorrupt one can turn out to be 20% more costly.⁷² The intersection of corruption and money laundering can cause high loses in health funds. For instance in Ghana, it is estimated that the percentage

⁶⁶ Mugarura, N. (2010) "The Effect of Corruption Factor In Harnessing Global Anti-Money Laundering Regimes", *Journal of Money Laundering and Control*, Vol. 13 p 1

⁶⁷ "Countries to Get Help Recovering Stolen Assets", *The York Times* September 17, 2007.

⁶⁸ Bunt, E, 'Corruption Costs Africa Billions', BBC News, 18th Sept 2002

⁶⁹ 'The Costs of Corruption', World Bank News & Broadcast, April 2004

⁷⁰ 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan', The World Bank 2007, June 2007

⁷¹ Ibid

⁷² Kaufmann, D, 'Economic Corruption: Some Facts', 8th International Anti-Corruption Conference 1997.

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of allocated funds that do not eventually reach hospitals and clinics is 50% of the allocated funds.⁷³

Corrupt proceeds that are laundered internally and cross-border can have the effect of accelerating the depletion of developing countries natural resources. This is particularly noticeable in the primary forests. For instance, it is estimated that a facilitation payment of US\$50 is paid in bribes for every cubic meter of timber that is felled in Cambodia.⁷⁴ Even in Indonesia, it was estimated that lost forest revenue do cost the nation up to US\$4 billion a year or five times the annual health budget.⁷⁵ Part of this money is laundered.

Clearly, corrupt money of which some significant part ends up being laundered contributes to social inequality, political instability and conflict in developing countries. As pointed out, it also diverts scarce public resources from some very worthy projects that would have assisted in lifting the citizens out of the poverty trap. More so, economic decisions in developing countries are skewed in favour of projects where opportunities for corruption and money laundering exist. Moreover, faith in public institutions and public officials are seriously undermined. This encourages members of the community to become very sceptical about the political process and ultimately they dis-engage.⁷⁶

As a former United Nations official once stated:

*'Corruption debases democracy, undermines the rule of law, distorts markets, stifles economic growth, and denies many their rightful share of economic resources or life-saving aid'*⁷⁷

3.3 Dilemma of Quantifying the Impact of Corruption and Money Laundering

⁷³ Lindlow. M, Kushnarova. I and Kaisa. K, in 'Measuring Corruption In Health Sector: What We Can Learn From Public Expenditure Tracking and Service Surveys In Developing Countries', Transparency International, 2006 Global Corruption Report, p30.

⁷⁴ 'Cambodia Public Expenditure Review: Enhancing the Effectiveness of Public Expenditure, Vol.11 Main Report', January 8th 1999, The World Bank, p. 13

⁷⁵ 'Tackling Corruption, Transforming Lives: Accelerating Human Development in Asia and the Pacific', United Nations Development Program, 2008, p. 98

⁷⁶ <http://www.gopacnetwork.org/doc/fight%20againstcorruption> accessed 20/06/2012

⁷⁷ Kofi Annan, former Secretary General, United Nations.

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The fact that most corrupt proceeds do undergo money laundering process both in the internal polity that this occurs, in addition that there are receptive countries willing, to receive this, is no longer a debatable issue. As indicated earlier, the capital flight costs the developing countries a lot of inconvenience. Attempts have also been made to get the exact figure involved but most of the figures are not exact or has not been able to pass the empirical tests. They are practically based on estimates and conjectures in certain cases. Corruption as a crime that is premised on secrecy which also involves laundering is very difficult to quantify.⁷⁸

It has been argued, that since corruption which in most cases leads to money laundering, is caused by a culmination of social practices often done by both individuals and organisations; it is a very difficult task to have a measurement of these social factors.⁷⁹

It has been on account of this dilemma that several organizations have developed in recent years Corruption Perception Index (CPI). This cuts across a wide spectrum of countries. The purpose is for a qualitative assessment of corruption pervasiveness. Amongst these NGOs, TI that is based in Berlin has published arguably, the most comprehensive perception index about over 163 countries globally including developing countries.

It has been noted, that on a particular level, TI's CPI has since its inception played a very significant part in raising the public awareness about corruption and also encouraged reforms in AML issues. It has also attracted some severe criticisms as regards the qualitative transparency methodology that indicated only one side of the corruption equation. That is simply, the accepting spectrum and ignoring the private sector.⁸⁰

Another question mark, on the methodology employed, is the size of the survey that has been used in different polities and the selection of these countries surveyed. An author has argued that the CPI has reinforced a sort of stereotypical perceptions concerning the corruption geography, in addition to

⁷⁸ Sharman, J.C and Chaikin.D, 'Corruption and Anti-Money-Laundering Systems: Putting A Luxury Good To Work'. *Governance: An International Journal of Policy, Administration, and Institutions*, Vol.22, No 1, January 2009 p.31

⁷⁹ Sikka,P. (2008), "Enterprise Culture and Accountancy Firms: The New Master of Universe", *Accounting Auditing and Accountability Journal*, Vol.21 No. 2, p268-95.

⁸⁰ OECD Observer, 2000 July

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the fact that the perversities of Transparency International rankings exude a reflection of probable confusion about the present corruption and money laundering phenomena. Typical example is the fact that 40% of the countries that have been identified by CPI as being the least corrupt are at offshore tax havens, inclusive of the major centres.⁸¹The author submitted thus:

*'The United Kingdom should be placed high on the list of most corrupt countries, because Britain's role as a defender of tax havens role of its overseas territories and Crown dependencies, as well as its dismal role in undermining the effectiveness of European Union's attempts to close tax loopholes.'*⁸²

The suggestion, simply emits what one can observe, is that CPI does not actually represent the true corruption and resultant money laundering geography. This therefore has led to the dilemma of quantifying the menace and this is very problematic.

There has been a body of academic write-ups on socio-political and economic spheres, roundly based, on some theoretical frameworks that have been used in analysis of corruption that would probably in its ramifications lead to money laundering. There is capitalism write-up, based on capital accumulation as a theoretical lens.⁸³There is also the state theory that is based on class theory.⁸⁴Some studies have also employed policy choice theory and others a public choice approach. Not only the above, other studies did use the theories of modernization and also political development.⁸⁵

The dilemma does not end in the above mentioned studies; there is the study that is also based on the perspectives of cultural theory⁸⁶and also globalisation.⁸⁷It could probably be due to the dilemma associated in

⁸¹ Christenson, J. (2007), "Mirror, Mirror On The Wall, Who's The Most Corrupt of All?", Tax Justice Network, World Social Forum, Nairobi, January.

⁸² Supra, See also *The Guardian Unlimited*, 2006, 4 September.

⁸³ Harsch, E. (1993)"Accumulator and Democrats: Challenging State Corruption In Africa", *The Journal of African Studies*, Vol. 31 No. 1, pp.31-48

⁸⁴ Dobel, J.P. (1978), "The Corruption of A State", *The American Political Science Review*, Vol. 72 No.3, pp.958-73

⁸⁵ Anvig, J.C.(2006),"Corruption and Fast Change", *World Development*, Vol.34 No.2,pp.324-40

⁸⁶ Anderson, C. and Tverdova,Y. (2003), "Corruption, Political Allegiances, And Attitudes Towards Government In Contemporary Democracies", *American Journal of Political Sciences*, Vol.47 No.1, pp. 91-109.

⁸⁷ Ibid No 72

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quantifying corruption and money laundering impacts in developing countries that there has been the emergence of various theorisations.

This chapter has indicated the possible scenario that could trigger both corruption and money laundering, albeit in some instances some theoretical reasons. It was noted that the intersection of corruption and money laundering can present great economic concerns to the developing world, inclusive of impeding the democratic processes and as a result this also presented problems in finding out the quantum of the impact that led to various theorizations.

CHAPTER IV

THE INTERACTION OF CORRUPTION AND MONEY LAUNDERING

It has become evident that for the corrupt proceeds to be reused, it undergoes the money laundering process. It is during this process that at some point that corruption and money laundering in most cases interact and form a sort of family-like relationship. This leads to differential jurisdictional appreciation of the intricate issues. However, for the money laundering circle to be completed, corruption is highly noticeable as a facilitative ingredient.

4.1 The Twin-Like Nexus or Interaction

It has been observed that arguably in almost all the cases involving significant corrupt practises across a very large spectrum, the proceeds do usually undergo the money laundering process. Admittedly over the years, this nexus between corruption and ML has been a sort of unfocussed area. Corruption instruments contain provisions on the nexus or interaction between corruption and money laundering.

The relationship between corruption and money laundering is probably very clear. Corrupt money is often laundered in order to legitimise it.⁸⁸ It is on account of this, that notable instruments that deal with money laundering have recognised this twin-like link. The World Bank observed thus:

'Corruption and money laundering are a related and self-reinforcing phenomenon. Corruption proceeds are disguised and laundered by corrupt officials to be able to spend or invest such proceeds. At the same time, corruption in a country's AML institutions (including financial institutions regulators, Financial Intelligence Units (FIUs), police, prosecutors and courts) can render an AML regime of a country ineffective'⁸⁹

⁸⁸ Ibid No 71

⁸⁹ World Bank 2007 Strengthening Engagement p.68

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The World Bank and IMF as far back as late 2001 have had an AML role. Instead of portraying itself as a standard-setter, it has assisted by virtue of assessing compliance with FATF Recommendations through programmes like Report on Observance of Standards and Codes plus the Financial Sector Assessment Programs. It provides technical assistance in implementation of the Recommendations.

The Bank observed that in solving the problems associated in the twin-like link between corruption and money laundering at its intersection points; indicated that the following lessons were learned from its anti-corruption and AML efforts. Firstly, an effective customer due diligence (CDD) under the AML requirements, for instance the provision of the details on the clients background, the background of the amount of funds that is involved, beneficiary identity, would definitely play a very essential part in promoting what is classified as a general financial transparency that would hinder corruption.

Secondly, the very close cooperation between the Financial Intelligence Units (FIUs), anti-corruption and the law enforcement agencies and the private sector would definitely help to combat corruption. Finally, in many polities, it is noted that the law enforcement agencies do specify that corruption is the main offence that usually generates the illicit funds that are subject to laundering, therefore AML policy is to a large extent fundamentally a sort of anti-corruption tool.⁹⁰

Suffice to say that the nexus is very important hence the World Bank, through its Financial Market Integrity Unit did look at the use of anti-money laundering information for anti-corruption issues. This involved 15 anti-corruption agencies around the globe carefully selected, focussing on whether an Egmont Group is present there. The focus was on how countries can use AML data to fight corruption, hence the intersection or nexus.

Another World Bank project was with Egmont Group regarding the governance of FIUs to serve as part of the Bank's wider perspective to re-draft its governance and anti-corruption strategy. In fact, World Bank sponsored another project that related to the corruption and money laundering nexus or link. This involved the studies of grand corruption and PEPs conducted by

⁹⁰ Ibid p68

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Richard Gordon and Braddock Stevenson of Case Western Reserve University.⁹¹ It focussed on the instruments and methods that are used, laundering the proceeds of corruption, where the money is kept, how this was detected, investigated and prosecuted.

The APG Scooping Paper recognised the serious nexus between commercial corruption and money laundering and noted thus:

*'When viewing corruption as a facilitative activity to support money laundering, the involvement of private sector players cannot be ignored. Corruption can be a key step in money laundering by securing the corrupt cooperation of bankers, accountants, lawyers, remittance agents etc, for the purposes of concealing the laundering activities and ensuring access to funds and profits.'*⁹²

In April 2007 World Bank and UNODC did launch the StAR Initiative focusing on returning stolen assets. In emphasising the close link between corruption and money laundering, UNODC arguably the guardian of other subsequent UN treaties that recognised this link indicated thus:

*'There are important links between corruption and money laundering. The ability to transfer and conceal funds is critical to the perpetrators of corruption, especially large-scale or "grand corruption." Moreover, public sector employees and those working in key private sector financial areas are especially vulnerable to bribes, intimidation or other incentives to conceal illicit activities. A high degree of co-ordination is thus required to combat both problems and to implement measures that impact on both areas.'*⁹³

It indicated further:

'Money-laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identifying and recording obligations as well as reporting suspicious transactions, as is also required by the UN Convention against Transnational Organised Crime and the United Nations Convention against Corruption, will not only facilitate detection of crime of money-laundering but

⁹¹ This was initiated by World Bank's Financial Integrity Unit in 2007

⁹² FATF/PLEN (2007) 37 p 77

⁹³ UNDOC p 20

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*will also help identify the criminal acts from which the illicit money proceeds originated. It is therefore essential to establish corruption as a predicate offence for money-laundering.*⁹⁴

In short, UNODC Global Program on money laundering and corruption nexus plays vital role in extending technical assistance to the developing world. It did list this nexus as a very important priority area of its research. This was evidenced in its sponsored 1998 report titled, '*Financial Havens, Banking Secrecy and Money Laundering*'.⁹⁵ This identified many common trends like risks posed by un/under-regulated Corporate Service providers plus anonymous corporate vehicles that existed between money laundering and corruption in their intersection points.

In fact the close link or interaction was even as far back as 1988 identified by the Vienna Convention when it called on its signatories to criminalise the proceeds of drug crimes.⁹⁶ Not only this, the twin-like nexus was also recognised in 2000 Palermo Convention. It did identify as one of its objectives, the facilitation of the war against money laundering and corruption. It did call on signatories to criminalise money laundering.⁹⁷ It went further to indicate the need for customer due diligence, suspicious transaction reporting⁹⁸ and encourages parties to set up FIUs, following the recommendations of international AML bodies.

UNCAC did indicate the very close links between corruption and money laundering evidenced by the wordings of its articles 14, 23, 52 and 58 respectively. Aside from UNCAC, arguably the 1997 OECD Anti-Corruption Convention that emanated from the Working Group on Bribery in International Business Transactions is very important on the nexus. It has various AML clauses. It called upon signatories that have made the offence of bribing a domestic official a predicate offence for money laundering to extend same to the bribery of foreign public official.⁹⁹

⁹⁴ UNDOC p 432

⁹⁵ See UNDOC 1998 sponsored paper via Global Programme Against Money Laundering.

⁹⁶ Article 23 Vienna Convention.

⁹⁷ Article 6 Palermo Convention

⁹⁸ Article 7 Palermo Convention

⁹⁹ Article 7 OECD Anti-Corruption Convention 1997.

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In fact OECD's 2006 Working Group in its *Mid-Term Review of Phase 2 Reports* did note the absence of a uniform comparable data collection. This hampers robust conclusions about common trends amongst signatories on the linkage. It called for greater efforts for data collection standardisation.¹⁰⁰ It was concerned at the linkage that could be noticed in suspicious transaction reporting systems. It noted:

*'A better measure in evaluating the effectiveness of the Convention is whether suspicious transaction reporting systems have led to the discovery of foreign bribery and related money laundering cases. If one assumes that foreign bribery is a prevalent phenomenon, and that the crime frequently involves money laundering (of the bribe or proceeds of bribery), then one could reasonably expect reporting systems to detect foreign bribery cases regularly'*¹⁰¹.

OECD Review was posed by the question of why STRs in most of the examined countries did not lead to bribery investigations. It supposed that the FIUs and reporting entities may not be adequately aware of the money laundering and corruption link. Very few of them, do issue corruption-related examples in their typologies, with Belgium and USA being classified as notable exceptions.¹⁰²

More so, on the nexus, OECD in its September 2007 paper titled '*Potential Obstacles to the Detection of Bribery of Foreign Public Officials by AML Systems*'. It examined three common features of foreign bribery that differentiate the said offence from many other predicate offences and could in a significant manner impact its detection on the AML nexus. These were identified as firstly; there is the offence of generation of two kinds of illicit funds-the payment of the bribe and the bribe proceeds; secondly, offence happening abroad and lastly relative newness of the offence. The paper, did point out the problem of detecting bribery that is concealed during a normal business interactions, dual criminality obstacles associated in international

¹⁰⁰ OECD Anti-Bribery Convention 1997 Mid Term Review May 2006 by its Working Group p.83

¹⁰¹ OECD Review 1997 p 87

¹⁰² Ibid No 21 p. 11

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cooperation, plus awareness training in money laundering corruption typologies as per the foreign bribery offence.¹⁰³

Other respectable organisations that have recognised the nexus between corruption and money laundering include the followings; Asian Development Bank/OECD Anti-Corruption for Asia and the Pacific who in its 2007 and 2008 Work Plan did express its intention to work assiduously with APG towards the nexus in the region.¹⁰⁴ It did focus on *Mutual Legal Assistance, Extradition and Asset Recovery of Proceeds of Corruption in Asia and Pacific*. It indicated possible easier substitutes for mutual legal assistance in the corruption and money laundering nexus or intersection.

There is also the significant example of the conviction of a former Pakistan Prime Minister for money laundering in Switzerland with the assets ordered forfeited to Pakistan.¹⁰⁵ ADB/OECD did indicate that one of the most effective alternatives to a formal mutual legal assistance (MLA) in the nexus is good co-operation between FIUs identified in its paper; *'Denying Safe Haven to the Corrupt and Proceeds of Corruption.'*¹⁰⁶

The corruption and money laundering twin-like nexus was recognised by Commonwealth as a big problem. They have initiated significant work via its Economic Affairs, Governance and Legal and Constitutional Affairs sections of the Secretariat. Its report in 2005 by Commonwealth Expert Working Group, did give some notable recommendations on the nexus. These included removal of immunities for serving heads of state and political figures. Countries should have effective conviction-based, non-conviction-based, and confiscation measures as part of AML laws. Bilateral treaties should not be required to aid assistance in this. Enhanced scrutiny has to be applied to both foreign and domestic PEPs and mechanisms should be derived to deal with corruption of serving heads of state.¹⁰⁷

In fact, Asia-Pacific Economic Co-operation (APEC) under the Bussan Declaration recognised the nexus issue by promoting transparency and

¹⁰³ Christine Urarte, OECD Secretariat, Anti-Corruption Division 17 September 2007.

¹⁰⁴ ADB/OECD 2007:6

¹⁰⁵ ADB/OECD 2007 p57

¹⁰⁶ ADB/OECD 2006

¹⁰⁷ Ibid No 21 p.13

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focussing on UNCAC's articles 14, 23 and 24. There are FATF-Style Regional Bodies (FSRBs) that also focused on the nexus. Notably, there is the Inter-governmental Action Group against Money Laundering in West Africa (GIABA) which commissioned a study in 2007. This focussed on corruption and money laundering linkage. This was titled '*Corruption and Money Laundering in West Africa: Assessment of Problem Status and Effectiveness of National and Regional Control Initiatives*'.¹⁰⁸ Interestingly, another FSRB that focussed on the link is Eastern and South African Anti-Money Laundering Group (ESAAMLG). This organisation in its 2005-2008 Strategic Plan, reiterated the need for a greater appreciation of corruption and money laundering link.¹⁰⁹

Apart from the above, in Europe, Group of States against Corruption (GRECO) efforts in monitoring its 46 members' implementation of the Criminal and Civil Conventions on Corruption is an *indicium* of the importance of the corruption and money laundering nexus. Its Second Round evaluations did urge members to amend their criminal codes in order to allow criminal law prosecutions in instances where corruption offences were committed abroad. A more robust international co-operation in repatriation of crime-proceeds, corruption prevention measures that relate directly to AML issues were also urged as per the nexus.¹¹⁰

It is very important to remember that any dissection of the nexus between corruption and money laundering should also be able to recognise the limits of this. It is not in all corruption cases that there is money laundering. A notable writer indicated thus:

'Without money laundering, there would still be corruption, but bribes would have to be paid (and held) in cash or readily movable valuables such as gold, diamonds and art. Not all bribes received have to be laundered: some cash can be redistributed as "grease" payments or simply spent. Corrupt public and corporate officials, as well as other criminals, often use laundering agents,

¹⁰⁸ Ibid No 21 p.14

¹⁰⁹ ESAAMLG 2005:12

¹¹⁰ Ibid No 100 p.15

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*relying on them to show discretion in handling funds-and to be uncooperative in any criminal investigations that might arise.*¹¹¹

But suffice to say that the nexus is also noticeable where there is organised crime and the insecurity of corrupt political elites in developing and transitional countries.¹¹²

4.2 Jurisdictional Differences on Classification of both Concepts and Linkage.

It has been historically observed, that public sector corruption did attract sanctions for a very considerable length of time at the intersection points. Sanctions for private sector bribery were criminalized in many jurisdictions just in the last 133 years. Jurisdictionally, in the Anglo-American legal system, it has been noted, that the common law offence of bribery was only applicable to the bench. This however was later extended to public officials and public functions, for instance voting during politics. The bribery offence was simply restricted at common law to corrupt payments to only people that performed public duties.¹¹³

During late nineteenth and early twentieth centuries, it was noticed that many US states did pass some general statues that prohibited and did criminalise agents' bribery, employees and also enacted some specific very compact legislations which barred bribery in some industries. In certain US states, bribery of lawyers, appraisers, architects, physicians and accountants were prohibited. Some of the US federal Statues did criminalise bribery in commercial contexts that involved certain interstate trade as bribery in procuring interstate transportations and people that appeared in television quiz performances.¹¹⁴

Interestingly, in United Kingdom, the common law offence of public bribery that does sometimes lead to money laundering was legislatively given backing by Public Bodies Corrupt Practices Act of 1889 which criminalised public sector

¹¹¹ Levi, M. (2001), "Money Laundering: Private Banking Becomes Less Private", in Hodess, R., Banfield, J. and Wolf, T. (Eds), *Global Corruption Report*, Transparency International, Berlin, p206.

¹¹² Ibid No 8 p.275

¹¹³ Ibid No 8 p.272

¹¹⁴ Noonan, 1984, N.2, pp. 578-9; *Harvard Law Review*, 1932

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corruption. Private commercial corruption was made a criminal offence by The Prevention of Corruption Act 1906. This dealt with both private and public agents. This 1906 legislation was not enacted specifically for corruption but rather it was meant to aim at the principal/agent relationship noticeable in commercial interactions.¹¹⁵

In United Kingdom and other common law jurisdictions as well as Continental Europe¹¹⁶ money laundering is seen as taking action with any form of property that can even encompass intangibles¹¹⁷ derived from criminal acts that do want to obscure the beneficial owners.¹¹⁸ In USA, money laundering is seen as engaging in financial transactions that usually conceal the identity, source, or destination of illegally acquired money. In other cases the offence of handling the crime proceeds do also include money laundering.¹¹⁹

Presently, statutes in different countries have criminalized commercial corruption that does lead to money laundering. In a joint study conducted by ICC and Max Planck Institute for Foreign and International Criminal Law, it was indicated that as of 2008, 10 out of 13 OECD countries surveyed, had commercial bribery statutes. It was noted in the study that jurisdictionally, there were differing policy goals in the countries that criminalised commercial corruption.¹²⁰

It was noted that in view of the legal interests that were protected in criminal law regarding issues of commercial bribery; these were classified under three wide spectrums. These are inclusive of protection of corporate assets, shareholder rights and property interests; penalising the violation of civil law obligations, like the obligations of employees to employers, or agents to principals; plus minimising unfair or un-free competition.¹²¹

It was argued in the report, that as a result of the various approaches employed by different jurisdictions or national systems in defining corruption,

¹¹⁵ James, L. (1962) "Bribery and Corruption In Commerce", *International and Comparative Law Quarterly*, Vol.11, pp.880-6

¹¹⁶ See Art .1 Council Directive 91/308/EEC definition

¹¹⁷ Art 3 (3) 2005/60/EC

¹¹⁸ This is under Common Law but Money Laundering Regulations 2007 and POCA Part 7 is more expansive

¹¹⁹ Deitz. A. & Buttle J, *Anti-Money Laundering Handbook*. Sydney: Thomson Lawbook Co. 2008. P4

¹²⁰ Ibid No 8 p.273

¹²¹ Ibid p. 273

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more particularly private corruption; this has inevitably led to substantial differences in the application of the legislation. The proof of such offence does therefore become very hard when the offence involves parties in different jurisdictions and the fact that the corrupt proceeds are laundered internationally. As a result, there had been some national UK legislation at various points to at least tackle an aspect of the issue. For instance the amendments in the 2001 British Prevention of Corruption Act did allow an expanded jurisdictional reach.¹²² The 2010 UK Bribery Act is also important on this.

Expansion of the jurisdictional net is therefore, a good way of improving the effects of the criminal laws as agreed by one writer.¹²³ UNCACs Art 42 allows each state to establish jurisdiction based on territorial principles and may assert jurisdiction over convention offences using nationality and passive nationality principles.¹²⁴ It is noted, that in extradition and dual criminality issues of jurisdiction about corruption and money laundering, there is not a uniformity of practice amongst states. For instance, if a requested state does not recognise the offence of possession of corrupt proceeds as distinct from money laundering, it may refuse extradition due to the fact that the said offence is unknown in law.¹²⁵

The above is not always so, as some countries or jurisdictions in practice do relax dual criminality requirements, adopting the '*conduct test*' by virtue of their national legislations and courts. For instance, Justice Dean of the High Court of Australia in *Commonwealth v Riley*¹²⁶ summarised the dual criminality requirements under Australian extradition legislation. UNCAC's Art 44(1) adopts a flexible conduct based approach to dual criminality but subject to its Art 43 which provides the same international standard as found in a number of international treaties like FATF. Mutual Legal Assistance (MLA) can be used for corruption and money laundering recoveries in jurisdictional matters thereby reinforcing this linkage. There were also jurisdictional problems in EU when the

¹²² See S1(4) of the Prevention of Corruption Act inserted by Section 108 (2) of Anti-Terrorism, Crime and Security Act 2001.

¹²³ David Chaikin, '*Extraterritoriality and The Criminalization of Foreign Bribes*' in Corruption: The Enemy Within, BAK Rider (Ed), pp 285-301 (Kluwer, 1997)

¹²⁴ Ibid

¹²⁵ Ibid No 21 p.61

¹²⁶ (1985) 159 CLR 1 pages 17-18

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Second ML Directive was passed. This was evidenced by the requirements of adoption of minimum standards. This simply meant that the provisions were applied differently in different EU countries thereby raising the harmonisation debate.

4.3 Corruption as a Facilitative Element to the Origins and Cycle of Money Laundering

Judicial notice has long been taken of the fact that corruption is in most cases always interacting with money laundering. As a result, it has been fingered as a dominant facilitative element to the origins and the money laundering circle.

The term 'money laundering' had been said to originate from the 'Mafia's corrupt ownerships of various Laundromats in USA. The gagsters earned huge illicit money from such classified corrupt and money laundering ventures like extortion, gambling, prostitution and bootleg liquor. Ably directed by Al Capone in the 1930s, the Laundromats were cash businesses which were purchased to help launder the illicit gains that were corruptly got.¹²⁷ Surprisingly, Al Capone was convicted in 1931 not for money laundering but for tax evasion.

'Money laundering' as an expression is one of a fairly recent origin which gained prominence colloquially in the 1970,s during the Watergate Scandal of President Nixon. The expression was first sighted in US papers and appeared in 1982 in a judicial or legal context in a case called *US v \$4,255,625.39*¹²⁸

The money laundering circles or processes involve three stages. These include placement, layering and integration circles.¹²⁹ It is good to point out that the cycle of money laundering does not necessarily follow the above order. This order is largely academic. The actors are so sophisticated and criminally imbued and perhaps ahead of the various AML mechanisms that the sequence above is not necessarily adhered to launder the corrupt proceeds.

¹²⁷ http://www.laundryman.u-net.com/page_hist.html accessed 30/06/2012

¹²⁸ (1982) 551 F Supp. 314

¹²⁹ Doug Hopton, (2010) Money Laundering: A Concise Guide For All Business. 2nd Edition p2 Gower Publishing Limited, Surrey England.

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The placement stage involves both the primary and secondary deposits. This is probably the most difficult stage. The launderer attempts at the primary deposit to put the illicit funds into the financial system, for instance depositing very large sums into the banking system. Here the launderer runs a very high risk of being caught. But he could get away undetected simply through the connivance of corrupt bank officials that have been bribed at this intersection point. This primary deposit can involve the use of the 'structuring' or 'smurfing' methods geared towards evading the regulatory radar by avoiding identification, reporting obligations and documentation issues.¹³⁰ At this stage, the launderers can also influence control by corruptly purchasing the financial institutions or setting up ones in offshore countries.

At the secondary deposit circle, the characteristics of converting the money into different assets, use of front men, setting up of juristic personalities or in some instances the use of insurance policies, are exhibited for laundering purposes.¹³¹ It is shameful to note that at the intersection points, the corrupt wizardry of some professionals like lawyers, accountants and banks who understand how to corruptly cheat the system is employed to achieve this.¹³²

The second circle is the layering stage. The launderers would use various mechanisms to conceal the origins of the illicit fund. They usually do this by contriving and being involved in a series of financial transactions which moves the 'dirty' or 'black money' around. Some of the methods corruptly used include but not limited to the use of financial derivatives and swaps. Inefficient cooperation of criminal prosecution, tainted with judicial corruption does facilitate the layering stage at the intersection points. At the integration or final stage, there is the presence of the illicit money being integrated into the formal or main economy. These include specific deposit stocks or direct investment in real estates and companies.

In the three stages, corruption is actively employed to launder the proceeds at the intersection points via the active connivance of the professionals. The case in United Kingdom that involved Ex-Nigerian Governor James Ibori who was sentenced to 13 years in April 2012 and his wife was sentenced to five years in

¹³⁰ Ibid No 16 p.394

¹³¹ <http://www.arch.tagesspiegel.de/archiv/18.11.2005/2180342.asp> accessed 30/06/2012

¹³² US Senate Sub-Committee On investigation, 2003,2005,2006,2008. TI 2006.

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November 2011 for corruption and money laundering are significant pointers. His British lawyer, Badrash Gohil who was described by the judge as the 'architect' was prior to this, sentenced to 10 years for helping him in the money laundering circle.

Twenty three British banks facilitated corrupt money laundered by former Nigerian head of State Sani Abacha.¹³³ On July 17 2012 Mr David Bagley, head of compliance in HSBC resigned his appointment and admitted that the bank had 'cleaned dirty money' that emanated from corruption and drugs money from Iran and Mexico to US.¹³⁴ The bank was fined £26m for the money laundering.¹³⁵ The bank through CEO Stuart Gulliver on July 30 2012 apologised for 'mistakes of the past' and stated: 'what happened in US and Mexico was shameful' and set aside a further £445 million for anticipated ML penalties.¹³⁶

On July 31 2012, a former CEO of defunct Nigerian bank Intercontinental Bank PLC Dr Erastus Akingbola was found liable by a London court. He corruptly laundered \$902m to companies that he has substantial interests in. He also bought real estate worth £8.5million in London.¹³⁷

A former head of security for Lloyds Bank online services, Jessica Harper, corruptly stole more than £2.4m from the bank from 2007 to 2011. Part of the money was laundered to buy homes for her family. She is to be sentenced on September 21 2012 at Southwark crown court.¹³⁸

It has been observed in this chapter that there is a conspicuous nexus between corruption and money laundering. But it was noted that it is not in all the cases that this is so. There was also the absence of a conflating view on issues of jurisdictional classification and dual criminality. Some countries notably Australia did invoke the conduct test. More so, in the circle of money laundering, it was indicated that this was made possible by corrupt mannerisms of certain professionals, albeit their dubiously facilitative characters exemplified by the setting up of complex financial vehicles employed to cheat the system.

¹³³ *BBC News*, 2001, 3 October

¹³⁴ *Metro*, Wednesday, July 18 2012

¹³⁵ *Evening Standard* Tuesday 7 August p2

¹³⁶ *The Wall Street Journal* July 30, 2012

¹³⁷ *Sahara Reporters*, August 08 2012 New York.

¹³⁸ *Metro* Wednesday August 8 2012

CHAPTER V

ADEQUACY OF THE REGULATIONS FOR COMBATING MONEY LAUNDERING AND CORRUPTION

The serious issues involved in the intersection of corruption and money laundering have called into question the adequacies or inadequacies of the mechanisms that have been put in place. Some of these come in form of 'persuasive' mechanisms while others are treaty-like.

5.1 The International Soft Law Dimension

The international community has responded reasonably to tackle the menace posed by the interaction of corruption and money laundering. We have earlier pointed out the various responses to this issue in chapter 2.3. However an interesting flavour to the adequacy is the soft-law issue. International soft law refers to legal norms, principles, codes of conduct and transactional rules of state practice that are recognised in either formal or informal multilateral agreements.¹³⁹ It has to be noted that soft law has the characteristics of presuming consent to the basic standards and the norms of state practice but generally without the necessary *opinio juris* required to form binding obligations under customary international law.¹⁴⁰

It is an international rule that has been created by a group of specially affected states that do possess a common intent to voluntarily observe the contents and with an intention of adopting it into their national laws and obligations. But it is the absence of the legal obligation which provides the standard setters with the flexibility to respond rapidly to developments in intersection points of

¹³⁹ Wellens, K.C., and G., M. Borchardt. 1989. "Soft Law In European Community Law." *European Law Review* 14: 267-321.

¹⁴⁰ *Ibid* No 18 p. 138

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corruption and money laundering rapidly and at the same time in a manner that would suit the needs of their jurisdictions.¹⁴¹

Typical examples of the soft laws that keep on evolving at various phases to tackle the methodologies of money laundering and corruption are the Basel Committee, OECD, ICC and FATF. The contents of their responses at various phases can arguably be said to be reasonably adequate more, particularly that of FATF. Suffice to say that the implementation of the soft laws especially the FATF is enhanced by the surveillance and conditionality programs of World Bank and IMF.

5.2 Basel Committee on Banking Regulation and Supervisory Practices

The Basel Committee can arguably be said to be one of the most influential financial standard-setting body. It does exercise influence either directly or indirectly over the development of banking law and regulations for most countries.¹⁴² The Committee was set up in 1974; made up of central bankers and bank regulators of the thirteen G10 countries when they met in Basel Switzerland at the Bank for International Settlement (BIS).

It is in recognition of the problems associated with money laundering which in most cases is the fall-out of corruption that they did issue various documents to combat the problems at the intersection points. This committee can rightly be said to be the source from which other subsequent 'soft law' organisations tactically copied and improved on their research to minimise the corruption and money laundering debacle.

In recognition of the fact that criminals can infiltrate the financial set ups with the banks being primary targets, it did issue a Statement of Principles in 1988. It is probably very correct to say that this is really a very significant step by the Committee to help prevent the use of the banks for money laundering.¹⁴³ Major concerns included customer identification; legislative compliance; high ethical standards conformity and local laws and regulations; issues of record keeping and systems; training of staff and corporation with national law enforcement

¹⁴¹ Ibid p. 138

¹⁴² Ibid p. 37

¹⁴³ Ibid 125 p.11

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organs without breach of customers' confidentialities. This was seen as a major self-regulatory initiative.¹⁴⁴

In October 2001 it issued another significant paper on Customer due diligence for banks. It focussed on verification and Know Your Customer (KYC) with trans-jurisdictional aspects.¹⁴⁵ This was as a result of variations in various national standards which were not seen as adequate. The important thing to note, is that these two papers did recognise that adherence to the suggestions would go a long way to minimise the problems identified in corruption and money laundering nexus at their points of intersection.

5.3 Financial Action Task Force (FATF)

This is the only international body set up solely to fight financial crimes. It was established in 1989 by G7 leaders in recognition of threats to financial stability by money laundering. Its original mandate was broadly elucidated to cooperate in cross-border fight against money laundering plus adaptation of standards that would lead nations to adopt the necessary legal and regulatory mannerisms that would prevent the use of their financial set-ups for criminal purposes.¹⁴⁶

It has drawn heavily on the work conducted by Basel Committee, more noticeably on CDD and taken this to another level in the fight against money laundering. FATF has undergone a lot of metamorphosis in reactions to the corruption and money laundering intersection points through its recommendations adhered to by more than 180 countries, noticeably in 1996, 2001, 2003, 2008 and 2012.

The most recent revised FATF Recommendations of February 12 2012 now fully integrate counter-terrorist financing measures with anti-money laundering controls, introduces new measures in order to counter the financing of proliferation of mass destruction weapons, more importantly on the corruption and money laundering intersection, will address better, the laundering of the proceeds of corruption and tax crimes. In fact they also make

¹⁴⁴ See Prevention of Criminal Use of The Banking System for The Purpose of Money-Laundering (Dec 1988)

¹⁴⁵ Bank For International Settlements (BIS), Customer Due Diligence for Banks October 2001

¹⁴⁶ FATF, 1990

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stronger requirements for higher risk situations and do allow countries to embark on a more targeted risk based approach.

FATF President Giancarlo Del Bufalo stated thus:

“Adoption of the revised Recommendations demonstrates countries’ shared commitments to fight money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction”....“The revised Recommendations include requirements for stronger law enforcement tools and improved international cooperation”.

The old Nine Special recommendations are now subsumed in the new ones. Their implementation is expected to be in place by February 2013. This is assessed rigorously by FATFs’ Mutual Evaluation processes and more importantly, via the assessment processes of IMF and the World Bank. Some of the important recommendations on the intersection of corruption and money laundering nexus were pointed out in chapter 2.3.

5.4 IMF and World Bank

IMF’s Executive Board did call money laundering ‘*a problem of global concern*’ that threatens to undermine the stability and integrity of the global financial markets.¹⁴⁷ IMF Articles of Agreement empowers it to oversee the international monetary system to ensure its effective operation. In accomplishing this, the IMF do exercise its treaty sanctioned surveillance powers over member countries exchange rate policies. It is these powers that they have now used in assessing member countries compliance with international standards. World Bank’s conditionality and surveillance powers, enables it to tacitly make its members to comply with these standards as well. The two organisations, the products of the Bretton Woods agreements, are fully aware of the danger posed by the intersection of corruption and money laundering.

In fact, in 2001 IMF did call on its members to ratify and fully implement the UN instruments to counter terrorism. In 2002 IMF and World Bank started a joint assessment program about the international standards that both FATF and OGBS initiated. Not only this, in 2003/4, requests from more than 100

¹⁴⁷ IMF, 2001a

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countries to help them develop and build institutional infrastructures to fight money laundering and terrorism were positively responded to by them. In April 2004 they agreed and adopted a more comprehensive and knit approach in conducting assessments of international standards to prevent money laundering bearing in mind that this is usually a fall out from corruption.¹⁴⁸ It is submitted, that without their 'carrot and stick' approach, the potency or adequacy of some of the various regulations would have been seriously undermined.

5.5 The European Union Directives on money laundering

The EU recognised the issue of intersection of corruption and money laundering and reacted by churning out three directives at various periods on prevention of the use of the financial systems to tackle money laundering. The first directive in 1991 was limited to credit and financial institutions but members were encouraged to be expansive. It was restricted to drug trafficking in accordance with the Vienna Convention.

It required members to prohibit money laundering, verifying of customer identification and record keeping, monitoring and checking of suspicious transactions, cooperation with authorities, non-tipping off of suspects, protection of people reporting suspicious transactions from breach of confidence, the implementation of internal control mechanisms and staff training.¹⁴⁹

The Second Directive took care of the limitations of the first one. There were radical and extensive changes and non-financial-sector-businesses were included. New EU entrants were required as a condition precedent to admission to adopt this Second Directive.¹⁵⁰ UK reacted by introducing proceeds of Crime Act 2002 (POCA) and Money Laundering Regulations 2003 later repealed by 2007 Act.

The Third Directive came into play in 2005. It contained more detailed requirements to CDD and that this should be done on a risk based approach.

¹⁴⁸ Ibid 125 p.16

¹⁴⁹ Ibid 19

¹⁵⁰ Ibid 39

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Articles 11 and 7 contained the main changes.¹⁵¹ The three directives kept on improving on the problems faced at the interception points of corruption and money laundering.

5.6 The Vienna and Palermo Conventions

The Vienna Convention of 1988 can arguably be said to be the ‘mother of all the subsequent UN conventions’ on money laundering and possibly corruption. It is noted that the Convention objective was directed to drug-orchestrated money laundering issues. But members were encouraged to extend this scope. Its’ Art 11 did churn out a comprehensive definition of money laundering. It was ratified by more than 100 nations and came into effect in Nov 1990. It urged members to criminalise drug trafficking and money laundering; to enact legislation to confiscate drug proceeds; measures to permit international assistance; measures for courts to order financial set-ups to make available to enforcement agencies evidence irrespective of bank confidential matters.¹⁵²

The Palermo Convention of 2000 is perhaps the most significant multilateral treaty that addressed organised crimes and financial crimes. States are obliged to implement measures to combat money laundering.¹⁵³ They are also expected to establish participation in organised crime, corruption and obstruction of justice and money laundering as offences. Interestingly, it recognised the comingling of corruption and money laundering by criminalising the proceeds in Article 6 and corruption in Article 8.

5.7 Wolfsberg Principles

It was as a result of the international discontent in the 1990’s that private banks were not viewed as doing enough to combat money laundering and corruption that these principles came into play. Ten international banks later increased to twelve global banks formed the association called the Wolfsberg Group. They worked closely with Transparency international. They churned out

¹⁵¹ibid 38

¹⁵²ibid 125 p.9

¹⁵³Article 7 Palermo Convention 2000

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Anti-Money Laundering Principles for Private Banks that first came into play in 2001 and revised in May 2002.

In recognition of the fact that proceeds of corruption can be used in terrorist activities by embarking in laundering using the banking system, the group did publish a Statement in January 2002. Also in November 2002, they did publish the Anti-Money Laundering Principles for Correspondent Banking. Other notable papers published include Guidance for Mutual Funds and Other Pulled Investment Vehicles. In 2007 the group in close association with TI and Basel Institute on Governance issued a Statement against corruption.¹⁵⁴ Although Wolfsberg Principles is soft law, there are negative commercial and regulatory implications for private banking to be non-compliant on account of risk management issues.

5.8 Egmont Group

This was founded in 1995 by the various Financial Investigation Units (FIUs) of the various FATF nations. Article 41 paragraph 1(b) and Article 58 of UNCAC are relevant here. They aim to enhance knit communication between FIUs globally in the fight against the global problems of financial crime which obviously include the intersection points of corruption and money laundering. It presently has over 100 nations that have created this. UK's own is Serious Organised Crime Agency (SOCA). They did establish a Memorandum of Understanding which can be used to share intelligence. But here, the intelligence is owned by the FIU that provides it and can only be released to another FIU provided that FIU has an independent status and is not part of the investigation authorities.¹⁵⁵

5.9 Offshore Group of Banking Supervisors (OGBS)

This was formed in Basel when the representatives of some offshore centres met with members of the Basel Committee on Banking Supervision. The aim was for offshore centres to define their common grounds more clearly; to also participate in the definition plus the implementation of the international

¹⁵⁴ Ibid 125 p17

¹⁵⁵ <http://www.egmontgroup.org> accessed 12/07/12

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banking standards involved in cross-border supervision of banks, keeping close and responsive approaches that are made by other supervisory authorities for assistance in the prudent supervision of international banks.¹⁵⁶

As a condition precedent to its membership, a clear political commitment has to be made to the implementation of the facets of FATF. Those members that are not members of FATF or CFTF do commit themselves via their individual ministerial letters addressed to FATF President. Its' regulatory robustness is derived via its commitment to FATF which in turn is backed by both IMF and World Bank.

5.10 Financial Stability Forum (FSF) and Commonwealth Secretariat

The FSF was set up by the G7 in 1999 on the recommendations of the Tietmeyer Report.¹⁵⁷ It brought together the national regulators, central banks, treasury departments and international financial institutions to tackle international financial problems on a more coordinated global basis.¹⁵⁸ The aim is to strengthen international cooperation and coordination in the area of financial market supervision and surveillance.¹⁵⁹ FSF did focus on the corruption and money laundering conundrum. But it has been described as a mere 'talking shop' because unlike other soft law mediums like FATF and OECD its progress has not been very convincing and it lacks the mandate to generate standards.

The Commonwealth does embark on various activities; some of which have focussed on the corruption and money laundering intersection; more particularly targeted at the developing countries. It did produce a model law in 1996 on the prohibition of money laundering. Its Finance Ministers did agree and endorsed a very comprehensive and practical set of guidance notes for the financial sector. This, it is hoped would be beneficial to members to call into play effective anti-money laundering mechanisms. It was revised as Code of Best Practice at various times and took into cognizance the evolving patterns of FATF recommendations and IMF's methodologies.¹⁶⁰

¹⁵⁶ Ibid p.12

¹⁵⁷ 1999b:1

¹⁵⁸ Ibid 18 p. 259

¹⁵⁹ Ibid p. 74

¹⁶⁰ Ibid 125 p.14

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This chapter did indicate that although 'soft law' mechanisms are not strictly speaking compellable, they have tactically transformed into a 'hard law' stance due to the surveillance and conditionality requirements of the IMF and World Bank. The adequacies or inadequacies of the other treaty-like instruments will continue to be very debatable. But suffice to say that encouraging incursions have been achieved to combat the menace of the intersection of corruption and money laundering in assessing the adequacies or inadequacies of the regulatory mechanisms.

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CHAPTER VI

NATIONAL REGULATORY RESPONSES TO CORRUPTION AND MONEY LAUNDERING

Countries have reacted legislatively to the problems evidenced by the intersection of corruption and money laundering on account of their negative implications. Notable examples are the UK and USA.

6.1 UK's Bribery Act 2010 As a Check to Corruption and Money Laundering.

This has been referred to as the 'FCPA on steroids' and has been described as 'the toughest anti-corruption legislation in the world'.¹⁶¹ The Act which came into existence on July 1 2010 has repealed all previous UK statutory and common law provisions that related to bribery¹⁶² which were described as 'inconsistent, anachronistic, and inadequate'.¹⁶³ It then replaced them with the crimes of bribery,¹⁶⁴ being bribed, the bribery of foreign public official,¹⁶⁵ and the failure of commercial entities to prevent bribery on its behalf.¹⁶⁶ It has a near-global jurisdiction. It allows for the prosecution of juristic personalities or individuals irrespective of where the offence was committed.

The important thing to note here on the corruption and money laundering intersection is simply that the various provisions of the act would be a deterrent to financial rewards to be offered. These in most cases are huge and the recipients would probably want to launder and disguise the origin. The provisions are therefore a deterrent to corruption and money laundering. It is on record that in October 2011 Munir Patel was the first person to be

¹⁶¹ Breslin, Brigid; Doroin Ezickson, John Kocoras (2010). 'The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practices Act' *Company Lawyer* (Sweet and Maxwell) 31 (11)

¹⁶² Section 17 UK Bribery Act 2010

¹⁶³ Aaronberg, David; Nichola Higgins (2010) All Bark And No Bite...? *Archbold Review* (Sweet and Maxwell) 2010 (5)

¹⁶⁴ Section 1 UK Bribery Act 2010

¹⁶⁵ Ibid Section 6

¹⁶⁶ Ibid Section 7

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convicted under the Act.¹⁶⁷ Companies were very reluctant to accept London 2012 Olympic tickets.¹⁶⁸

6.2 USA's Foreign Corrupt Practices Act; A Stumbling Block to Corruption and Money Laundering

FCPA 1977 is recognised for its two main provisions, one is its accountancy transparency requirements under the Securities and Exchange Act of 1934 (SEC) and the other is bribery of foreign officials. Its anti-bribery provisions do prohibit issuers, domestic concerns and any person from making the use of interstate commerce corruptly in furtherance of an offer or payment of any value to a foreign official, foreign political party, or candidate for political office, for the purpose of influencing any act of that foreign official in violation of the duty of that official, or to secure any improper advantage in order to obtain or retain business¹⁶⁹.

It has to be noted that some of the offences associated with the FCPA is money laundering.¹⁷⁰ These are covered in certain dealings classified as 'specified unlawful activities' and dealing in monetary instruments or funds with the intent to promote the carrying on of a specified unlawful activity.¹⁷¹ In point of fact, FCPA is so wide and it recognised that corrupt money can be laundered to evade the regulatory radars.

Convictions were got by Department of Justice (DoJ). The Siemens and the Alcatel-Lucent cases are notable examples. Recently in June 2012 a convicted Ex-Nigerian Governor Diepreye Peter Alamiyeseigha forfeited \$401,931 on a Massachusetts brokerage fund¹⁷² that indicated that the sum consisted of proceeds and corruption and money laundering. The forfeiture for his Maryland House is still pending in federal court in Maryland as at the time of writing.

¹⁶⁷ <http://www.thelawyer.com/opinion-first-conviction-proves-bribery-act-has-sharp-teeth/1010398.article/>

¹⁶⁸ *The Telegraph* 07 June 2012 'Companies Refuse Tickets Amid Bribery Act fears'

¹⁶⁹ 15 USC 78dd-(1)(a)(1), (2); 15 USC 78dd-(2)(a)(1), 2:

¹⁷⁰ See sections 1956 and 1957 of Title 18 of US Code

¹⁷¹ *Ibid* 1 p600

¹⁷² *Wall Street Journal* June 28 2012

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In late July 2012, US DoJ through the Criminal Division's Kleptocracy Asset Recovery Initiative got the US District Court in the District of Columbia to confiscate a mansion in Houston and two Merrill Lynch brokerage accounts worth over \$3m belonging to Ex-Governor James Ibori acquired through corruption and money laundering from Nigeria.¹⁷³

Standard Chartered Bank was accused by US Regulators to be a "rogue institution" that did scheme with Iran to launder as much as £160bn over a period of ten years. The transactions passed through US and this is where FCPA comes in. This made US financial system vulnerable to corrupt money, terrorists, weapons dealers, and drug money. The bank also covered similar activities with Libya, Burma and Sudan during their sanctions.¹⁷⁴ The bank was threatened with possible revocation of its licence in US. But the bank in August 2012 agreed with New York State Department of Financial Services (DFS) to pay a 'civil penalty' of £217m to settle the matter.¹⁷⁵

This chapter indicated that both UK Bribery Act 2010 and USA's FCPA 1977 demonstrated their trans-border jurisdictional capabilities to fight the problems encountered at the intersection points of corruption and money laundering.

¹⁷³ *The Punch*, 25 July 2012 (Nigerian Newspaper)

¹⁷⁴ BBC News 6 August 2012. <http://www.bbc.co.uk/news/business-19155577> accessed 06/08/2012.

¹⁷⁵ BBC New Business 15 August 2012

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CHAPTER VII

CONCLUSION

In this thesis, effort has been made to point out some interesting issues noticeable at the nexus or intersection points between corruption and money laundering. It was indicated that both the definitions of corruption and money laundering over a period of time did evolve to their present day definitional acceptability. It was suggested by one of the foremost NGO soft law organisations on commercial corruption that the differences that exist between the private and public sector corruption have become so blurred on account of privatizations; therefore, the differences are no longer of contemporary relevance.¹⁷⁶

The fact that both corruption and money laundering at their intersection points have caused a great deal of societal disequilibrium was recognised by the international community. They responded by churning out various treaties against the malaise. Some were in form of soft laws, while others were in form of convention-binding-obligations. One of reoccurring decimals in these anti-corruption and money laundering reactions is the criminalisation of corruption and money laundering. Emphasis was also placed on close scrutiny of the CDD or KYC; recognising the fact that it was on these issues that the corruption and money laundering do in most cases interact or intermingle with each other.

The thesis did point out that there are various reasons why individuals engage in corrupt activities which in most instances will employ the money laundering avenue to hide the proceeds. Due to the fact that the two are economic and financial crimes, theorisations by various writers were put forward as justifications for participation in crime. It was noted that societal effects of the fall-outs at the intersection points can be very devastating in developing countries. There were also some non-conflating views on the dilemma of quantifying the corruption and money laundering conundrums.

It was also recognised that there has been a serious twin-like relationship between corruption and money laundering and that they arguably have

¹⁷⁶ ICC 2005 edition

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symbiotic relationship. This was assiduously recognised by various organisations notably the World Bank and IMF who have been the prime movers of the various mechanisms in place for the corruption and money laundering intersection points. It was noted that there were some jurisdictional differences noticeable in tackling the issues.

More so, the circle of money laundering was recognised to exhibit the characteristics of engaging the corrupt activities of professionals like accountants, lawyers and bankers at the various intersection points to beat the system. It is submitted that the mechanisms in place are encouraging but more still needs to be done as the problems at the intersection points are always evolving; so the regulatory mechanisms has to evolve also at a very fast pace.

The interest on the intersection points between corruption and money laundering can probably be rightly said to be of a more recent development. The fact is that they were previously focussed on differently. But more recent events have evidenced that the two are symbiotically linked in almost all the cases as previously pointed out.

The fact is that whenever large proceeds are got from corrupt activities the next probable step for the culprit(s) to take is to embark on money laundering to disguise the proceeds. But let us not forget that it is not all corrupt money that is laundered.¹⁷⁷ It is probably right to say that they both feed on each other or complimentary of each other. If there are no proceeds from corrupt activities, there will probably not be anything for the culprits to launder. In fact, the vehicle of money laundering is always available to commence its journey provided there are on board the corrupt passengers who are always willing to pay enhanced fares to get to their destinations. In point of fact, they mutually support each other but the scale tilts towards corrupt money feeding the money laundering process.

Although there are problems at the intersection points, the authorities has to do more. For instance, FATF and OECD can make it mandatory for the subjects or modules of corruption and money laundering to be introduced universally in educational institutions around the globe to raise the awareness level to a different height globally irrespective of the fact that TI are arguably doing

¹⁷⁷ Ibid No 110

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some encouraging work on awareness. Needless to say, the Bretton Woods institutions are present to give credence to this through their 'carrot and stick' approach.

Again, it is recognised that most states have criminalised both corruption and money laundering.¹⁷⁸ The fact is that if the sentencing radar is increased, for instance to life imprisonment and in some cases death penalty, it is hoped that the problems caused at their intersection points would be minimised rapidly; after all, in China and some states in the US still use the death penalty in some offences. It sounds harsh but a viable option, I think.

Again there has to be a very strong political will to tackle this menace at the intersection points of corruption and money laundering. The institutional frameworks has to be strengthened, for instance the judiciary and the law enforcement agencies should be allocated enhanced budgets to strengthen an already weak AML and corrupt facilities in some jurisdictions.

Criminals and organised crime syndicates thrive best in jurisdictions where the institutional frameworks are very weak. For instance Ibori was absolved of all corruption and money laundering charges in Nigeria but was convicted of same or similar charges in United Kingdom. But that is not to say that the UK does not have its problems at the intersection points. After all, UK stopped the British Aerospace Systems investigations in 2006 on 'national security' reasons. This was seriously frowned upon by OECD.¹⁷⁹

More so, the various jurisdictions should wake up and recognise the fact that since the two are linked, they should try and amalgamate or use the framework of each other to contain the problem. In fact AML can be used to fight corruption more particularly where corrupt offences have been made the predicate offence of money laundering again re-enforcing the argument that they feed on each other.

It was recognised that professionals play significant roles at the intersection points. It is therefore suggested that any professional indicted should be struck off the role of their professional body irrespective of the sentence the person

¹⁷⁸ United Kingdom, USA and Nigeria are notable examples.

¹⁷⁹ See OECD 2007 Anti-Corruption Group

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gets in order to restore sanity. Aside from these, various jurisdictions must also make it compulsory that assets are publicly declared to enhance transparency and accountability.

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OXFORD STANDARD FOR CITATION OF LEGAL AUTHORITIES (OSCOLA) WAS USED IN THIS THESIS.

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