

**THESIS TITLE**

**THE CONVERGENCE OF DIRTY MONEY AND PRIVATE TO PRIVATE  
CORRUPTION: FACT OR FICTION? HOW EFFICIENT ARE THE TOOLS TO  
CONTAIN THIS? A DISCOURSE FROM ANGLO-AMERICAN AND LESS  
DEVELOPED COUNTRIES' PERSPECTIVES**

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## **Declaration**

I declare that this submission is my own work, and that the entire thesis was produced while I was a registered student for the Degree of Doctor of Philosophy in Law, Institute of Advanced Legal Studies, School of Advanced Study University of London. The law as at 1<sup>st</sup> December 2018 was used in this thesis.

Signed

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Date

### **Dedication**

To the everlasting memory of my brother Nnama Ekwueme and parents, Mr and Mrs Joel Onuzulike and Esther Obiageli Ekwueme, who have all transited to the great beyond. May He that is He, continue to grant you eternal rest.

## **Acknowledgment**

My sincere gratitude goes to my supervisors, Professor Barry Rider and Dr Richard Alexander, who painstakingly supervised the conduct of this research. Not only did they furnish me with materials which were not easily at my disposal, they also devoted so much time in guiding me so as to minimise my errors and improve the quality of the work. There may, of course, still be infelicities, errors, and omissions, for which I am solely responsible.

May I use this opportunity to appreciate the library staff members of the IALS, who continued over the course of this research to provide me with the rapid response whenever support was needed in locating the materials. Special thanks go to Lindsey Caffin, Laura Griffiths, and Narayana Harave, who were always there to provide the much needed information technology support.

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## **ABSTRACT**

The advent of globalisation and liberalization have necessitated and escalated a momentum amongst natural and legal persons in the quest to make profits. As a result, there have been activities, characterised by ways in which to evade the orderly manner of commercial interactions, thereby evading the regulatory radars. This has generated an inquest to ascertain the symbiotic nexus between dirty money and private to private corruption. The culprits generated funds via crime in both the private and public sectors and used money laundering to reintroduce the profits into the formal system. It is at this juncture, that the convergence question presents itself. Some mechanisms or tools directed towards curbing the problems are in the form of “soft laws” like the Financial Action Task Force (FATF), the Organization for Economic Cooperation and Development (OECD), the Basel Committee for Banking Supervision (BCBS) and the International Chamber of Commerce (ICC). The implementation is backed by the policy of “carrot and stick” mechanisms subtly introduced by global financial institutions exemplified by the International Monetary Fund (IMF) and the World Bank, exuding anti-money laundering and corruption characteristics. Some major Conventions and statutory mechanisms came in form of the United Nations Convention against Corruption 2003 (UNCAC), the United Nations Convention against Transnational Organised Crime (UNTOC) 2000, the United Kingdom Bribery Act 2010 and US Foreign Corrupt Practices Act 1977. This has necessitated the examination of the efficiency of the combative mechanisms, as there are evidently differences in the approach to tackling the issues on account of diverse jurisdictional frameworks.

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## Table of Abbreviations

ADB	Asia Development Bank
AML	Anti-money laundering
APEC	Asia Pacific Economic Co-operation
AU	African Union
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
CCC	Customs Cooperation Council
CDD	Customer Due Diligence
CFA	Criminal Finances Act
CTF	Counter Terrorism Financing
CFATF	Caribbean Financial Action Task Force
COE	Council of Europe
CPI	Corruption Perception Index
DFS	Department of Financial Services (New York)
DoJ	Department of Justice
EAG	Eurasian Group
EDD	Enhanced Due Diligence
EFCC	Economic and Financial Crimes Commission
ESAAMLG	Eastern and South African Anti-money Laundering Group
EPS	European Payment System
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDIC	Federal Deposit Insurance Corporation
FIU	Financial Intelligence Unit
FMIU	Financial Market Integrity Unit



FSAP	Financial Sector Assessment Program
FSRBs	FATF Style Regional Bodies
FSB	Financial Stability Board
FSF	Financial Stability Forum
GAFILAT	Latin American Anti-Money Laundering Group
GDP	Gross Domestic Product
GIABA Africa	Inter-Governmental Action Group against Money Laundering in West Africa
GFC	Global Financial Crisis
GIFCS	Group of International Financial Centre Supervisors
GPAC	Global Programme against Corruption
GRECO	Group of States against Corruption
ICC	International Chamber of Commerce
ICPO	International Criminal Police Organization (Interpol)
ICRG	International Co-operation Review Group
ICSID	International Centre for Settlement of Investment Dispute
IFC	International Financial Corporation
IMF	International Monetary Fund
KYC	Know Your Customer
MENAFATF	Middle East and North Africa FATF
MIGA	Multilateral Investment Guarantee Agency
MLA	Mutual Legal Assistance
MLD	Money Laundering Directive
MONEYVAL	Council of Europe Anti-Money Laundering Group
NCA	National Crime Agency
NCCTs	Non Corporative Countries and Territories
NGO	Non-Governmental Organization

NYSC	National Youth Service Scheme
LDC	Least Developed Country/Less Developed Country
ODA	Official Developmental Assistance
OECD	Organisation for Economic Co-operation and Development
OFC	Offshore Financial Centre
OGBS	Offshore Group of Banking Supervisors
PEP	Politically Exposed Person
PSC	People with Significant Control
POCA	Proceeds of Crimes Act
WCO	World Custom Organisation
SDD	Simplified Due Diligence
SEC	Securities and Exchange Commission
StAR	Stolen Assets Recovery Initiative
SAR	Suspicious Activity Report
STR	Suspicious Transaction Report
SOCA	Serious Organised Crime Agency
SOX	Sarbanes-Oxley Act 2002
TCSP	Trust Companies Service Providers
TI	Transparency International
UKFIU	United Kingdom Financial Intelligence Unit
UNCAC	United Nations Convention against Corruption
UNCTOC	United Nations Convention against Transnational Organised Crime
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crimes
WGB	Working Group on Bribery

## Introduction

The prevalent impression amongst keen and close economic observers is that the liberalization of the markets is undoubtedly, a “good omen.” This has been necessitated as a result of the dynamics of the trends brought about by the process of international integration that arose as a result of the interchange of world views, products, ideas, and including different types of culture. However, it is important also to look through the lens of the commercial/economic aspects of this integration known as “globalization,” taking into account that the word presents different connotations.

With the advent of globalization and crumbling of trade barriers, it became evident that there was and still is a conspicuous interaction between legal and natural persons in the commercial sphere. The same level of interaction was also noticed and is still going on in business relationships amongst comity of nations. Of course, this brought about faster and more efficient manner of conducting business. As a result, profits were made, losses were also incurred. Wealth was created which was evidenced by the manner of life-style enjoyed across various strata of the society both nationally and extra territorially.

It is good, to quickly point out that wealth creation did not commence with globalization. It is as old as history itself. And there have been instances where people have tried to hide the source of their money in order to avoid the inquisitive eyes of the authorities.<sup>1</sup> As far back as 1471, Minister Yao Ku’ei in China complained that the practice of ensnaring young and upcoming officials by providing “secret loans” that would eventually ensure a great influence in the future, had become a big scandal. He therefore called for the reporting of such advances.<sup>2</sup> This has been going on for a very long time.

Additionally, in China merchants around 2000 BCE used to hide their wealth from rulers to avoid taxation or confiscation of the wealth from the rulers and being exiled. They took this wealth from them and banished them. In addition to hiding it, they would move it and invest it in businesses in remote provinces or even outside China.<sup>3</sup>

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<sup>1</sup> B. Rider “*Taking money launderers to the cleaners*”: Part 1 Private Client Business 1996., B. Rider, *The Perception of Corruption in Developing Nations*, Third Int’l Anti Corruption Conference (1987) Hong Kong.

<sup>2</sup> R. Huang, “Taxation and Government Finance in Sixteenth-Century China” MS 92/968; MSL Tai-tsu Shih-lu 1441

<sup>3</sup> S. Grave, “*Lord of the Rim*” (1995) 1<sup>st</sup> Edition p.353. Note BCE means “Before Common Era.” This was part of the calendar that “Man” used to track time. Others include “AD” and “BC.” This attitude is an *indicum* that hiding wealth is as old as history itself.

There is nothing specifically wrong in enhancing one's economic arsenal by making more money. The problem here is whether during this process of trying to enhance or boost one's pocket, the participants used lawful means to acquire financial gains. It is during this process of making money that various corrupt practices were and still are called into play by the actors. The orchestrators of this "macabre dance," which is evident in both public and private sectors, will always attempt or be involved in avoiding the regulatory radar.

In a bid to avoid the authorities or the regulatory template as the case may be, it is not surprising that the perpetrators employ their "best criminal endeavours" to hide the source of their illicit gains. In other words, they will engage in money laundering issues to fashion ways to use the money legitimately.

J.D McClean indicated that from the point of view of the criminal, there is no use making a large profit out of criminal activity, if the profit cannot be used. Putting the proceeds to use is not as simple as it sounds. Although a proportion of the proceeds of crime will be kept as capital for further criminal ventures, the sophisticated offender will wish to keep the rest for other purposes. If this is to be achieved, without running a risk of detection, the money which represents the proceeds of the initial crime must be laundered, put into a state in which it appears to have an entirely respectable provenance.<sup>4</sup>

It is to be noticed that such things as transparency, probity, and truthfulness are always very scarce commodities or in short supply; because the process involved in getting this money is illegal and mostly done in secret. The players, having got this "dirty money," as pointed out above sometimes through corruption, dominated by bribery and played out sometimes in the private sector, which evidences "private to private corruption" will want in most cases to reinvest the "dirty money" back to the system. It is during this process that the convergence scenario presents itself, and accompanied with some difficulties presented to the official establishment.

The vibrancy of the regulations will no doubt, be put to test during this process that transcends national borders. Some of these regulations have extra-territorial status and contain provisos which are tactically tailored by the framers towards curbing the menace at the convergence point(s). It is to be noticed that some of the Articles are couched or styled in

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<sup>4</sup> J.D McClean, *International co-operation in civil and criminal matters*, Oxford, Oxford University Press, 2002. at p.261. It is generally agreed by academic commentators and other observers, that once "dirty money" is generated, the culprits in most cases will generally look for a way to navigate part or all of it into the legitimate economy.

words that are not mandatory. And the present writer sees this as a calculated deliberate attempt by the formulators to tactically respect states' sovereignty. This is understandable, as every state is usually very unwilling to give up the sanctity of its sovereignty.

It is not unreasonable to indicate, that putting a marker on what is "corruption" and "dirty money" respectively, has been characterised by non-conflating opinions by various academic writers. Holistically, a look at the concept of "dirty money" in its relation to "private to private corruption" will indicate that part of corruption issues has its origin from funds that emanate from "dirty money."

Corruption can be interpreted in many ways. The corruption picture is captured vividly by R. Alexander. He indicated that anytime corruption is considered as a crime, more particularly as a financial crime, you have to endeavour to ascertain what corruption means. It contains a lot of behaviours which encapsulates a lot of various crimes. It can cover other types of behaviours, which can be seen to be morally incorrect and could lead to someone to be forced to resign from his position or job. However, these behaviours, at least under English law do not actually amount to contravention of the law.<sup>5</sup>

The term "dirty money" one can surmise, usually comes into play and depends on the odium that a particular jurisdiction attaches to the set of activities that give rise to that fund or wealth generation. Jurisdictional perspective is usually a condition precedent before money can wear the tag of being "dirty." And this scenario is usually not a very rigid one, and can be said to be fluidic in nature. It is noticed that during the movement of this wealth from the informal to the formal economy, the money itself can quickly change its level of cleanliness depending on the stage.

The fact remains that the owners of the "dirty money" will eventually want to integrate it into the legitimate economy to enjoy the fruits of their labour. Granted, that the "dirty money" can come from various sources, which are inclusive of funds from both private and public corruption; in most cases, it would be an uphill task to distinguish the above, partly due to the issue of privatization. This usually, will have the potential of rekindling the debate whether there are significant differences between private and public corruption. This has prompted the question, whether there is really any need for this "Berlin Wall" to continue. The fact remains that the problems thrown up at the convergence point(s) emits significant

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<sup>5</sup>R. Alexander, "Corruption as a financial crime," *Company Lawyer*, 2009, 30(4), 98-104

negativities to the economic wellbeing of the citizenry and do distort the global financial markets.<sup>6</sup>

It is therefore unsurprising, that the international community realised that they are in a very serious dilemma, and therefore decided to come together to fashion out different Conventions to stem or control the tide. It must be realised that some of the Conventions were reactive to changing “economic dynamics” of the time and a wakeup call. The United Nations Convention against Transnational Organized Crime (UNTOC or Palermo Convention), effective 29 September 2003, and The United Nations Convention against Corruption (UNCAC), effective 14 December 2005 are notable ones. We also have some “soft law” instruments that came into play as reactive mechanisms to stem or checkmate the negative tidal waves associated with the convergence dilemma.

In fact “soft law” can be seen as a set of legal norms, principles, codes of conduct and transactional rules of state practice that are recognised in either formal or informal multilateral agreements.<sup>7</sup> It is recognised that soft law has the characteristics of presuming consent to the basic standards and norms of state practice but generally without the necessary *opinio juris* required to form a binding obligation under customary international law.<sup>8</sup> Some of the typical examples of very persuasive “soft law” mechanisms include: the International Chamber of Commerce (ICC) Rules of Conduct and Recommendations 2005,<sup>9</sup> the Financial Action Task Force (FATF) Recommendations - often classified as the most important in the fight against money laundering, the Wolfsburg Principles, the Organisation for Economic Cooperation and Development (OECD) to mention but a few. The combinations of the above have combined to fight the convergence issues.

Interestingly, one will notice that “soft law” on its surface, is seen to be non-mandatory. But other relevant International Financial Institutions (IFIs), namely, the International Monetary Fund (IMF) and the World Bank, have played major roles in the convergence problems, provide them with the ammunition needed to tackle the convergence dilemma. This is achieved by using or employing what the present writer calls the “adapt or perish

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<sup>6</sup>K. Alexander et al, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* p.84 Oxford University Press 2006. See also IMF 2001a, E. Ekwueme and M. Bagheri “The intersection of commercial corruption and money laundering: a look at international responses and adequacy of regulations.” *Amicus Curia* p.25 issue 95 2013.

<sup>7</sup>K.C Wellens, and G. M. Borchardt. “Soft Law In European Community Law.” *European Law Review* 14: 267-321

<sup>8</sup>*Ibid* No 6 p. 138

<sup>9</sup>For example ICC Article 1 2005 edition advocated strongly, the criminalization of private sector corruption.

mechanism,” “carrot and stick approach” or “conferment of tactical imperative status” on the “soft laws.” The two bodies do this, by making it as a condition precedent, for countries to adopt the provisions of a particular soft law before accessing their services - a chess-like move, one can surmise. Stated differently, the IMF will use its Article IV, while the World Bank will use its conditionality and surveillance powers.

In addressing the convergence problems, it must be noted that some of the convention oriented treaties and Directives, contain Anti-Money Laundering (AML) provisions to tackle the problem of “dirty money” and corruption. This can also be found in statutes, such as the United Kingdom’s Bribery Act 2010, which has been described as “the toughest anti-corruption legislation in the world.”<sup>10</sup> There is also the United States’ Foreign Corrupt Practices Act (FCPA) 1977 and the UK Money laundering Regulations 2017.

It is during the process of transmutation of the illicit money into clean funds that the perpetrators acquired from corrupt activities to the legal economy that the convergence scenario usually rears its head. And attempts were made to quantify or put a marker on the amount of money that undergoes this money laundering process. A former Managing Director of the IMF M. Camdessus, provided an estimate that one can say has since been pervasively quoted. He indicated that an amount that is equal to between 2% to 5% of global Gross Domestic Product (GDP) is laundered within the global financial system each year.<sup>11</sup> It is very difficult to put a marker on the amount of “dirty money” that is laundered globally or the quantum of criminal assets that would be subject to seizure. Interestingly and possibly rightly so, B. Rider calls this “guesstimates.”<sup>12</sup>

We should also not miss the fact that the generation of “dirty money” through corruption is an activity that both natural and legal persons indulge in. However, it must be taken into account, that some legal persons with special reference to the banks are viewed to be principal conduits through which “dirty money” can slip through into the wider legitimate economy. On account of this, it is the contention of this writer, that a robust corporate governance mechanism must be put in place to contain the menace of “dirty money” and corruption that usually occurs through the banking system.

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<sup>10</sup>B. Brigid; D. Ezickson, J. Kocoras (2010). “The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practices Act” *Company Lawyer* 31 (11).

<sup>11</sup> M. Camdessus, *Money Laundering: The Importance of International Countermeasures* (February 10, 1998) available on <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp021098> accessed on 20/05/2015

<sup>12</sup> B. Rider, *Accountability and Responsibility-Reinforcing the Criminal Law*, paper delivered at opening ceremony of the Centre of Anti-Corruption Studies and Seminar 1<sup>st</sup> April 2009 p. 223

Good governance is needed in all organizations, but the role of corporate governance in financial institutions with special reference to the banks should be given a more focused attention to help tackle the convergence dilemma. In fact, the negativities that bank failure emit to the society are colossal than those of other entities; largely because of the special role they play in the economy. They are, arguably, the most important source of external finance, especially for the Small and Medium Enterprises (SMEs). This can also be viewed from the perspective of the principal-agent problem.<sup>13</sup> However, it does not mean that “dirty money” cannot slip through other non-bank entities due to lapse governance matters. In fact, the Enron scandal in the USA revealed in October 2001 eventually led to the bankruptcy of the Enron Corporation. The directors created Special Purpose Entities (SPEs) and by the use of accounting loopholes, were able to hide billions of dollars in debts, failed deals and projects. Through this way, they were able to siphon funds.

The convergence dilemma has impacted very negatively on the larger society. In Africa alone, it is estimated that the combined cost of corruption and money that is laundered represents more than US\$148 billion a year, about 25% of Africa’s Gross Domestic Product (GDP).<sup>14</sup> Worldwide, the annual sum that is paid as bribes and eventually laundered is said to be close to US\$1 trillion, but again this is seen as a conservative estimate.<sup>15</sup>

The impact of the convergence will indicate that in less developed economies, the rate of economic growth is retarded. The World Bank at some point, indicated, that 20% to 40% of the Official Development Assistance (ODA) is lost due to issues of corruption and money laundering in less developed countries.<sup>16</sup> We should be mindful of the fact that the convergence issues contribute to the social inequality, political instability and conflicts in less developed countries. Scarce resources are diverted from worthy projects that would have assisted the lifting of the citizenry out of the poverty trap. This could eventually lead the members of the community to be very sceptical about the institutions inclusive of the political process and they could ultimately find themselves disengaged.<sup>17</sup>

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<sup>13</sup> A. Mullineux, “The corporate governance of banks” 2006 J.F.R &C, 14 (4), 375-382

<sup>14</sup> “Countries to Get Help Recovering Stolen Assets,” *The New York Times* September, 2007

<sup>15</sup> “The Costs of Corruption,” World Bank News and Broadcast, April 2004.

<sup>16</sup> “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan,” World Bank 2007, June 2007.

<sup>17</sup> Ibid. Indeed a lot of informed people are fully aware that in some LDCs, diverting of state resources meant for development purposes has impacted very negatively on the countries. Nigeria is a typical example of this scenario.



A former senior United Nations official indicated that the corruption cankerworm not only debases our democracy but also undermines the rule of law. The markets are glaringly distorted, economic growth is stifled and many people are usually denied their rightful share of the economic resources or life-saving aid.<sup>18</sup>

In addition to the above, the thesis highlights that what is involved is to minimise the malaise to the barest, as it is virtually very difficult to harbour the conception that the problems are to be wiped off the global corruption slate completely. As it is always, and in consonance with the tradition of all academic inquisitions, there is definitely a general summary of this thesis. And this summation, has highlighted that there is truly an established link that exists between ‘private to private corruption’ and ‘dirty money;’ plus the fact that the tools in place to check-mate this, should inculcate the habit of evolving at a very fast tempo, principally, to keep pace with the perpetrators. The authorities should try as much as possible to always endeavour to be more proactive and less reactive to the convergence issues. It is the sincere hope of the writer, that the findings that are encapsulated in this thesis, inclusive of its strengths and weaknesses would be a springboard for further research in criminal finance, which is also part of economic crime. The reader should be mindful of the fact that laws and legislations are not static. They can be changed to reflect the dynamics of time. As a result, the writer has decided to concentrate on the extant laws and legislations as at the 1<sup>st</sup> of December 2018.

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<sup>18</sup> K. Annan, “Corruption an insidious menace to economic and social development.” Available at <https://news.un.org/en/story/2003/06/70622-corruption-insidious-menace-economic-and-social-development-annan> accessed 5th June 2016

## **CHAPTER 1**

### **Conceptualization of dirty money and private to private corruption**

#### **1. Introduction**

##### **Structural approach**

The aim of this initial chapter is to thematically put in place an approach that is seen to be legally peculiar, and also aimed to conceptually set out the scenario of “dirty money” and “private to private” corruption. Although, the primary concern is not only to go ahead and set out what private to private corruption and “dirty money” are, but to marry the two against different facets of the society with special reference to Anglo-American and less developed countries scenarios.

The writer will examine some of the relevant key statutes, together with their analysis in the academic literature. This preliminary chapter will commence, by informing the reader about the changing nature of the terms “corruption” and “dirty money.” It will elucidate that these terms, can sometimes be seen to have undergone a process of transmutation. And in certain circumstances, during the process of engaging in corruption which most of the time has “dirty money” as an element, there has not been a conflating view amongst some observers concerning at what point, that the tag attached to “dirty money” should be dropped.

Additionally, “private to private corruption” has long been seen to be a significant factor that contributes to unfairness in the markets. The same can be said with the term “public corruption.” This part of the chapter will argue that since both public and private corruption have significant impacts on the markets, it is not appropriate to classify the two differently. Corruption should be viewed as corruption irrespective of which direction it comes from.

The last part of this chapter, presents the reader with the genesis of key carefully selected United Nations tools that can be viewed as responsive to the convergence dilemma. Since the damage or financial disruption which the phenomena of “private to private corruption” and “dirty money” transcends across international economic borders, it is not surprising, that these were not and have not been viewed as domestic issues, hence, this triggered concerted efforts in the international arena to tackle the menace or conundrum.

## 1.2 Morphology of the terms - corruption and dirty money

It is universally acknowledged that the problem of corruption and “dirty money” is a globalised one. It is no longer acceptable to ascribe them to a particular section of the global economy. It must be recognized that corruption in whatever form it manifests is inherently negative. And a major problem, in developing an adequate response, is the difficulty encountered in even defining corruption and also attempting to put a marker on what “dirty money” stands for.

In tandem with the above, we need to define the terms corruption and “dirty money.” A close scrutiny of the study of origin of words - etymology, will indicate, that the word “corruption” is derived from a Latin word-“*corruptus*.” This means to break in its simplest form. In fact, this derivation is an emphasis of the destructive effect of corruption on the very foundation of the society, plus the fact that its popular meaning contains all those situations where agents and public officers do break the confidence that is entrusted to them.<sup>19</sup>

The *Oxford English Dictionary* has defined 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, esp. in a state, public corporation etc.” It went further to define the adjective “corrupt” as “perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like; venal.” It defines the verb “corrupt” in a similar way, except that it extends to any duties, “public” or not, and offers a further definition: “to induce to act dishonestly or unfaithfully, to make venal; to bribe.” It defines the verb “bribe” as “to influence corruptly, by a reward or consideration, the action of (a person), to pervert the judgement or corrupt the conduct by a gift.”<sup>20</sup>

It is noted that these definitions, correctly lay emphasis on the importance of corruption in its legal sense, which culminates in the inducement to show favour, rather than showing of favour itself. Again there is a demonstration of the word to encapsulate acts other than what is traditionally termed bribery.<sup>21</sup> Perhaps, one should emphasise that as things presently stand, the restriction of the definition of corruption to “public” duties no longer reflects the

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<sup>19</sup> 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). See also E. Ekwueme and M. Bagheri: Intersection of commercial corruption and money laundering: A look at international responses and the adequacy of Regulations - *Amicus Curiae* Issue 95 Autumn 2013 p. 1  
<sup>20</sup>1989 edition.

<sup>21</sup>C. Nichols et al, *Corruption and Misuse of Public Office*, 2<sup>nd</sup> edition 2011 Oxford University Press p 2

present state of English law<sup>22</sup> or other modern nations. It can be argued that the absence of the restriction in the definition of the verb ‘‘corrupt’’ includes all persons who are induced to act corruptly, irrespective of the fact that they may not be entrusted with the discharge of public duties or otherwise.<sup>23</sup>

It is submitted, that the fact that this restriction appears in one definition but is clearly omitted from another displays a move from the tendency, which has existed until very recently in modern times, to restrict the use of the word to acts of public officials, having regard to the public nature of the crimes involved and the gravity attached to them.<sup>24</sup> A perusal of the contents of the United Kingdom Bribery Act does not include the words ‘‘corrupt’’ or ‘‘corruptly.’’ It instead, focuses on the notion of inducing another individual to act ‘‘improperly.’’

Transparency International (TI) defines corruption as ‘‘the misuse of entrusted power for private gain.’’ This definition has the hallmark of simplicity. It has the advantage of including bribery that occurs in the private sector. Arguably, it contains other facets of corruption, such as bribery, and other related offences which include misconduct in public office, extortion, embezzlement, fraud, and theft.<sup>25</sup> A typical example of TI’s definition is where a director of a private company accepts a bribe to award a supply contract to a particular supplier. And this director has very strong powers and influence entrusted to him by the company to use in the best interest of the said company. At the end, he eventually misuses that power for private gain.

It must be recognized, that it is very difficult to put a marker on what is actually meant by corruption. Attention to this difficulty has been pointed out clearly by R. Alexander. He was quick to point out that we have different legal systems and different cultures. On account of this, it is actually notoriously problematic to come to an agreed definition of corruption. He stated that corruption should be seen as an abuse of someone’s office either to commit some act/s that is in breach of his/her duty or to demand some kind of favour. This will be in return

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<sup>22</sup>This was the situation even under the now repealed Prevention of Corruption Act 1906. In fact, the present UK’s Bribery Act 2010 has completely removed the distinction between public and private corruption.

<sup>23</sup>Ibid No 19

<sup>24</sup>Ibid

<sup>25</sup>Ibid

for performing acts that are within their duty to perform in any event. It must be considered, how this relates to the law.<sup>26</sup>

The above mirrors what the Council of Europe noted in 1995 about the difficulty of articulating an all inclusive definition of corruption. The Council made it clear that it is very difficult to find or articulate any precise form or degrees of corruption that one can say would be universally acceptable in every jurisdiction.<sup>27</sup> This presents a big problem in tackling the scourge.

Granted that there are various types of corruption, therefore, a cursory insight into some of these is necessary in order to illuminate both the morphology and the concept of corruption which includes private to private corruption. "Grand corruption" readily comes to mind. The term is often used to describe scenarios where massive personal wealth has been got from the state apparatus by public figures through corrupt means.<sup>28</sup>

This can occur when high government officials have power over the granting of large public contracts and local agent receives a commission if the transaction is awarded or won. This has three notable criteria: size, immediacy of its rewards, and mystification; the more technical and complicated a transaction, the less likely it is that questions would be asked.<sup>29</sup> Some of the major mechanisms of Grand corruption were fully described in G.M. Stuart's book, *Grand corruption in Third World Development*.<sup>30</sup> The report of the Society of Advanced Legal Studies Anti-Corruption Working Group in 2002 eventually concluded that grand corruption includes two main activities: bribe payments and the embezzlement and misappropriation of state assets. This bribery could be part of a direct payment in return for a favour shown or payment of part of a contract that was granted as a result of bribery; often referred as a kickback.<sup>31</sup> Needless to say, there are various high-profile corruption cases that involve this type of corruption.

Petty corruption is worth elucidating on. It is a term that is usually used to distinguish between grand corruption that is practised by Heads of State, government ministers, plus

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<sup>26</sup>See supra No 5 p.1

<sup>27</sup>Council of Europe Multidisciplinary Group on Corruption (GMC) Programme of Action Against Corruption adopted by Committee of Ministers 1995 p25

<sup>28</sup>See Report of the Anti-Corruption Working Group of the Society of Advanced Legal Studies, "Banking on Corruption, the legal responsibilities of those who handle the proceeds of corruption," February 2002.

<sup>29</sup>Ibid, paragraphs 2.1 and 4.1

<sup>30</sup>Ibid no. 19 (Berlin: Transparency International, 1994)

<sup>31</sup>Ibid no. 5 p 3

senior officials, and the type of corruption that is for instance, perpetuated by some magistrates and judges. The above term is often employed to describe “facilitation” or “grease payments” that are sought by officials for services that the public is entitled to free of charge. These types of “greasing” include payments to a custom official to clear or pass goods; to immigration officers to have travel documents accepted, to medical staff to receive prescription drugs or to other benefits.<sup>32</sup>

Petty corruption in less developed countries is even more pervasive than the above examples suggested. Some of the pernicious examples are located amongst the world’s indigent people who are helpless to stem the tide. A typical example can be seen in Kibera in Nairobi, reputed to be one of the largest slums in the world. Here, it is very difficult for the locals to fix or erect even the smallest of buildings without bribing a local fixer. In fact, jobs can only be got by bribing foremen. Additionally, some “free” school places are only secured by payment to staff, and once your child is in school, you have to “pay” to get the homework marked.<sup>33</sup> In all these, the money involved is usually small but however amount to extortion. Petty corruption is usually very difficult to deal with and most of the work in this area is carried out by certain dedicated Non Governmental Organizations (NGOs).<sup>34</sup>

Although petty corruption is prevalent in many countries, TI rated the government of Mikheil Saakashvili in Georgia positively in this stead. M. Hunter was a senior TI analyst at the time of writing. He strongly believed that no country could be described to have had the lowest rate of corruption than Georgia and where people attested to the positive results of fighting the problem. This was an indication that government efforts moved towards the right direction in fighting petty corruption.<sup>35</sup> One cannot say that TI does not presently have its critiques. But credence is usually accorded to them as this observation was not met with any negative reaction.

S. Shaverdashvili, the publisher and editor-in-chief of the Georgia magazine “Liberali” attested to the fact that the culture of corruption had been eradicated from the day-to-day life. It could be very difficult to backslide, even under a different regime. Previously, it was very difficult to get your passport processed and you were expected to pay bribes. Georgia got

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<sup>32</sup>See Evidence of the Select Committee on International Development (TI) 4 April 2001.

<sup>33</sup>Ibid No 21 pages 3 and 4 supra. See also <http://www.bbc.co.uk/news/world-africa-31540911> accessed 7th October 2016 “Kenya’s Kibera slum gets a revamp” by P. Fihlani 23 february 2015.

<sup>34</sup>See Slums Information Development and Resource Centres (SIDAREC) website.

<sup>35</sup>[http://www.rferl.org/content/geogia\\_corruption/2243593.html](http://www.rferl.org/content/geogia_corruption/2243593.html) “As corruption Rises Worldwide, Georgia Proves The Exception” by D. Sindelar accessed 29/07/20015

positive accolades even from the World Bank and the European Bank for Reconstruction and Development for ease of conducting business and anticorruption efforts. The individuals that indicated that they paid bribes were very low in Georgia compared to other countries.<sup>36</sup>

The issue of systemic corruption is a big problem. It is estimated that some 40-60 countries in the world suffer from this, ranging from some of the post-Soviet countries to places like Afghanistan, Pakistan and most of sub Saharan Africa. This type of corruption, sometimes called institutionalised or entrenched corruption, is simply brought about, encouraged or given serious impetus by the particular system itself. It happens where bribery itself is routine on a very large scale. It occurs alongside grand corruption. The remote causes are usually brought about by the inefficiency, inadequacy and typical undue laxity in the system. In short, a nation that is perceived to be rife with grand corruption will generally have petty corruption issues. A typical example with due respect, is Nigeria.

This can come into play where corruption has permeated a country's political and economic institutions and is no longer confined to just a few dishonest people. It can thrive where institutions are seen to be weak, characterized by poor governance matters, not too adequate legislative controls, no independent judiciary, or proper oversight functions, and where independent media and civil society groups are absent or very weak. Many countries can fit into the above. As a result what surfaces is kleptocracy, a government that has institutionalized theft at its heart.<sup>37</sup>

It does not necessarily mean that such regimes are to be tolerated. Take Nigeria for instance - a country that has private to private corruption issues like other countries. The criminal activities of some bad eggs involved in the notorious scam known as "419" or "Yahoo Yahoo" has contributed in drawing negative attention to Nigeria. But impressively, the Shell oil company whose activities in the oil sector contribute very sizeable revenue to the Nigeria economy, has helped to portray a positive image of Nigeria. It has a zero tolerance to facilitation payment. Every Shell employee is aware of this and more assuring, is the fact that any Shell employee that is approached for a "grease payment" in public place, like the

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<sup>36</sup>Ibid

<sup>37</sup>Congressman Jim Leach, Chairman of the House of Representatives Banking Committee, T.L O'Brien, "Russian says officials funnelled cash to bank in laundering case" *New York Times* 28 August 1999.

airport, just needs to show his/her Shell identity for the official to back off: this is a considerable achievement.<sup>38</sup>

The truth of the matter is that there is systemic corruption in Nigeria. The Vice-President of Nigeria, Professor Osibanjo once stated:

*“Corruption as we all seem to agree, is an existential threat to Nigeria both as a nation and as a viable economic entity. Clearly, there is no doubt whatsoever whether any arm of the government can excuse itself, ....But the truth of the matter is that we all know that corruption in Nigeria is systemic.”*<sup>39</sup>

### ***Defining private to private corruption***

It must be noted that the study of corruption faces the initial challenge of defining the term, due to the fact that it has many meanings, legal, linguistic and moral.<sup>40</sup> Corruption is frequently denoted to be bribery and involves the payment of illegal compensation to a public official or a private person. However, it is important to understand the concept of “private to private corruption.” This is simply the type of corruption that is evident or occurs in a private organization or corporation when a manager or employee of that organization exercises a certain power or influence over the performance of a function, task or responsibility. As a result of the fact that he has a margin of discretion, he can choose to use this contrary to the duties and responsibilities of his job and can directly or indirectly harm the company for his benefit or another individual, company or organization. This can be in form of bribery, extortion or solicitation, illegitimate use of or trading of information, gifts, favours, facilitation payments etc.<sup>41</sup>

The above can also involve a payment to or acceptance of a kickback or commission by a person in a non-governmental sector. The purpose of the payment is to influence the conduct of the person that receives the bribe and will most probably act in a way that is favourable to the briber and will not give due consideration to the interest of the employer, principal, fiduciary or client.<sup>42</sup> Put differently, illegal payment/s can be advanced to someone in a

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<sup>38</sup>See Article13.com on Shell website which explains Shell’s approach: *Shell Integrating Transparency and Anti-corruption Throughout its Business in Nigeria*.

<sup>39</sup>Nigeria Vanguard March 3 2017 “Corruption shouldn’t be about one man,” by L. Nwabughiohu & J. Onoyume.

<sup>40</sup>J.T Nonan Jr (1984), *Bribes*, Macmillian, New York, NY pp. 5-9

<sup>41</sup>A. Argandona, “Private-to-Private Corruption” *Journal of Business Ethics*, Vol. 47, No. 3 (Oct, 2003) p. 255

<sup>42</sup>D. Chaikin, “Commercial corruption and money laundering: a preliminary analysis.” *Journal of Financial Crime* Vol. 15 No 3 p.270 2006.



private capacity or office to influence conduct. It can also include payments and the like made by persons in order to further the interest of the company that they represent.

In June 2016, Judge Anuja Dhir told Mr Simon Davies and Robert Gilam both directors of a UK company Mondial Defence Systems when they pleaded guilty to corruptly paying £120000 to a businessman W. Gannon as a kickback that they would go to jail. The payment was made in order to facilitate a contract worth £5m to enable their company supply bomb disposal equipments to British and American troops in Afghanistan. The Dorset-based UK firm was not alleged to be involved in the illegal kickback. This is a typical example of a ‘private to private corruption scenario.’<sup>43</sup>

The ‘bribes,’ ‘proceeds’ or ‘inducements’ that the recipients got is a source of wealth to them. They will usually make very significant efforts to hide this wealth and find a way of reintegrating this into the legitimate economy. Mostly, they will be involved in money laundering depending on the size of their respective loots. This can present a difficult scenario on how this money is viewed. How ‘dirty’ is this money? As indicated by B. Rider: *“dirty money is money, or other form of wealth that is derived from a crime or other wrong.”* He admits that this definition can open up a ‘Pandora’s Box.’<sup>44</sup>

The above definition of ‘dirty money’ he stated is broad enough to refer to wealth that is got via civil wrongs. Although, it is not every proceed of a civil wrong that should be seen to be ‘dirty.’ However, if dishonesty is involved, there is the likelihood that this would attract the designation ‘dirty.’<sup>45</sup> In short, in situations where funds or wealth has been created by some form of conduct that lacks probity, with all intents and purposes, this should be a justification to attract the designation ‘dirty.’ The problem here is that this could be viewed differently from various moral grounds. In some situations, where the issue involved is within a domestic one, it is expected that the local legislation and their value system in place can deal with the matter. There could be two or more jurisdictions involved and where the wealth or money eventually comes to rest, the preceding conduct of acquiring this wealth will not be seen as having broken any law.<sup>46</sup> One can quickly discern from the above, the difficulty of describing this money as ‘dirty.’

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<sup>43</sup>*Evening Standard*, “Defence Firm directors face jail over bribe to win £5m military supply deal” Monday June 6, 2016

<sup>44</sup>*Ibid* no 1 p.3

<sup>45</sup>*Ibid* p. 5

<sup>46</sup>*Ibid*

Granted that the perpetrator will want to go through the process of laundering, it must be noted that this process may not necessarily be abusive in character or evil in its entirety. And to actually keep your wealth secret may not be viewed as objectionable from a legal or moral perspective. In fact, this can be seen to be prudent and beneficial depending on the circumstances.<sup>47</sup>

Moving “dirty money” to make it appear “clean” indicates that money laundering must be done. And the versatility of the process means that the move in most cases must be between the informal and the formal economies. This is associated with a wide range of some informal economic activities which can include tax evasion, pornography, prostitution, people smuggling or use of undocumented workers to drugs-related-matters etc.

It is submitted, that the designation or classification of what a particular society will associate as being the product of “dirty money” must be dependent on the legislation in place. It is as simple as that. The reaction of that particular society’s social/moral tolerance to the given set of behaviour should be secondary. It is expected that this reaction may be very fluid by the society. This depends on what the present writer calls the “badge of social latitude” ascribed by that society to the said behaviour.

Proceeds derived from tax evasion, prostitution and other criminal acts are simply “dirty money.” The proceeds will always be considered to be criminal property, irrespective of the fact that the tax regime or legislation in place may be seen to be economically oppressive or excessive. It does not matter if this is seen by some people as “grey money.” In fact, even money or wealth derived from the sale of pornographic materials, that could be legal in jurisdictions like Denmark, Belgium or the Netherlands, can be ranked as “dirty money” when the funds find their way to the UK. We have to be mindful as earlier said that the proceeds will often be considered as criminal property.

Money in certain instances can be seen as clean, grey, dirty or hot. Clean as the name implies, does not indicate any negative issue because it is legitimately earned. Some “grey money” can be said to come from tax evasion which as the author indicated is not acceptable because the regulatory template on tax issues are tactically circumvented.

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<sup>47</sup>B. Rider, *The price of Laundering Dirty Money* (Jesus College, University of Cambridge: Private paper 1992)

Hot money simply refers to financial flows that are stimulated by adverse changes in economic, social, and political conditions<sup>48</sup> and may be an amalgam of clean, grey, and “dirty money” depending on the scenario. They tend to be short term but very volatile in character and has very strong potential to contribute to financial crisis.<sup>49</sup>

R. Bosworth-Davies captured the distinction about the three terms. He stated that it is not all the money that one wants to launder that should be seen to have emanated from crime. Money that is classified as dirty is definitely hot money. But the opposite is not the same. We should note that there is definitely a very important distinction between money that is dirty due to how it is acquired and money that along the line becomes contaminated when the holders eventually dodge taxes or the exchange control mechanisms. This could be a massive burden on the shoulders of financial bodies that would have the intention of being seen by the general public to be very unwilling to help the laundering of “black” or “dirty money.” But at the same time, are prepared to allow flight capital or tax evasion which certain people refer to as “grey money” in their parlance.<sup>50</sup>

The present writer does not agree with the latter point. We have to be mindful of the fact that in some jurisdictions, which also include the United Kingdom, the proceeds of tax evasion are in no uncertain terms seen to be the proceeds of crime. This is particularly encapsulated within the meaning of the money laundering laws. In fact in *R v K*,<sup>51</sup> the Court of Appeal ruled that the proceeds of cheating the Revenue could amount to “criminal property” within the meaning of s.340(5) of the Proceeds of Crime Act (POCA) 2002 even in circumstances where the trade whose profits were liable to income tax or whose turnover was subject to Value Added Tax (VAT) is a legitimate trade. The Court was emphatic on this point, stating that any person that cheats the revenue must be seen to have acquired a pecuniary advantage as a result of criminal conduct within the confines of s.340(6) of POCA. This sum is therefore a benefit by reason of s.340 (5).

It is submitted that in view of the various stages that money goes through to present a picture of legitimacy, it is not surprising that there has been a discordant opinion regarding at what stage to accord this wealth the toga of legitimacy. But suffice to say, that there must be a

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<sup>48</sup> J. Cuddington, “Capital Flight: Estimates, Issues and Explanation” in *Princeton Studies in International Finance* (No 58, December, 1986),2

<sup>49</sup> See Financial Stability Forum, Report of Working Group on Capital Flows. (April 5 2000) [www.fsforum.org](http://www.fsforum.org)

<sup>50</sup> R. Bosworth-Davies, “Global Ungovernability: Influence of Futures and Derivatives Markets in the Creation of Financial Instability, a Criminal Threat Assessment” in *Tenth International Symposium on Economic Crime- Collected Papers* (Jesus College, University of Cambridge, England: 1992).

<sup>51</sup> 2007 1 W.L.R. 2262

time, that at least this wealth will have a de-facto legitimacy to enable the benefactor fully integrate it into the formal economy after the ‘‘dirty money’’ had been ‘‘washed.’’

The above is analogous to the story we heard about the Roman Emperor, Vespasian, who ruled from 69-79 AD. When he put a tax on the use of public toilets, his son, Titus, objected and said it was dirty. Vaspasian then instructed his treasurer to go into the store house to bring back some coins that had been washed on receipt. He held these out and said to his son: ‘‘*Pecunia non olet*’’- money does not smell. However wealth or money is fungible. By the time we see it, it does not smell. But the truth is that some money definitely stinks or smells - ‘‘*Pecunia nunc olet*’’ especially when it comes from drugs, people or human trafficking, and ransoms paid on kidnapping.<sup>52</sup>

In addition, money that emanates from tax evasion is dirty as indicated above. As a result, the OECD has continued to lead its initiative that it launched in 1998. This was aimed in improving countries’ ability or capacity to tackle tax evasion. OECD believes that this has been facilitated by bank secrecy and offshore financial centres (OFCs). It is no surprise that OECD’s efforts have found support from the countries that need tax revenues to improve their facilities as they come under strain as a result of the aftermath of the global financial crisis. In fact, G8 has indicated in their Declaration in 2013 that ‘‘tax authorities across the world should automatically share information to fight the scourge of tax evasion.’’<sup>53</sup>

### **1.3 Private to Private Corruption (PPC) as an unnecessary acronym or designation**

We have established that corruption has various ramifications and can present itself in different shapes and sizes. This can depend on the opprobrium attached to a particular set of inducement received by people placed privately or publicly to safeguard real or imagined excesses in the work they do. It does not necessarily matter if this occurs in a public or private setting; the tendency is that, it will still be viewed as inappropriate by many. The negative impact or effect will in most situations be felt by the public. Hence part of this wealth, as previously pointed out, will undergo money laundering processes.

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<sup>52</sup>H. S. Sandhu, ‘‘The Global Detection and Deterrence of Money Laundering,’’ *Journal of Money Laundering Control*, 2000 Vol. 3 No 4 , see also J. Gacia, ‘‘International measures to fight money laundering,’’ *J.M.L.C*, 1999, Vol. 3 issue 1 p.39. Indeed, there are now some international agreements to eliminate dirty money. Money now smells.

<sup>53</sup>See C. Nakajima, *Confidentiality vs. Transparency – discussion at the ‘‘Panama Papers’’ conference*. *Comp. Law*. 2017, 38(5), 137-138

The amount of money lost through corruption (public and private) is enormous and is now enhanced by the advent of new technologies. With the advent of these, a new sweeping impetus was presented to legitimate trade and commerce, of which criminal enterprises quickly took advantage. Vast mass communications therefore facilitated contacts with people all over the globe. Modern banking, with its revolution in electronics, helped international criminal transactions. This gave criminals immediate access that helped them to steal vast sums of money. The illicit huge profits were laundered.<sup>54</sup> With just a click on the computer, huge sums of illegitimate money can be quickly transferred to other safe havens by criminals.

In the writer's view, there is no need to distinguish between a private corruption and a public one. Private sector corruption discourages competition and also harms the market. The same can be said of public corruption. In the UK, the framers of the 2010 Bribery Act did not distinguish between the two. This issue was considered by the Law Commission in 2007 in its Consultation Paper- *Reforming Bribery*. The Commission pointed out that there was really no need to have separate offences for private and public corruption. It is difficult to distinguish with clarity the difference that exists between a public sector and private sector function. Increasingly, you will notice that what were formerly classified as public sector functions are now sub-contracted to private entities. On the other hand, many public companies now form joint ventures with private companies.<sup>55</sup>

It can be deduced from the above, that in the opinion of the Commission, the increasingly blurry line between government and private sector makes the distinction between official and private bribery highly irrelevant. It is much more difficult now to actually capture the full picture of what is to be seen as a public body than it was more than a century ago. There is again the difficulty of ascertaining if a person actually belongs to this body or is really a private individual that has been contracted to carry out the function of a public body.<sup>56</sup>

So many more private individual organizations are now contracted to provide public services or to provide services to the private sector that have a "public interest" element to them. In the private sector, the acceptance of advantages in doing business may be perfectly acceptable in many contexts. How should such people or bodies be treated, if there is to be a

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<sup>54</sup>Report of the Secretary-General, UN Doc E/CN.15/1993/3 "The impact of Organised Criminal Activities Upon Society at Large." 11 January 1993 p. 4

<sup>55</sup>Law Commission, "Reforming Bribery," 2008, para. 1.14, p 5

<sup>56</sup>Law Commission, *Reforming Bribery*, *Reforming Bribery Report: Report*, Law Com. No. 313 (London: The Stationary Office, 2008), para. 3.19, p. 19

separate bribery-related offence focused on “public” sector? The fact that there is now more private sector provision of goods and services in the public interest, makes it hard to argue that no one should ever accept advantages in any form, simply because what they do involves a public service dimension.<sup>57</sup>The present writer adds that this can be seen as issues of “blending or amalgamation” of private and public functions brought about as a result of changing societal dynamics.

Closely related to the above, there are other areas of the law that also changed in response to this blurred line. The issue of “restrictive doctrine of sovereign immunity” readily comes to mind. Initially, the doctrine of sovereign immunity provides that a foreign state is generally immune from the jurisdiction of the courts of another sovereign state. Until the mid-twentieth century, this was treated as absolute. However, as governments and state enterprises became more and more active in commercial activities in the modern era, private entities interacting with foreign states attacked complete sovereign immunity as fundamentally unfair in eliminating judicial recourse and favouring state companies.<sup>58</sup>

There was Anglo-American reaction to the above. The restrictive action adopted was this - foreign states were immune from jurisdiction relating to their “public acts” - *acta jura imperi*. But were not immune from jurisdiction for their “private acts” including commercial activities - *acta jura gestionis*. Sovereign immunity was therefore restricted to bring fairness in commercial interactions between private entities and States. In the USA, this was evidenced in Foreign Sovereign Immunities Act of 1976 (FSIA). In the UK, State Immunity Act of 1978 came into play. In fact, the Council of Europe adopted a European Convention on State Immunity and an Additional Protocol that became effective in 1976. The United Nations finalized its Convention known as the United Nations Convention on Jurisdictional Immunities of States and Their Property (the UN Convention) on December 2, 2004.<sup>59</sup>But we have to note that States are only bound if they are signatories and eventually ratify, as ratification, effectively triggers that particular State’s legal obligation to implement or apply the Convention. We have to note that China still maintains the absolute doctrine and presently, has not changed their stance on this.<sup>60</sup>

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<sup>57</sup> Ibid para. 3.216, p 58

<sup>58</sup> T. McNamara, “A Primer on Foreign Sovereign Immunity,” a paper presented to Union Internationale des Avocats. Winter Seminar on International Civil Litigation and the United States of America, February/March 2006.

<sup>59</sup> Ibid

<sup>60</sup> DRC v FG Hemisphere Associates LLC 14 HKCFAR 95 (2011)

We should be mindful, that we are in an age where corporate entities have arguably a greater accessibility into various facets of our lives than before. In fact, there is no reason to assume that the corrupt decisions of private company employees will necessarily cause less harm than the corrupt decisions of a public officer. A corrupt decision made by Fortune 500 Company might adversely affect the lives of many victims than a corrupt decision made by bribe-taking judge, city councillor or even a member of the US Congress.<sup>61</sup> However, can one evidentially, surmise that the wrongs and injustices of official corruption or bribery differ qualitatively from those of private-to-private bribery? We should bear in mind that bribery in both public and commercial sphere is seen to “corrupt” both the political and commercial life by inviting inappropriate platforms for decision-making.<sup>62</sup>

The present writer, submits that in recent years, we have witnessed a trend that indicates that the functions once seen to be governmental - operating of prisons, schools, post offices and various utilities etc have increasingly been taken over by private entities. In the same fray, some business activities long viewed to be within the purview or exclusively operated by private entities such as banks and insurance, have been ‘nationalized’ or at least subject to significant government involvement.

Liberalization of the market has made it very difficult to stick to the dichotomy of public and private bribery. And both emanate from corrupt practices. One of the most notable advocates of criminalizing private corruption - International Chamber of Commerce (ICC), has stated that there is no meaningful difference that exists between public and private to private corruption because they both distort commercial dealings and that they deserve similar treatment in law. Needless to say, the above position has been fortified by the rapid increase in privatization throughout the world, including developing countries, and the increased complexity and interaction between the public and private sectors in international transactions and by an increase in the monetary value of these transactions.<sup>63</sup>

ICC Article 1 2005 edition on Combating Extortion and Bribery requires “Enterprises” to prohibit bribery and extortion at all times, in whatever form, whether direct or indirect. In fact, this prohibition applies to payments to public officials, political directors, officers,

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<sup>61</sup>S. P. Green, *Official and commercial bribery: should they be distinguished?:Modern Bribery Law, Comparative Perspectives* CUP 2014 p. 56

<sup>62</sup>*Ibid.* See also A.J. Heidenheimer, M.Johnson and V.T LeVine (eds), *Political Corruption: A Handbook* (New Brunswick, N.J: Transaction Publishers, 1989).

<sup>63</sup>D. Chaikin and J. Sharman, APG/FATF Anti-Corruption/ AML/CFT Research paper September 2007. p.76.

employees and agents of private enterprise for the purpose of obtaining or retaining business or improper advantage.<sup>64</sup>It must be noted that the above is not legally binding on “Enterprises” or businesses and can be classified as a sort of “soft law” provision. But the ICC is a highly influential international body that big commercial players listen to. The fact that they do from time to time try to streamline what they think should be “best practices” in business irrespective of whether this is private or public adds serious impetus to the postulation that the distinction between public and private to private corruption should be disregarded.

It is reiterated, that the distinction between public sector bribery and private sector bribery makes less sense in the twenty-first century. Since the 1980s, the private sector has grown at an alarming rate. This is especially noticeable in the former Soviet Union and also in other developing economies like India and China. In many countries, it is evident that the private sector is larger economically than the public sector. It is on account of this, that there has been a very blurring and opaque distinction between the private and public entities largely brought about by market liberalization, privatization plus the out-sourcing of many governmental functions.<sup>65</sup>During the performance of the above functions associated with the above scenario, bribes will exchange hands and significant proportion of the loot will be laundered to escape the regulatory radar. The presence of the present flux of economic affairs makes the distinction very infinitesimal.

But we must be wary of the fact that it is not all the money that is generated via corruption that is laundered. M. Levi strongly believes that even without money laundering there would still be the issue of corruption. In spite of this, bribes can still be paid using cash or some sort of movable valuables like gold, diamonds and art works. Admittedly, it is not all the bribes that come one’s way that must be laundered. Part of the cash can still be moved around as grease payments or can be spent. Corrupt persons and the criminals themselves can employ laundering agents to do the work for them. They will rely on them to be very uncooperative when a criminal investigation seeks to trace the loot.<sup>66</sup>

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<sup>64</sup>Ibid p. 78

<sup>65</sup>D.Hall (1999), “Privatisation, multinationals, and corruption,” *Development in Practice*, Vol.9 No 5, pp.539-56.

<sup>66</sup>M. Levi (2001), “Money Laundering: Private Banking Becomes Less Private,” in Hodess, R., Banfield, J. and Wolf, T. (eds), *Global Corruption Report*, Transparency International, Berlin, p. 206



Further, bribes can still be paid indirectly. For example, a US company may instead of inducing a government minister in Nigeria with cash, can pay the minister's son's fees in a UK university. Additionally, a commercial entity may bribe a potential client by offering particularly lavish hospitality, which it pays for directly. Bribes come in different shades and shapes and are mostly noted to be done in secrecy. This is its traditional hallmark.

The above is arguably indicative that the same state of affairs is present in the illicit acquirement of wealth through either public or private bribery. The present writer, it is submitted, does not see any rationale to exhibit the dichotomy between private and public corruption as both crimes can rightly be said to cut across national borders.

#### **1.4 From slumber to waking up: An overview of the key international responsive tools.**

In acquiring the so called "dirty money," through illegal means, the actors will want to use their ill-gotten loot. They will do this by reintegrating this into the formal economy. In the process, there is a distortion on the normal or legitimate economic flows. To minimise this, the international community reacted to stem the tide. It was noted that this was no longer a national issue to be left to individual countries to deal on their own. This problem cuts across economic borders. The writer is of the view that curtailment of crimes must take a sort of international cooperation to tackle. P. Wilkitzki also argues that domestic criminal legislators should not see crimes as merely a national phenomenon.<sup>67</sup>

The enhanced momentum that galvanized the international community is attributed to the growing negative consequences noticed in the increasing volume of drug trade and its impact on both the international financial system and the social/economic well being of the citizenry. When "dirty money" is made, albeit not only through drugs trafficking but also through other criminal activities, part of this money is laundered and in the process also used by the culprits to bribe their way through the system. The international community has no choice than to seek cooperation amongst its comity of nations.

Since 1945, there had been a growing list of international instruments dealing with subjects as varied as terrorist offences, apartheid and genocide.<sup>68</sup> The United Nations is not the only

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<sup>67</sup>P. Wilkitzki, "Development of an Effective International Crime and Justice Programme- a European View," in A. Eser and O. Lagodny, (eds), *Principles and procedures for a new transnational criminal law*, Freiburg, Eigenverlag MPI, 1992, p. 267, at p. 270.

<sup>68</sup>R. Clark, "Offences of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg," *Nordic Journal of International Law*, 1998, at pp. 49-119 and Currier, R, *International and Transnational Criminal Law*, Toronto, Irwin Law, 2010, Ch 7.

global institution with an interest in countering money laundering and promoting the tracing, seizing and confiscation of the proceeds of crime. Others include the International Criminal Police Organization (ICPO/Interpol)<sup>69</sup> and the World Customs Organization (WCO, formerly Customs Co-operation Council).<sup>70</sup> Although WCO has no operational powers, its involvement in laundering flows from the fact that in many jurisdictions, the enforcement of relevant customs legislation usually falls within the relevant finance ministry to whom the customs report.<sup>71</sup> There have been instances where culprits have attempted to smuggle large quantities of physical cash of “dirty money” and intelligence was passed. Both Interpol and WCO combined their efforts in the past to curtail this. In some instances, the customs organisation used the mechanism of “controlled landing” to get the criminals.

The high political priority now accorded to “dirty money” from the drug trade is of fairly recent origin. This can be attributed to the magnitude and the complexity of the problem that reared its heads in the 1980s when international concern came to focus on the global threat presented by international drug trade. Some experts have tried to analyse the trend. W. Gilmore has the view that the focus on drugs at that time cannot only be attributed to the escalating nature of its abuse. The negative social impact and its distortive effects on world economy plus its negative domestic political effect necessitated the attention. In Colombia during this period, politicians, judges and other prominent people were murdered. Attempts were also made to penetrate into the main organs of government using “dirty money.” It was as a result of this type of problem, that the US invaded Panama to remove General Noriega from power. The suspicion was that the drug trade can even be a significant danger to the stability of international peace.<sup>72</sup>

The situation is simply this - the clamour for “dirty money” through the drug trade generates enormous profit for the barons. The tendency is simply to engage in money laundering to hide the enormous proceeds. Many institutional frameworks are infiltrated through bribery, publicly and privately, as a result, they become very weak to tackle the malaise. This can be done by corrupting some Anti Money Laundering (AML) officers significantly in the banking

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<sup>69</sup>M. Anderson, *Policing the world: Interpol and politics of international police cooperation*, Oxford University Press, 1989.

<sup>70</sup>A. Rigdon, “Aspects of International Police and Customs Cooperation,” in *Action against transnational criminality: papers from the 1992 Oxford conference on international and white collar crime*, London, Commonwealth Secretariat, 1993, pp. 83-88.

<sup>71</sup>Ibid p. 84

<sup>72</sup>W. C. Gilmore, “Dirty Money: The Evolution of counter measures to counter money laundering terrorist financing” 4<sup>th</sup> edn p.17 Council of Europe Publishing 2011.

systems. When this occurs, it would translate into some “domino effects” in the world financial system.

It must be noted that the process of cross-border illicit capital flight usually has a negative impact on the global economy. This can occur by firstly, encouraging bad economic policies in some countries and harming effective operations of state economies. Secondly, there is serious potential to corrupt the financial markets impacting negative confidence in cross-country financial system and lead to risk increases and instability. Thirdly, as a result, the rate of economic growth globally is reduced.<sup>73</sup>

As previously pointed out, one of the most significant phenomena that galvanized the international community into action to combat the negative effects of “dirty money” is the drug trade. It must be noted that it is not only the drug trade that generates “dirty money.” However, the proceeds from the trade are enormous to be ignored. The United Nations played a very significant role to make this happen through various Conventions. Of all these, three are particularly significant - the 1988 Convention in Narcotic Drugs and Psychotropic Substances (Vienna Convention), the 2000 Convention on Transnational Organised Crime, and 2003 United Nations Convention against Corruption (UNCAC).

There were international measures before 1988 that made significant contributions in controlling the production of drugs that generated “dirty money.” However, at some point, it became apparent that they lacked modern apparatus to deal with the range of complex issues raised by modern international drug traffickers.

It was evident that the recipe in place at the time which primarily focused on the production and regulation of the dangerous drugs could only go as far as protecting medical and scientific uses. It did increase the cost of illegal trafficking. But it was inadequate due to its conceptual narrowness. A more robust reactive mechanism was needed as a base for better reactive legislation internationally.<sup>74</sup>

It was evident that a new momentum globally was needed to supplement the existing mechanisms. There was the feeling that this must focus on transnational drug trafficking

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<sup>73</sup>V.Tanzi, “Money Laundering and the international Financial System” IMF Working Paper, WP/95/55, May 1996, p. 2. See also P. Quirk, “Microeconomic Implications of Money Laundering,” IMF Working Paper, WP/96/66, June 1996.

<sup>74</sup>J.Donnely, “The United Nations and the Global Drug Control Regime,” in P.H Smith, (ed), *Drug policy in the Americas*, Boulder, Colorado, Westview Press, 1991, p. 282, at p. 287

operations and enhanced co-operations in law enforcement. There was an international awareness that the “dirty money” generated by the drug trade corrupted the global system and that a more ‘enhanced and intrusive’ anti-drug recipe was needed. It can be said that the underlying philosophy can be found in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse, adopted by the 1987 UN Conference on Drug Abuse and Illicit Trafficking.

This focussed on ensuring that there should be a vigorous law enforcement apparatus that would reduce, deter, and make massive contribution to prevent drug abuse. It was evident that significant coordination amongst countries’ national agencies internally and extension of the same attitude cross-border was seriously needed to ensure a positive result.<sup>75</sup>

Following the initiative taken by the government of Venezuela, the UN General Assembly on 14<sup>th</sup> December 1984, adopted unanimously a resolution expressing the view that as a result of the massive scale of illicit narcotics trafficking, it was necessary to put in place a Convention. This considered the different aspects of the issues in greater detail than they were in the existing international documents.<sup>76</sup>

As a result, the General Assembly requested the UN Economic and Social Council to instruct the Commission on Narcotic Drugs to prepare a draft convention “*as a matter of priority.*”<sup>77</sup> The commission then adopted by consensus, on February 14 1986 a resolution with the relevant elements for inclusion. It was this that culminated in the UN conference and the birth of the Vienna Convention in 1988, described by the then United States President George H.W Bush as “*of fundamental importance to effective international co-operation to combat drugs.*”<sup>78</sup>

The Convention entered into force on 11<sup>th</sup> November 1990, by 2010, it attracted 184 states as well as the formal participation of the European Commission. The Convention even attracted the positive participation of a growing number of world drug producing countries like - Afghanistan, Bolivia, Colombia, India, Pakistan, Iran, Lebanon, Mexico, Nepal and Morocco. It is now regarded as constituting the essential foundation of the international legal regime in

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<sup>75</sup>*International Legal Materials*, 26, 1987, Washington DC, American Society of International Law, p. 1637, at 1686

<sup>76</sup>*Ibid* No 52 p. 54

<sup>77</sup>UN General Assembly Resolution 39/141.

<sup>78</sup>“International Narcotics Control Strategy Report,” Washington DC, Bureau of International Narcotic Matters, US Department of State,1988, p. 67

this important area of concern.<sup>79</sup> E. U Savona and D. Foe have rightly remarked that we have to evaluate a country's ratification of the Vienna Convention as a good indication of its commitment, as a responsible member of the world community, to fight drugs and money laundering.<sup>80</sup>

The writer agrees with this view, because the international community is strongly needed to fight the scourge, due to the fact that the activities need to be coordinated internationally. The culprits are highly sophisticated and tend to be a step ahead of the legislations in place.

### ***The key elements of the Vienna Convention relating to the convergence question***

Arguably, the principal effective strategy to nip the modern international drug trafficking activities of the cartels is to provide the law enforcement community with the required tools to counter their financial power. The essentialities of the above will include the criminalization of money laundering and also the confiscation of the proceeds. The strategy was in full realization that the proceeds of "dirty money" of which a great percentage emanates from drugs are used to infiltrate the system through both public and private bribery. When you make significant efforts to cut this off, there is the high tendency that the criminals will find it very difficult to continue polluting the system.

The laundering process includes much that is not healthy for the smooth operation of the world economy. Article 3(1)(a) therefore places a strict obligation on each participating state to criminalise a number of drug trafficking activities which have an international impact, ranging from production and cultivation through to organisation, management and financing of trafficking operations. It targeted the drug barons, the first time that a global convention had done so.

M.C Bassiouni remarked that the organizers of the international illicit traffic do not in most cases physically handle any drugs themselves. They instigate and finance the operations that are usually undertaken by their subordinates.<sup>81</sup> These are there to take orders and carry out the dirty work for their masters.

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<sup>79</sup>N. Boister, *Penal aspects of the UN drugs conventions*, Dordrecht, Kluwer, 2001 p.80

<sup>80</sup>E.U Savona, and D. Foe, "Money Trails: International Money Laundering Trends and Prevention/Control Policies," paper presented at the International Conference on Preventing and Controlling Money Laundering and Use of the Proceeds of Crime: A Global Approach, Courmayeur, Mont Blanc, Italy, 18-20 June 1994.

<sup>81</sup>M.C Bassiouni, "The International Narcotics Control Scheme," in M.C Bassiouni, (ed) *International criminal law*, New York, Transnational Publishers, 1986, Vol.1, p521

Article 3(1)(b) requires that the drug-related ‘‘money laundering’’ be established as a criminal offence. It defined this as:

*(i) the conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions.*

*(ii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.*

The significance of this for international cooperation should not be underestimated. By requiring its criminalization and treating it as a criminal offence in paragraph 1, the drafters ensured that cooperation in respect of confiscation, mutual legal assistance and extradition would be easier to achieve. This is commendable because confiscation, mutual legal assistance and extradition have all played significant roles in assisting to reduce the impact of corruption and money laundering.

The US delegation was elated about this, particularly the extradition aspect, because countries are obligated to establish Article 3 (1) offence in their local law. Therefore, this will meet the dual criminality requirement in extradition matters. Although, it is recognised that illicit drug trafficking is a universal extraditable offence, narcotics related money laundering is new and was not seen as an extraditable offence. The inclusion has changed the landscape and evidently is considered as one of the most important aspects of the Article.<sup>82</sup> At a practical level, the mandatory wordings of Article 3 in relation to money laundering that emanates from ‘‘dirty money’’ made signatories retune their respective domestic legislation.

Another significant feature is the approach towards confiscation of proceeds derived from instrumentalities used in drug trafficking. Article 5 treats this in detail. It addressed measures to be taken at national level and the necessary mechanisms to enhance international cooperation in this important area. It is vital because confiscation measures punctuate the criminal’s ability to enjoy the loot and puts significant dent on the resources at his/her disposal to continue or refinance the crime.

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<sup>82</sup>This was reproduced in W. Gilmore, (ed.), *International efforts to combat money laundering*, Cambridge University Press, 1992, p. 98

Confiscation also prevents the offenders from unjustly increasing their wealth, and eliminates the advantages they have gained from their crimes. It also deters the culprit from crime by frontally attacking the profit base of the venture. This can protect the community by reducing the circulation of most prohibited items.<sup>83</sup>

The first paragraphs of Article 5 treat the issue of confiscation at the domestic law and practice. They are framed in mandatory terms but were deliberately worded in order to allow each state a wider flexibility and discretion to achieve the required result. More so, Article 5 addressed the stumbling block of the concept of bank secrecy which the harbingers of “dirty money” had used as clog to hinder investigation, to wit:

*‘existing many bank secrecy laws are being used to obstruct co-operation and the provision of information needed for the investigation of allegations of drug-related offences.’*<sup>84</sup> This was addressed in Article 5(3): *“A party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.”*

P.W. Sproule and P. Saint-Dennis agreed with this and stated that removal of the bank secrecy impediments and excuse to discontinue investigation can be seen to be the most important mechanism employed to combat drug money laundering operations.<sup>85</sup> This is a welcome development due to the fact that culprits do usually with tacit connivance with some criminally minded gate keepers, often fronts this as an excuse in not helping with the investigations to get to the root of the criminality.

The participants made sure in Article 7 that bank secrecy impediments were removed as a clog to progressing mutual legal assistance in investigations and prosecutions relating to money laundering. In fact, the provisions of Article 7(5) were wholesomely welcomed by the US delegation. It was recognised that countries can still conclude further bilateral or multilateral agreements to address issues of importance.

With regard to forfeiture issues also contained in Article 5, the scenario presented looks very promising. This appears very clear with specificity and in most instances mandatory. It is agreed that this article can be classified as a significant breakthrough to attacking the gains

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<sup>83</sup>A. Freiberg, “Criminal Confiscation, Profit and Liberty,” *Australian and New Zealand Journal of Criminology*, 1992, p. 44, at pp. 45-46

<sup>84</sup>*International Legal Materials*, 26,1987, Washington DC, American Society of International Law, p. 1637, at p. 1686

<sup>85</sup>D.W Sproule and P. Saint – Denis, “The UN Drug Trafficking Convention: An Ambitious Step,” *Canadian Yearbook of International Law*, 1989, p. 263, at pp. 281-282

associated with drug trafficking. It enhances the view that to attack the profit base is very important in the war against drug trafficking and other criminal activities.<sup>86</sup>

A further contribution was the introduction of the concept of mutual legal assistance (MLA) to many countries where this was still in its infancy. This is a great help in confronting the various stages of the money laundering. For instance, there could be a situation where the proceeds from a drug related offence are physically taken out from country A, deposited in country B (placement) and then transferred to financial institutions in country C (layering). Eventually the money can be paid into a number of corporations in different countries as payments of share transfers (integration). The only hope of tracing this loot back via confiscation by investigators in country A would be by MLA.<sup>87</sup> This can be proactively employed in the recovery of proceeds of “dirty money.”

Another important feature of the 1988 convention is the attention it paid to extradition. Although this is a continuation of the 1961 UN Single Convention as amended and the 1971 UN Convention on Psychotropic Substances. It adopted a basic approach that is similar to other multilateral instruments dealing with criminal activities. Article 6 requires that domestic criminal offences that give effect to the obligations of the 1988 Convention shall be deemed extraditable offences in any existing treaty between parties. And the obligation is restricted to more serious offences, including money laundering, provided in Article 3(1).

It must be noted that the 1988 Convention is not really a radical departure from the tenets of state practice in this area. But nevertheless, as D. Stewart pointed out, Article 6 makes it somehow easier ‘*for prosecuting states to obtain the extradition of narcotics traffickers and cartel chiefs from overseas*’<sup>88</sup>It is fair to surmise that the Convention addressed the fragmented legal loopholes that the sophisticated “dirty money” earners through money laundering use to operate. It has made a solid foundation for future progress in this area.

Another UN Convention that developed from the foundation laid by the Vienna Convention is the UN Convention on Transnational Organised Crime 2000 (UNTOC). The primary purpose was to combat organised crime. Typical examples of the criminal groups are the mafia and yakuza groups commonly found in Italy and Japan. They have trans-border

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<sup>86</sup>Ibid p. 281

<sup>87</sup>G. Kriz, “International Co-operation to Combat Money Laundering : The Nature and Role of Mutual Legal Assistance Treaties,” *Commonwealth Law Bulletin*, 1992, p. 723, at p. 726

<sup>88</sup>D. Stewart, “Internationalizing the War on Drugs: The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,” *Denver Journal of International Law and Policy*, 1990, p. 387.



influence. The Convention came up also to combat non-drug crimes. This UN initiative has its origins in the Political Declaration and Global Action Plan adopted at the World Ministerial Conference on Organized Transnational Crime held in Naples 1994. This was subsequently approved by the General Assembly in resolution 49/159 of December 1994.

The processes and subsequent negotiations, led to the adoption by the General Assembly of the UN Convention against Transnational Organised Crime in 2000. The cornerstone of this Convention is its Article 3 that sets out the scope of its application. It indicated that its scope of application applies to the prevention of, and investigation of stipulated offences. Admirably, this included money laundering plus other serious crimes that were defined in Article 2(b) by reference to the threshold of punishment. It was specified that the offence must involve “an organised criminal group” and is “transnational in nature.”<sup>89</sup>The link to the present discourse is that “dirty money” can also be acquired through organised criminal cartels that include drug barons. When the proceeds are got, part of it is used to corrupt the system through both public and private to private corruption.

There was the initial problem of finding a definition for transnational organised crime. But this was later taken care of in Article 3(2). For the purpose of paragraph 1 of this Article, an offence is transnational in nature if:

*(a) It is committed in more than one state;*

*(b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another State;*

*(c) It is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or*

*(d) It is committed in one State but has substantial effects in another State.*

Although, the 2000 Convention assimilated significant proportion of information from the Vienna Convention, it is not its clone. For example, the way it addressed the interface between organised crime and corruption in Articles 8 and 9 is to be commended. Article 31 also applies to prevention as well as to prosecution of offences. It tried to undermine the activities of the criminal groups that generated “dirty money” by focussing on their finance. European Union Action plan noted that the fundamental element behind organised crime is simply the pursuit of financial gain. And this will naturally be a magnet for the group/s to

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<sup>89</sup>See Article 3(1)

explore other possibilities in pursuit of economic crime which eventually leads to the need to embark on laundering the proceeds after the criminalities.<sup>90</sup>

Possibly, the most innovative provision was the inclusion of measures to prevent money laundering. This is reflected in Articles 6 and 7. A review of many novel features of the 2000 Convention lies beyond our present discourse. The Convention minimised the potential barriers towards cooperation on issues of corporate criminal liability in Article 18(2). It also addressed the issue of returning confiscated proceeds from ‘dirty money’ that went through money laundering. This brought into play Article 14 for the return of property.

Perhaps, the most significant UN convention that came into play to tackle the convergence issue of private to private corruption and ‘dirty money’ is the 2003 UN Convention against Corruption (UNCAC). This entered into force in 2005 and by 2010, had some 148 state signatories.

It contains several provisions that deal with both public and private sector corruption. It provides:

*‘Each state party shall take measures, in accordance with the fundamental principles of its domestic laws, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sectors and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measure.’<sup>91</sup>*

The most significant anti-private sector bribery provision is Article 21 of UNCAC. It reads:

*‘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 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 works, in any capacity, for a private sector entity, for the person himself or herself or for*

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<sup>90</sup>Official Journal of the European Communities, No. C 251/1, 15 August 1997, p. 2

<sup>91</sup>This is Article 12(1) UNCAC 2003

*another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*<sup>92</sup>

It must be noted that a separate criminal offence is to be found in Article 22. This is similar to the provision contained in Article 17 that criminalizes the embezzlement of property in the public sector. The present writer therefore submits that this provides further evidence that public and private corruption are to be treated as equally very harmful under the Convention.<sup>93</sup>

Aside above, the major focus of UN activities is on the UN Office on Drugs and Crime (UNODC), based in Vienna. It has a specialist section, the Law Enforcement, Organized Crime and Anti-Money Laundering Unit. This provides vital assistance in legal field including significant assistance logistically to those jurisdictions that are confronted with the challenge of enacting very highly complex legislation needed to give domestic effect to the numerous obligations contained in 1988 and other subsequent legislations on issues of dirty money and private to private corruption.

The present writer submits that the generation of “dirty money” albeit through various means, do distort the fiscal and economic dynamics of the formal economy. This was the driving force that the international community needed to galvanise them to come together to fashion out the various responses.

Finally, we should mention the OECD Convention of 1997. This helped in combating bribery of foreign public officials in international business transactions and includes anti-money laundering provisions. It is of interest that Article 7 required countries that have made the offence of bribing domestic officials as a predicate offence to money laundering to do same with regard to bribing foreign officials. Later on, the convention did not allow companies to embark on “tax deductibility” of the bribes that they paid to secure their businesses. They urged countries to stop the practice. Until then, companies seeking contracts abroad paid bribes to get them. They will later write it off as part of the expenses incurred.

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<sup>92</sup> Article 21 supra

<sup>93</sup> See UNCAC, Legislative Guide for the Implementation of the United Nations Convention Against Corruption 2006

## **CHAPTER 2**

### **The Convergence of dirty money and private to private corruption**

#### **2.1 Introduction**

##### **Structural approach**

It is the aim of the writer not to deviate from an already established approach of not veering away from a legally peculiar perspective noted in the initial chapter. However, part of the initial application in this chapter, will be to show that at some point, there is amalgam of funds acquired through illegitimate manner noticeable in the private sector and the process to reintroduce this into the legitimate economy. Having pointed out previously, the difficulty associated in determining in certain circumstances, if an inducement can be classified as originating from a private or public source, the writer will clarify any scenario that comes up. This will always have in mind, the “inducement incidents” in Anglo-American and less developed countries as reference points.

Going forward, a proactive attempt will be made to highlight that it is very difficult, after the creation of the illicit wealth, for the criminals not to attempt to reinvest the loot into the legitimate economy. The primary intention is to present this loot as if it emanated from a legitimate source. During the process of legitimising this wealth, it will be highlighted that the “dirty money” and the acts tainted seriously with bribery are usually very difficult to separate - hence the inseparability of “dirty money” and private to private corruption.

Aside above, one would notice that there are certain jurisdictional differences in the approach to the notion of dirty money and private to private corruption. Enactment of statutes to tackle the conundrum came into play at different times in different countries - in the UK and the USA. As a result, there was a problem of quick reciprocal conformity to tackle the issues when presented extra-jurisdictionally. On account of the amorphous picture or perception of “dirty money,” it was not surprising that different polities had different approaches on how to combat the malaise as there were evidently, some divergent cultural permutations and differences to take note of. Indeed, jurisdictionally, countries employ both criminal and civil law mechanisms to deal with the convergence matter.

Granted, that generation of illicit wealth can emanate from nefarious and numerous activities, post generation, also presents its own problems. As the culprits would be very eager to enjoy

the “fruits of their labour,” money-laundering of this “profit” could probably and evidently be the best option available in other to reuse the gains. But the process of acquitting or stripping the wealth of the traces of its illegal origin is not an easy thing to embark on.

There are various or different processes that the money must go through. In elementary terms, the processes needed to finally reuse this money will have to pass through the followings - placement, layering and finally integration. Although, these three processes are noted to be the traditionally recognised stages that the dirty funds have to go through before being reintegrated, it must be pointed out, that this sequence is merely academic in form, and that funds can be laundered beginning at any stage. Not very unsurprising, the greasing ingredient that each or all the processes would need to achieve a positive outcome and employed as a complimentary tool is simply corruption. The perpetrators use corruption as a powerful tool to scale through the different stages. And instances are to be elucidated accordingly.

## **2.2 The inseparability of dirty money and private to private corruption**

It has to be noted that “dirty money” as previously indicated has the characteristics of changing the tag attached to it. This is necessitated on account of the particular transformative stage the said fund is. In fact, B. Rider stated that it can be argued that even procedures and laws that usually serve as a hindrance to perpetuate the tag of “dirty” on money by prohibiting its return to the formal economy can be seen to be disadvantageous.<sup>94</sup> This view was corroborated at some point following the activities of the government of Pakistan. The country had been noted to have a significant underground economic machine.<sup>95</sup>

In fact, it was noted that at some point, the State Bank of Pakistan went as far as advertising for the sale of bonds on the basis of not even asking for the source of the funds and on the condition that no questions would be asked about identities. The present writer submits that it is not justifiable that a “green light” was given for the purchase of bonds with no questions asked on the source of the funds. This is tacitly, indicative that the source would be very questionable and that there would possibly be corruption involved in the process. This brings into play the inseparability issue.

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<sup>94</sup> Ibid No 1 p. 4

<sup>95</sup> Refer to “Drug Money Fears Halt of State Bond Sale,” Time, March 23, 1992

It is the submission of the writer, that any act geared towards the generation of wealth that is seen to be unconscionable, fraudulent and incompatible with civilized behaviours qualifies to have the tag of “dirty” attached to the proceeds - the writer will use this approach in this thesis. The fact simply is that when wealth or money as the case may be is generated through public or private corruption and/or other illegitimate manner, depending on the size of the loot, this is usually laundered with the intention of legitimate use. Therefore, in certain situations, there could be difficulties in ascertaining if this occurred within or outside the private economic sphere. But more importantly, the moment or instance the loots or proceeds go into the banking or financial system, ready to be laundered, the convergence and the inseparability issues come readily into play. And with all intents and purposes, this must be seen to be a factual situation and not fictional.

The equation looks or sounds very simple. For money to have the tag or hallmark of being “dirty,” it must have to, arguably, be sourced from questionable means. And for there to be the notion or evidence of its inseparability from corruption, there must be a meeting point or convergence with another process. This process is money-laundering. Therefore, one is not far from the truth when it is surmised that there is a clear linkage between corruption and money laundering; it is the same as indicating that there is a nexus between “dirty money” and money laundering. The writer’s approach in this thesis is simply this - where “dirty money” is mentioned, it includes corruption as corruption has many facets.

### ***The World Bank’s credence to the inseparability issue***

The impetus or credence to the present writer’s assertion has been strengthened by the pronouncement of a leading International Financial Institution (IFI) - the World Bank. The Bank has been recognised as a very important leading institution when it comes to advancements of global economic tools that usually enhance better economic existence. The writer submits that the Bank’s observations have to be accorded very significant attention.<sup>96</sup>

We need to take cognisance that the cankerworm of corruption and money laundering must be assessed as strongly related and has a self-reinforcing phenomenon. The proceeds of corruption are usually disguised and eventually undergo the money laundering process

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<sup>96</sup>It must be noted that World Bank came into existence as a major international financial institution after the 2<sup>nd</sup> World War. It has helped to elevate some “soft laws” into a “hard law stance” by making countries to adapt such laws before they can access their services. For example, compliance to FATF 40 Recommendations helps to access World Bank facilities.

manipulated by people that are corrupt who usually spend this or invest the proceeds. Simultaneously, corrupt activities in any country's AML institutions (this can include financial institutions' regulators, Financial Intelligence Units (FIUs), police, prosecutors, and the judiciary) can actually incapacitate the AML mechanism of that country and make it totally ineffective. It has been seen that the nexus that exists between money laundering and corruption has increased the focus of the Bank on corruption-related proceeds. It is observed that a significant deterrence to the corruption problem is the fact that there are no water-tight or absolute safe havens for the proceeds. They can be traced, seized, confiscated and eventually repatriated to the victim country.<sup>97</sup>

There are some lessons that can be seen from the above. To start with, effective customer due diligence evidenced under AML/CTF requirements like the provision of details of a client's background, the source of funds in addition to the identity of the beneficiary would definitely play an important role in the promotion of general financial integrity and would hinder corruption.<sup>98</sup> More so, the writer flows with the fact that the close co-operation between FIUs, anti-corruption agencies, law enforcement and the private sector is very important in order to maximise the impact the AML regime can have to combat corruption.

It is noted that in many countries, the law enforcement agencies do specify corruption to be the main predicate offence that generates illegal funds to be laundered. This is the case with Nigeria. Therefore on account of this, AML policy is to a large extent primarily an anti-corruption tool.<sup>99</sup> It is submitted that this should be seen that there is a significant indication that there is a link since most of the AML policies can be used primarily to control corruption.

Aside above, the World Bank project that was carried out by its Financial Market Integrity Unit (FMIU), focused on the use of anti-money laundering information for anti-corruption purposes. This was a study of 15 anti-corruption agencies in the world. They were selected on account of their geographical location, size, type, and the presence of an Egmont Group FIU. The purpose was to ascertain how far a particular country's anti-corruption agency used the data picked up by its AML data to combat corruption. The intention of the information was to

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<sup>97</sup>See Strengthening World Bank Group Engagement on Governance and Anticorruption Paper. March 21, 2007 p. 66. See also E. Ekwueme and M. Bagheri: Intersection of commercial corruption and money laundering: A look at international responses and adequacy of Regulations- Amicus Curiae Issue 95 Autumn 2013. p. 20

<sup>98</sup>D. Chaikin and J. Shaman: APG/ FATF Anti-Corruption/AML/CFT Research paper September 2007. p. 7

<sup>99</sup>Ibid

disseminate it to other countries to help them fight corruption as well as help in repatriating the proceeds.

On account of the importance of the present discourse, the Bank in collaboration with the Egmont Group embarked on another project to ascertain the mode of governance of the FIUs. This was viewed as the Bank's review of its governance and anti-corruption stance or strategy. The findings were utilized to strengthen corruption prevention in FIUs. Additionally, a study sponsored by the Bank was done by R. Gordon and B. Stevenson of Case Western University. It focused on the misuse of corporate vehicles and simulation of further discussion on the convergence dilemma. It has therefore not come as a surprise that the Bank has had an AML/CTF role to play as far back as late 2001. What it did was that instead of being seen as a standard pace setter in this field, it, through its operations, chose to assess compliance using FATF 40 Recommendations (R). This is usually achieved through such programmes as the Report on Observance of Standards, Codes, and Financial Sector Assessment Programmes.<sup>100</sup>

#### ***Importance of United Nations Office on Drugs and Crime on inseparability***

The United Nations Office on Drug and Crime (UNODC) is arguably the back bone, guardian or the resource repository for the United Nations Convention (UN) that is relevant to financial crimes. The writer surmises, that the importance of mentioning UNODC is simply that its activities since coming into existence support the view or notion that there is tangible evidence that the convergence is not a mirage. It gave recognition to important link between private to private corruption and money laundering.

Admittedly, UNODC has gravitated towards the convergence question. There are very important nexus that exists between corruption and money laundering. The fact is that the innate ability to transfer and hide funds is very vital to the perpetrators of corruption, more particularly when it comes to grand corruption. People that work in the public sector and some important private sector sections are exposed to bribery and are usually intimidated to help conceal illicit financial activities. It is on account of this that the authorities must implement a high degree of effective linkage and coordination needed to confront the above

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<sup>100</sup> Ibid



issues and effectively implement measures that must positively impact on this.<sup>101</sup> This is a significant contributory stance that the convergence dilemma is a reality.

Moving further, statutes legislated to tackle money laundering, can significantly be a positive contribution to detect corruption and related offences. This of course, can present a solid basis for further financial investigation. The identification and the required recording obligations and prompt reporting of suspicious transactions will definitely assist in detection of illicit capital flights narrowing down on their source. It can therefore be deduced, that corruption should be established as a predicate offence for money-laundering.<sup>102</sup>

To further buttress the inseparability of “dirty money” and private to private corruption, the UNODC through its Global Program plays a vital role in extending AML technical assistance to developing world. It lists as a matter of priority, money laundering/corruption linkage as one of its vital areas of research. It has a very important paper in this regard that it published as far back as 1998 - *Financial Havens, Banking Secrecy and Money Laundering*. This work led emphasis on risks or short comings posed by un/or under-regulated Corporate Service Providers (CSPs) and anonymous corporate vehicles.<sup>103</sup>

We should also bear in mind, that the inseparability question was the major reason why the World Bank and UNODC put into place as far back as September 17 2007 Stolen Assets Recovery Initiative - St.AR. Part of the goal was to help to repatriate assets that were expropriated by corrupt people to their home country, ratification of UNCAC and extension of technical assistance to less developed economies. Once again, the proceeds are seen to be “dirty” and were laundered to foreign jurisdictions, and during this process the convergence or inseparability evidently happened through the financial system. The banking system is seen as a very notable accomplice and significant conduit in the convergence role.

The aim of the St.AR joint initiative was to send the signal that “dirty money” (corruption) does not pay. This sounds interesting. It also claimed to transmit the message that it would constitute a strong force as a deterrent to corruption, this seems overstated.<sup>104</sup> But the present writer submits that there is “profit in corruption.” Otherwise, how come that a lot of people are complicit and engage in this if there is the absence of profit. Some writers have surmised

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<sup>101</sup>See UNODC Anti-Corruption Tool Kit p. 20

<sup>102</sup>Ibid p 432

<sup>103</sup>This was authored by J. A. Blum, Esq, M. Levi, R. Thomas Naylor and P. Williams.

<sup>104</sup>UNODC StAR Initiative/World Bank available at <https://star.worldbank.org/> accessed 12/February 2016

that the StAR initiative is a consciousness-raising or hortatory exercise and that the publicity this has generated, so far, can still be classified as a positive vibe.<sup>105</sup>

### ***The United Nations Convention against Corruption (UNCAC) 2003 and inseparability***

It is good to reiterate the fact that the present writer brings to the fore; that where corrupt money, which, with deep sense of sincerity is very elastic in nature is mentioned, it connotes or signifies ‘‘dirtiness.’’ And when this ‘‘dirty money’’ undergoes the transformative process of laundering, the close affinity between corruption and money-laundering is thus evidenced. This simply is convergence. As a result, this has been evidently acknowledged in some important global Conventions.

The author reiterates that UNCAC 2003 has been a very respectable and prudent source that has exuded very significant contributions to tackle the ‘‘dirty money’’ convergence issues. A. Argandona described it as the first genuinely global legally binding instrument on corruption and related matters that is the first to be developed with an extensive international participation comprising a broad consensus of signatory States plus international private sector and civil society organizations.<sup>106</sup> The importance of bringing the above convention into reckoning is simply that its Articles are reoccurring decimals in tackling the convergence dilemma at various stages of this thesis. Many people have found significant comfort in its Articles. And when ‘‘dirty money’’ is mentioned, corruption that has various facets usually comes into focus.

The UNCAC has laid out the close nexus that exists between corruption and money laundering. The contents of the second clause of the preamble attest to this. In fact, the vital or germane areas include Articles 14, 23, 52 and 58. Article 14,<sup>107</sup> indicates that the signatories, mandatorily, have to set up AML supervisory arrangements. This should include customer due diligence and establishing beneficial ownership. A suspicious transaction monitoring system must be there, arrangements to monitor cross-border movement of cash and negotiable instruments, relevant information about electronic transfers, adherence to the standards of existing AML bodies, and ensure that the international cooperation among law enforcement, judicial and financial regulatory agencies are maintained.

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<sup>105</sup>D. Chaikin and J.C Sharman; ‘‘Corruption and Money Laundering A Symbiotic Relationship.’’ Palgrave Macmillan 2009 p. 43

<sup>106</sup>A. Argandona, ‘‘The United Nations Convention Against Corruption and its Impact on International Companies:’’ (October, 2006). IESE Business School Working Papers No. 656, p. 4

<sup>107</sup>UNCAC 2003

Each facet of Article 14 will definitely be a serious hindrance to the perpetrators of corruption and money laundering. Whenever the ‘‘dirty money’’ is available to be laundered, if the various facets are stringently adhered to, as envisaged by this Article, there will definitely be a serious block or hindrance for the actors or criminals to actualise their intentions. The target or aim is to make it very hard for the criminals to succeed, as interdiction is a very important element in crime deterrence. Former United States Senator Susan Collins who was the Chairman of Permanent Subcommittee on Investigations on Governmental Affairs is of the opinion that once money laundering is stopped, much of the seed capital that criminal organisations need to operate would be dried up.<sup>108</sup>

The UK’s Cabinet Office agreed. The view is that when the authorities remove assets from criminals, this disrupts the criminal organisation. It is similar to slamming excessive taxation on legitimate businesses which cuts their profit margin and reduces the working capital for existing enterprises. This can also remove the reserves to begin new criminal ventures.<sup>109</sup>

Article 23<sup>110</sup> was drafted in a mandatory tone to facilitate the parties to the Convention to legislate in their domestic laws the criminalisation of money-laundering. This must take into account the domestic circumstances of each country. Parties are required to put into place various predicate offences that are needed to satisfy the money-laundering offence. It is submitted that the contents are good omen to the convergence or inseparability dilemma. Once there is legislation in place with the attendant consequences, that checkmates money laundering, the tendency is for the culprits to think twice before embarking on their criminal ventures.

It is noted that Article 52<sup>111</sup> states that the signatories have to ensure that their financial institutions have to employ enhanced scrutiny on accounts opened by public officials. These include both domestic and foreign officials that have been conducting prominent public functions plus their families and close associates. They are known as Politically Exposed Persons (PEPs). This Article, also expects parties to draw up the modalities needed for the kind of natural and legal persons that this enhanced scrutiny should be applicable to. It is also

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<sup>108</sup>United States Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, 18, 2004.

<sup>109</sup>United Kingdom Cabinet Office, Performance and Innovation Unit, *Recovering the Proceeds of Crime* (London England: Cabinet Office, 2000), 18

<sup>110</sup>UNCAC 2003

<sup>111</sup>Ibid

expected that parties have to consider setting up a financial disclosure system for public officials, including foreign financial accounts that have penalties for non-compliance.<sup>112</sup>

There is really no single agreed universal definition of PEP. The European Union Third Money Laundering Directive (EU3MLD) defined it as “natural persons who are or have been entrusted with prominent public functions and immediate family members or persons known to be close associates of such persons.”<sup>113</sup> Irrespective of the various definitions of PEP (like those of FATF, Wolfberg Group, Joint Money Laundering Steering Group JMLSG etc), the consensus is that the chances of PEPs engaging in money laundering is higher than other people due to their proximity to positions that offer opportunity for rent seeking. It does not mean that all PEPs are corrupt and banks should take cognizance of this. Admirably, the FATF cautioned that the requirements are preventive (not criminal) in nature and should not be interpreted as stigmatising PEPs as being involved in criminal activity.<sup>114</sup> Proper due diligence must be employed by the financial institution dealing with them (enhanced due diligence “EDD” is suggested).

It must be taken into consideration that PEPs also conduct businesses in their private capacity. They also offer bribes, plus the fact that they have numerous companies set up with the intention of avoiding the authorities by disguising the beneficial owners. Some of them are very powerful and can influence the managerial decisions in private financial institutions and use them to launder their proceeds thereby reinforcing the inseparability or convergence question. This is irrespective of the fact that the banks are expected to carry out EDD on them.

Aside above, Article 58<sup>115</sup> encourages parties to set up FIUs. This will enable the country to receive, analyse and disseminate relevant information (STRs) needed to track down the orchestrators involved in the convergence problem. Again, it must be noted, that establishing FIU is also a means of reducing the problem. However, this could be very problematic to some countries due to cost implications. Tackling ML can be a very expensive commodity for some Least Developed Countries (LDCs). The truth is that countries want to be seen to be in conformity with “international standards.” Conformity with UNCAC and FATF

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<sup>112</sup>Ibid

<sup>113</sup>K.K Raymond Choo, “Politically exposed persons (PEPs): risks and mitigation.” JMLC Vol. 11 No 4, 2008 p. 372

<sup>114</sup>See FATF Guidance, on politically exposed persons (recommendations 12 and 22) 2013

<sup>115</sup>Ibid

recommendations comfortably fit this template. But the cost implication on conformity presents a big burden to some of these countries.<sup>116</sup>

P. Reuter and E.M Truman noted interestingly, that it must be classified or seen as an article of faith to the authorities who are located in the advanced world that all the nations need to be in possession of efficient AML regime, but however resources to maintain this are scarce. It must be noted that actually the global threat exhibited by the weaknesses in very poor nations may be quiet infinitesimal. This is the reality on the ground.<sup>117</sup>

### ***Organization for Economic Cooperation and Development (OECD) and other legal persons on inseparability***

Of relevance to the present discourse, is the role that was played by OECD in 1997, when it issued the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (OECD Anti-Bribery Convention). This was the product of the work first initiated by its Working Group on Bribery in International Business Transactions that came into play in 1994. We have to quickly point out here that OECD's Convention is mentioned because bribery that occurs trans-national, along the line, permeates the private sector and as previously pointed out in this thesis, it is no longer necessary distinguishing if this occurred in the public or private sectors as both cause significant damage to the economic system.

Of significant importance in this Convention, is the fact that it contains AML provisions. Article 7 calls upon signatories who have made the offence of bribing a domestic official a predicate offence for money-laundering to do so on the same terms for the bribery of a foreign public official. The importance of this, in this writer's view, is that this recognises that when the bribes are received by either the domestic or foreign official, most of them go through the laundering process to disguise the origin thereby reemphasising the inseparability issue. This Convention frowned seriously against making bribery a tax deductible expense in business transactions. This was true in early 1990s but much less now. Most multinationals navigate their way into getting very lucrative business contracts in some countries. The

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<sup>116</sup>J.C Sharman and D. Chaikin; *"Corruption and Anti-Money-Laundering Systems: Putting a Luxury Good to Work."* Governance: An International Journal of Policy, Administration, and institution, Vol.22, No 1, Jan 2009 p.33

<sup>117</sup>P. Reuter, E. M. Truman 2004. *Chasing Dirty Money: The Fight against Money Laundering*. Washington DC: International Institute for Economics. p. 7

manner they do this is not very complimentary on account of the fact that bribes do exchange hands to land these contracts.

As far back as 2006, the Working Group (WG) released its *Mid-Term Review of Phase 2 Reports*. This was a compilation of reports for 21 individual country reviews that were completed in 2008. The section very relevant to money-laundering that dealt with article 7 indicated that there was an absence of standard data collection techniques noticeable amongst countries. On account of this, it was really very difficult to come up with a robust reportage on common trends between countries. It therefore, called for standardisation of data. It laid emphasis on how the proceeds of the bribery would be treated, rather than just the bribe alone.<sup>118</sup>

On issues of inseparability, for a more enhanced evaluation to be recognised of this convention, there must be a clear indication that the suspicious transaction reporting systems have led to the discovery of foreign bribery and related money laundering incidents. If the assumption is that incidents of foreign bribery are regularly happening plus the fact that this involves money-laundering, it is within the confines of legitimate expectation that the reporting systems should be detecting foreign bribery on a regular basis. Unfortunately this was not the case as STRs did not quickly lead to bribery investigations in most of the examined parties.<sup>119</sup>

One wonders and finds it puzzling and very disappointing that the developed countries that are noted as having a very high level of expertise in dealing with these issues did not produce the expected result. It was therefore, not a surprise to find a more disappointing scenario amongst the LDCs. It was the speculation that the above low level corruption-related STRs could be as a result of non-inclusion of foreign bribery examples in the typologies that were issued. This therefore, could have led to FIUs and the reporting entities not being adequately aware of the money-laundering and corruption linkage.<sup>120</sup>

The writer notes that OECD in fact came up with another paper that helped to highlight the convergence dilemma in September 2007 titled ‘*Potential Obstacles to the Detection of Bribery of Foreign Public Official by AML Systems.*’ Three common characteristics in foreign bribery that sets it apart from many other predicate offences were looked into. First,

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<sup>118</sup>See p. 86 of the report.

<sup>119</sup>Ibid p. 87

<sup>120</sup>Ibid No 58 p. 11

there is the generation of two types of illicit fund offences - payment of bribes and the proceeds of bribe. Secondly, there was the issue of the offence occurring abroad and lastly the relative newness of the offence. All these, might impact on the detection by AML. There was the problem of detecting bribery that happened via normal business transactions plus the issue of dual criminality obstacles noticeable in international co-operation.

Aside this, OECD also entered into alliance with other legal persons and their pronouncements fitted the convergence or the inseparability problem. There was Asia Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific. This came into existence in 1999. Their 2007/08 Work Plan expressed a very serious intention in collaborating with APG to investigate the link between corruption and money laundering.

This was geared to undertake a good thematic review jointly with Asia-Pacific Group on ML tailored to the framework of the FATF/APG Project Group on the links between anti-corruption and ML and financing of terrorism. There was the focus on strengths and vulnerabilities to the corruption of member nations' anti-corruption mechanisms and to provide respectable suggestions for moving forward. A joint workshop geared towards protecting AML institutions in particular FIUs against corruption complemented the review.<sup>121</sup>

The writer submits, that this group noticed that corruption occurs and participants navigate their way through the financial systems using bribery as a powerful weapon. AML are therefore weakened thereby reinforcing the inseparability or convergence question and the scrutiny of effectiveness of the system in place.

The initiative, issued a report titled '*Mutual Legal Assistance, Extradition and Asset Recovery of Proceeds of Corruption in Asia and the Pacific.*' It suggested a substitute for mutual legal assistance in corruption matters. Instead of using this to recover the proceeds of corruption, the requesting state might ask its foreign counterpart to commence domestic money laundering charges.<sup>122</sup>The writer notes that this approach appears simpler and cheaper for LDCs.

### ***The input of Commonwealth to inseparability***

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<sup>121</sup>ADB/OECD 2007:6

<sup>122</sup>ibid p 57

Apart from the initiatives of OECD and other legal persons, the initiatives of the Commonwealth have added the spark to the inseparability issue. The work conducted was through its Economic Affairs, Governance, Legal and Constitutional Affairs divisions in its Secretariat. The work built on the efforts made as far back as 1999 on the commitment of Commonwealth Heads of Government to the Framework for Commonwealth Principles of Good Governance and Combating Corruption.

In its work and as a follow-up on UNCAC implementation, the Commonwealth in 2005 published a major report by its Working Group on Asset Recovery. The germane recommendations are as follows: Immunities from criminal prosecutions for head of states, government and political figures should be removed, there should be an enhanced scrutiny for both domestic and foreign PEPs, a mechanism for dealing with corruption by serving heads of state, effective conviction, and civil confiscation measures should be put in place as part of AMLs. It also suggested that bilateral treaties should not be necessary for assistance in this area. Asset registries for public officials should be used as an effective preventive mechanism more particularly when verified with tax information.<sup>123</sup>

Needless to say, the writer surmises that there is actually in some Commonwealth jurisdictions a lack of political will to go along with the above recommendations. It is really very difficult for some countries to implement the above. Cronies or political associates are sometimes appointed into sensitive positions in some countries to cover the corrupt antics of the people that provided or facilitated the appointments.

### ***Asia Pacific Economic Cooperation (APEC) and inseparability***

There is also an initiative by Asia-Pacific Economic Co-operation-APEC that wanted to promote transparency and focussed on corruption and money laundering. This is relevant to the inseparability of “dirty money” and private to private corruption. Under the “Busan Declaration,” APEC leaders agreed that the implementation by their respectable relevant economies of principles of United Nations Convention against Corruption (Article 14 Measures to prevent money-laundering, Article 23 laundering of the proceeds of crime, Article 24 Concealment) can have a positive impact in advancing their commitment towards a cleaner and more honest and transparent community in the Asia Pacific region. The writer sees the above approach as an indication that the inseparability or convergence question, as

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<sup>123</sup> Ibid No 95 p. 13



being recognised by the organisation. This therefore evidences the fact that the problem is not fictional.

***Financial Action Task Force Style Regional Bodies - (FSRBs) and inseparability***

Very relevant to the inseparability question is the impact of other FATF-Style Regional Bodies (FSRBs). We have nine FSRBs located in different parts of the world. But for ease of reference, the writer will concentrate on a few. The statement attributed to Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is of essence. In summary, its Strategic Plan stresses the need for the appreciation of corruption and money-laundering link.

The difficulty in this region is simply that the topical issue of ML has been totally misunderstood and regarded as a separate and independent matter. Evidentially, most countries have actually developed financial sector reform strategies and anti-corruption strategies which have failed to address the FATF recommendations. Country policy makers have to be aware that AML/CTF measures are very important to financial development. It must be noted that money-laundering is simply the other side of corruption and other criminal activities. Needless to say, corruption is also one of the predicate offences of money-laundering.

When you cut off the means to use the proceeds of crime, this serves as a big deterrent. The ability for countries to investigate and at the same time repatriate corruption proceeds can obviously provide a respectable succour in terms of millions of dollars in returned revenue. On account of this, it is very essential that the AML programmes are not only fully integrated within the national development plans but also within financial sector reform and anti-corruption programmes.<sup>124</sup>

It is submitted that there is no gain-saying of the fact that ESAAMLG has beamed more light on the inseparability matter and recognised that large amount of “dirty money” is laundered which is acquired through corruption.

In fact, the Inter-governmental Action Group against money-laundering in West Africa (GIABA) in its report on corruption-AML linkage; titled “*Corruption and Money Laundering in West Africa: Assessment of Problem Status and Effectiveness of National and Regional Control Initiatives*” is clearly of the opinion that the report has revealed among

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<sup>124</sup>ESAAMLG 2005: 12

other things that the link or nexus between corruption and money laundering must be seen as a very strong manifestation of the evil of organised criminal activities. In fact, the very weak compliance level with the extant AML laws can rightly be seen as a result of corruption. Corruption not only produces, but evidently protects money laundering activities. As such, this assertion must be seen as the main message in GIABA investigation.<sup>125</sup> It is the contention of this writer, that the above strongly evidences the convergence issue and adds serious impetus to the dilemma.

### ***Other matters arising on the issue of inseparability***

Granted that there is a blurring of distinction between public and private bribery, several states are concerned about private sector bribery. This can be attributed in no small measure to the growth of international business and the growth of private sector which admittedly is larger than public sector in most countries. It has been noted, that the bribery of corporate officials, has a transnational connotation; just as the bribery of public official which has transnational effects into the public sector of many countries.

Private sector corruption has the capacity to distort the efficiency and credibility of free open and global competition, and would destroy trust in the markets and eventually be a major barrier in creating an unbiased playing field in international trade. Public and private confidence in the rule of law is undermined when private sector corruption is tolerated. Political lobbyists can be used in private sector corruption to destroy the reputation of an organization. Attempts would be made to launder some of the proceeds thereby showcasing the inseparability matter.

We should be aware that the private sector should be seen to be a major player in the inseparability issues that evidently involves money laundering. The activities of the private sector should never be ignored when you assess corruption as a facilitative element in money-laundering. It is corruption that is used to make sure that this facilitative element is a must in a bid to secure the cooperation of the bankers, accountants, lawyers, remittance agents and a

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<sup>125</sup>GIABA Report May 2010, "Corruption-Money Laundering Nexus: An Analysis of Risks and Control Measures in West Africa." p.3. This report pointed to the fact that West Africa is a peculiar region with a multifaceted culture incorporating both British and French attitudes with diverse cultural approaches to receiving gratification.

lot of other accredited gate-keepers for the purpose of concealing massive funds that are laundered and ensure access to profits.<sup>126</sup>

The writer has so far, advocated for an approach of non-distinction between public and private corruption. Other legislations geared towards dealing with the instrumentalities of private corruption point to the direction that proceeds of corruption are laundered to enable reuse into the formal economy. This is a glaring indication of inseparability of “dirty money” and private to private corruption.

These instruments include but not limited to the followings: African Union (AU) Convention on Preventing and Combating Corruption, 2003.<sup>127</sup>UNCAC 2003, Framework Decision of Council of European Union on Combating Corruption in Private Sector 2003,<sup>128</sup>Council of Europe Criminal Law Convention on Corruption 1999,<sup>129</sup>and Council of Europe Civil Law Convention on Corruption 1999.<sup>130</sup>

The writer contends and surmises that the notion that “dirty money”/corruption and money-laundering are separate matters may have been necessitated on account of the fact that initially corruption and money laundering were assessed by the relevant authorities as “stand-alone-matters” and/or “distant relations.” However, the governmental responses should have been integrated. This disconnect is a product of distinct historical origins on the efforts to attack each independently plus the obvious non-flexible bureaucratic allocation of labour between anti-corruption agencies and AML agencies.

### **2.3 Anglo-American and less developed countries’ approach to the idea of dirty money and private to private corruption.**

Indeed, and historically possibly rightly so, the style or manner with which the Anglo-American and LDCs approached or tackled the monster of “dirty money” and corruption - both private and public can be seen from both the criminal and civil law angles. There are issues like extradition, dual criminality, mutual legal assistance, forfeiture, plus constructive trust matters that were used to bring the perpetrators to justice. Jurisdictionally, there were problems that one can possibly indicate were as a result of divergent recognition of the issues.

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<sup>126</sup>See APG Scoping paper on money-laundering 2007 p77

<sup>127</sup>Article 4 indicates active and passive corruption in private set-ups or organizations

<sup>128</sup>Article 2 requires members to criminalize both passive and active corruption in private sector within profit and non-profit organizations.

<sup>129</sup>Article 7 and 8 are for active and passive bribery in private sector respectively.

<sup>130</sup>Articles 1 and 2 require states to provide compensation to victims of corruption.

### *Initial Legislations, International Chamber of Commerce and Max-Plank Institute Study*

Legislation to confront the problem of corruption was put in place at different times in various jurisdictions. It has been observed, that public sector corruption was the first to attract sanctions for a considerable length of time. The spoils were laundered and this helped or prompted the convergence matter. Notably, the sanctions for private sector bribery were criminalized in many jurisdictions in the last 140 years. In the Anglo-American legal system, the common law offence of bribery was only applicable to the bench. As time went by, this attitude was changed. This was later extended to public officials and public functions - typical example being voting during elections. The offence of bribery, strictly speaking, was restricted at common law to corrupt payments that were made to people that only participated in public duties.<sup>131</sup>

In the United States of America (USA), in the late nineteenth and early twentieth century, it came to the fore that many US States passed legislation or general statutes. These specifically, outlawed and actually criminalized agents' bribery. In addition, they also prohibited bribery in some industries. In some States, bribery of lawyers, appraisers, architects, even physicians and accountants were banned. Some of the USA Federal Statutes actually criminalised bribery in commercial context. This involved certain interstate trade and bribery was used to procure interstate transportation. Some people that appeared in television quiz performances paid bribes.<sup>132</sup>

In the UK, the common law offence of bribery, which we obviously (at least in the assessment of many) know, can eventually be a comfortable source to trigger laundering. This was initially and legislatively backed by Public Bodies Corrupt Practices Act of 1889. This criminalized public sector corruption. Interestingly, private commercial corruption was made a criminal offence by the Prevention of Corruption Act 1906. This legislation, it is noted, dealt with both private and public agents. This particular legislation was not actually enacted to fundamentally deal with corruption. But it was directed to or aimed at the principal/agent relationship noticeable in business interactions.<sup>133</sup> Indeed, this British legislation provided the rightful pattern or model for a mimicked or similar legislation in

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<sup>131</sup>D. Chaikin, "Commercial Corruption and Money Laundering: A preliminary Analysis," *Journal of Financial Crime*. Vol.15 No 3 2008 p.272

<sup>132</sup>J.T Noonan, 1984, N.2, pp. 578-9, *Harvard Law Review*, 1932.

<sup>133</sup>L. James, (1962) "Bribery and Corruption In Commerce," *International and Comparative Law Quarterly*, Vol.11,pp. 880-6

most Commonwealth polities. These include the jurisdictions of Australia, Canada, Hong Kong, India, Singapore and New Zealand.

Prosecutions under the Prevention of Corruption Act 1906 in England was only triggered or brought about with the consent of the Attorney General, a senior government minister. This was one of the Prevention of Corruption Acts 1889 to 1916 directed towards ‘‘dirty money.’’ In fact, the Anti-Terrorism, Crime and Security Act of 2001 (ATCSA) had extra-territorial application when the corrupt act was committed by a UK national or a body incorporated under the UK law if the act was done within the UK.

Above gainsaid, presently, statutes in various countries have criminalised ‘‘dirty money’’ albeit through prohibition of corruption which usually leads to money laundering. In fact, in a joint study that was conducted by the ICC and the respectable Max Plank Institute for Foreign and International Criminal Law, it was indicated that as of 2008, that 10 out of 13 OECD countries that were surveyed, had bribery statutes. It was noted that in the study, there were differing policy goals amongst the countries that criminalised corruption.<sup>134</sup>

The report noted that in view of the fact that the various legal interests stand protected under criminal law on issues of bribery, it deemed it necessary to separate these under three headings. These include protection of corporate assets, shareholder rights, and property interests; penalizing the violation of civil law obligations, like the obligations of employees to employers, or agents to principals; plus minimising unfair competition.<sup>135</sup>

As a result of the divergent approaches employed by various jurisdictions in analysing the ‘‘dirty money’’ concept evidenced in corruption definition - more particularly private corruption - the report noted that this logjam has led to differences in application of legislation. The proof of such offence therefore, becomes even harder, if this involves parties in different jurisdictions,<sup>136</sup> inclusive of the fact that the proceeds are laundered internationally, thereby prompting the convergence dilemma.

It is as a result of the above, that at various periods, the UK enacted some legislation to at least tackle an aspect of the problem. For instance, the amendments in the repealed ATCSA

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<sup>134</sup> A. Deiz. & J. Buttle, *Anti-Money Laundering Handbook*. Sydney: Thomson Lawbook Co. 2008. p.4

<sup>135</sup> *Ibid* No 122 p. 273

<sup>136</sup> *Ibid* No 122 p. 39

2001 allowed an expanded jurisdictional reach.<sup>137</sup> Of course, most people are aware that the present 2010 UK Bribery Act has its jurisdictional and extra-territorial reach. D. Chaikin<sup>138</sup> indicated that the expansion of the jurisdictional net is a good way of improving the effects of the criminal law.

### ***Extradition and dual criminality***

Continuing on the present discourse, the author notes that when a culprit is identified as having acquired ‘dirty money’ through corruption or other ‘facets of dirtiness,’ the legal instrument of international extradition can be employed to bring the person to book. However, this approach is fraught with difficulties. International extradition that is considered to be a more intrusive manner of cooperation has additional obstacles like: the difficulty of entering into bilateral arrangements with states whose legal systems are based on different ideological and political perspective that can result in an absence of trust. This is vital in any effective extradition marriage.<sup>139</sup>

There is also the principle of non-extradition of nationals that we see in some non-common law jurisdictions. Japan refused the request from Peru for the extradition of Alberto Fujimori a former President of Peru claiming that he was a Japanese citizen. Again, you will come up with prima facie or probable cause evidentiary requirement that is a very old extradition requirement that is noticeable in some jurisdictions. There are the issues of expansive reasons for refusing extradition; such as severe penalties (death penalties) or humanitarian reasons which some states observe.<sup>140</sup>

It will appear rather very surprising for the United Kingdom to grant an extradition request from Malaysia for a drug trafficking offence of its citizen. Drug-trafficking carries a death penalty in Malaysia and there is no provision for death penalty in the United Kingdom. The United Kingdom at the time of writing has triggered article 50<sup>141</sup> to opt out of the European Union after the Brexit vote and negotiations would be difficult and muddy. The implication

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<sup>137</sup>See S1 (4) of the repealed Prevention of Corruption Act inserted by Section 108 (2) of Anti-Terrorism, Crime and Security Act 2001.

<sup>138</sup>D. Chaikin, “*Extraterritoriality and The Criminalization of Foreign Bribes*” in *Corruption: The Enemy Within*, BAK (Ed), pp. 285-301 (Kluwer, 1997)

<sup>139</sup>*Ibid* No 98 p.56

<sup>140</sup>*Ibid*

<sup>141</sup>This is Article 50 of the Treaty of European Union. It allows a member state to notify the EU of its withdrawal and obliges the EU to try to negotiate a “withdrawal agreement” with that country. The treaty would cease to apply to UK on entry into force of the agreement.

here with regard to extradition would be that the UK will no longer be part of the European arrest warrant system. But we still need to recognise that the UK had extradition arrangements with several other European countries prior to the creation of the European arrest warrant, but on the other hand it did not with some other countries, notably Spain. The UK on several occasions extradited people from other countries to its territories to face trials on corruption and money laundering.<sup>142</sup>The UK sought and extradited a former Nigeria governor James Ibori from Dubai. He was eventually convicted in the UK for money laundering and has served his sentence.

The former petroleum minister of Nigeria Mrs Diezani Alison-Madueke forfeited properties (final forfeiture) worth over £1.5b to the Nigeria government. She was on bail in London and investigated in the UK by the National Crime Agency (NCA) for her alleged corrupt practices when she was a government minister. The Nigeria corruption agency - Economic Financial Crimes Commission (EFCC) commenced action in Nigeria for her extradition in order for her to defend her corruption charges.<sup>143</sup>

The writer submits, that the dirty money/money laundering question of international cooperation or approach that has thrown up the convergence quagmire is similar or akin to investigating international financial crime in its ramifications. In point of fact, the process of extradition is cumbersome. It is time consuming, expensive and possibly an inefficient way of international co-operation. However, some people may disagree and be on the other side of the thinking spectrum.

The author notes, that there is a wild variety of practice among states on the dual criminality matter in extradition. Some states are inclined to applying a more technical approach to this. It means that there must be a corresponding or conceptual similarity between the offence in both the requesting and the requested state. Most states do not follow this system. And there is no requirement that the crime be described in the same manner as the crime in the requested country.

Australia, is a typical example, where in practice there is the relaxation of the dual criminality, by adopting the “conduct test.” The pronouncement of Justice Dean in the

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<sup>142</sup>Dubai Allows Nigerian extradition, available on <https://www.bbc.co.uk/news/world-africa-11986056> accessed on 8<sup>th</sup> December 2018

<sup>143</sup>Available on <https://www.premiumtimesng.com/news/headlines/295146-efcc-confirms-moves-to-extradite-diezani-alison-madueke.html> accessed on 7<sup>th</sup> December 2018

Australian case of *Commonwealth v Riley*,<sup>144</sup> presents undoubtedly, an interesting understanding of this issue. It must be preferred that in “conduct test cases,” what the authorities should be concerned with should be the substance of the matter and not its technical form. This is likely to command a general acceptance.

The requirements of double criminality should be seen to be satisfied, when the acts in both countries are seen to be criminal, irrespective of the fact, that the two offences have different names and elements. Primary emphasis, should be placed on the acts that constitute the offence on the warrant, rather than the usual general theoretical correspondence between the legal elements of the offence, that are alleged to be committed against the law of the requesting state and some offence that are recognised by the law of the requested state.

The writer, agrees with this and notes that UNCAC adopts a “flexible conduct oriented approach” to dual criminality.<sup>145</sup> It indicated that the Convention will apply to the “dirty money” offence (corruption) where the extradition is sought for an offence that is punishable under the laws (domestic) of both countries. The above article is subject to article 43:

*“In matters of international co-operation in criminal matters, when ever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party shall place the offence within the same category of the offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both State Parties.”*<sup>146</sup>

The writer, submits, that the whole thing hinges on the substance and not the form of the offence as corroborated above. The author notes that Article 43 displays a similarity that is recognizable in most international treaties. But irrespective of the fact that it contains or assimilates a “conduct-oriented” approach of dual criminality, this does not exclude the difficulties inherent in the requirement. D. Chaikin a notable legal author gives support to this. He is of the opinion that the application of the double criminality principle may still require a translation or substitution of certain factors. These can include the locality, institutions, officials and procedures.<sup>147</sup>

### ***Mutual legal assistance (MLA)***

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<sup>144</sup>(1985) 159 CLR 1 at pp. 17-18

<sup>145</sup>See Article 44 paragraph 1 UNCAC 2003

<sup>146</sup>UNCAC 2003 Article 43

<sup>147</sup>D. Chaikin, “*International Extradition*” *Bond Law Review*, Vol. 5, No 2, December 1993 p. 143.



It is noted that Mutual Legal Assistance (MLA) is vital in dealing with the convergence matters involving “dirty money.” Holistically, there is a much weaker case to propagate to retain dual criminality in MLA than extradition. The reason is simple - MLA is less intrusive on the rights of individuals. As will be elucidated in further segment of this thesis, Financial Action Task Force (FATF) recommended that countries should do their best to provide MLA even in the absence of dual criminality. We have to be aware that the Harare Scheme<sup>148</sup> does not usually require dual criminality as a mandatory reason to refusing MLA. The Scheme as amended in 1999 recognises that there are negative cost implication matters not in favour of LDCs. It therefore, set some guidelines in apportioning costs on MLA with special attention to the needs of LDCs. The author assesses this as a good approach.

### *Civil recovery approach*

So far, we have focused on some of the criminal dimensions in the approach used to confront the culprits in the “dirty money” convergence issues. In some instances, the civil law approach can be used and considered effective in ameliorating the problems. Indeed, when the culprits have through their criminal ingenuity, effectively acquired their “dirty money,” laundered all or some of them, the establishments can employ civil mechanisms to get this loot back or at least a sizeable amount. This can be done through civil forfeiture of corrupt proceeds. It does not necessarily mean that it is only liquid assets that this is directed to.

Several countries including the United States, Australia, Nigeria and the United Kingdom do have civil mechanisms or laws that permit civil forfeiture of illicit assets. Interestingly, in the US, the Federal Statute on civil forfeiture is arguably regarded (in the minds of many) as one of the most robust or effective for the recovery of corrupt proceeds, albeit “dirty money” proceeds emanating from foreign offences.<sup>149</sup> 18 USC ss 981 is the general civil forfeiture provision in US and it is very wide. It contains long list of offences of which the proceeds may be subject to forfeiture. The good thing here is that any property that is subject of “dirty money” and has passed through the convergence process or in violation of US Bank Secrecy Act 1970 (BSA) may be forfeited. This is sometimes called civil seizure or civil judicial forfeiture. The action here is simply against the property and not the actual person involved or the defendant.

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<sup>148</sup>Mutual Legal Assistance Scheme amongst Commonwealth nations

<sup>149</sup>See 18 U.S.C N 981

S.D. Casella is understandably, an authority in asset forfeiture matters in the United States of America. He indicated that civil forfeiture should not be seen as a criminal matter. In this, the government in place must file a clearly separate civil action that is against the stated property. This must be “*in rem*.” The government will then judicially proceed and prove on a balance of probability that the said property was actually got from crime or used to commit it. Civil forfeiture does not really depend on a criminal conviction. And the action itself can be commenced civilly before indictment, after indictment or even if there is no indictment to start with.<sup>150</sup>

The writer notes that the provision does not require a concurrent criminal matter against a specific defendant. In fact, this can be used in circumstances where the money launderer is either dead, missing, cannot be located or even a fugitive.<sup>151</sup> In the UK, Part 5 of the Proceeds of Crime Act 2002 covers this. In this, the State is not required to prove its case by relying on the established criminal standard of proof - the essential ingredient or parameter, is for the state to indicate, that based on just probable cause, the property is subject to forfeiture. This process will apply even if the property is held in favour of a nominee and it is shown that he/she is subject to money laundering but there is insufficient evidence to get a criminal conviction.

We have to note that it is a requirement in civil forfeiture matters that the property must be traceable to the offence. A former Nigerian governor from Bayelsa State in Nigeria, Diepreye Alamieyeseigha who died in 2015, had his Maryland home in USA forfeited in this manner and substantial amount of cash in United Kingdom. Late Col Qadhafi’s son had his property estimated to be worth £10m forfeited in UK. Another former Nigeria Governor of oil rich Delta State, who was convicted of money laundering and corruption, was released in Dec 2016 after completing his jail term in UK. Additionally, the US DoJ secured a restraining order for forfeiture of more than \$3m looted funds and a mansion in Houston Texas owned by him.<sup>152</sup>

In Nigeria, \$15m was ordered by a Nigeria court to be forfeited to Federal Government of Nigeria. This sum was purported to be a subject of bribery to the corruption agency of Nigeria - EFCC to scupper the trial of James Ibori. In August 2016, EFCC under sections 26

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<sup>150</sup>S. D. Cassella, *Asset Forfeiture Law in the United States* (Juris 2<sup>nd</sup> Edition, 2013), p.14

<sup>151</sup>A. Kennedy, “Civil recovery proceeding under the Proceeds of Crime Act 2002: The experience so far” (2006) 9(3) J.M.L.C 245.

<sup>152</sup>The Punch Nigeria, U.S court orders seizure of over \$3m Ibori funds, mansion, July 24, 2012.

and 29 of EFCC Act 2004 applied to the Federal High Court for an interim Forfeiture Order and had two shopping malls belonging to Gesil Khan located in Bayelsa State and over £100,000 forfeited. She was the resident commissioner for Independent National Electoral Commission (INEC) for the 2015 Presidential election in Nigeria. Bribes were distributed and allegedly facilitated by ex-Nigeria Petroleum minister Mrs Doziani Alison-Madueke.<sup>153</sup>

Interestingly, on 16<sup>th</sup> February 2017, a Federal High Court in Lagos ordered the final forfeiture of N34 billion linked to her to the Federal Government of Nigeria that was stolen from Nigeria National Petroleum Company-NNPC. The investigators traced the looted funds to three banks in Nigeria.<sup>154</sup> Wonders they say shall never end in Nigeria! The sum of \$9.8million and £74,000 was recovered hidden in a safe in a house owned by a former group managing director (GMD) of NNPC Dr Andrew Yakubu. This money was forfeited to the Nigeria Government in February 2017.<sup>155</sup>

### ***Constructive trust dimension***

The author submits and recognises that proceeds of bribery in whatever guise is “dirty money,” even if this emanates from a fiduciary or any agent. The process of a civil liability for a corrupt agent through the doctrine of constructive trust, it is surmised, is an effective way of stripping the profits of “dirty money” or corruption whenever it is identified and judicially pursued. This is more likely in countries that apply the English concepts of equity. In fact, trustees, servants, employees, agents and even directors who accept bribes plus making additional profit from what was accepted, and eventually betray the trust of their beneficiaries, masters, and principals may be seen as fiduciaries. They are not supposed to keep money that they have made through bribery, without the consent of their principal/s.

Bribery is always a dominant element in corruption and is prevalent worldwide. This is why it is good that the principle of constructive trust must be applied. An agent that receives bribe holds that in constructive trust for his principal. If the agent is an officer of the state, then the principal is the government that he serves. The leading case here is *Attorney-General for*

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<sup>153</sup>PDP 2015 Election Bribe: EFCC Seizes 2 Giant Shopping Malls, Freezes N49m From Female INEC Commissioner, Gesil Khan. Available on <https://puoreports.com/2016/08/28/pdp-2015-election-bribe-efcc-seizes-2/> accessed 27<sup>th</sup> August 2016

<sup>154</sup>Judge orders final forfeiture of N34 billion linked to Diezani Alison-Madueke. Premium Times Thursday February 2017.

<sup>155</sup>See Punch News paper 15<sup>th</sup> February 2017

*Hong Kong v Reid*.<sup>156</sup> In fact, in this case, Reid had already been prosecuted successfully and sentenced to a term of imprisonment. The case was still commenced. This emphasised the different roles of the criminal and civil law mechanisms. The criminal law can be used at least, albeit theoretically, to appease the society, whilst the civil law makes sure that the defendant does not enjoy the fruits of the crime.

It is noted, that at the trial of Reid, he was ordered to pay back the funds of which he did not comply. Instead, he used part of the money to buy good properties in New Zealand, his native country. An action was instituted to recover the properties by Hong Kong Government. The Privy Council entered judgement in favour of the government because the properties were seen to be held in trust by Reid in favour of his principal. This is irrespective of the fact that the properties may have appreciated in value and in addition to the fact that the money used to purchase them may not all be from bribery. The court could have devised a way to separate the non-bribery funds if this was proved.

Lord Templeman was very clear on this. He ruled that a bribe if accepted by a fiduciary in breach of his duty must be seen to hold this bribe on trust for his principal. Even if the property increased in value, the fiduciary is not in any manner entitled to the surplus in excess of the initial value of the bribe. This is on account of the fact that he is not allowed by any means to make a profit out of his breach of duty.<sup>157</sup>

Suffice to say, that it is recognised that in the Anglo-American common law systems and some other jurisdiction(s) like South Africa, the civil enforcement apparatus have considerable advantages when compared with the criminal side of events. This can be in terms of detection, flexibility, remedies and resources. ‘‘Dirty money’’ that comes through corruption is more likely to be detected by the victims.

A competitor that ended up not benefiting from a valuable contractual scenario or has had its employees thoroughly suborned, can seek civil judicial succour. However, there could be this problem of proving that the aggrieved competitor could have succeeded in getting the contract and must find a way of seeking other kind of liability. Arguably, private litigants do enjoy the advantage of flexibility in prompting a law suit in deep contrast to narrow constraints of indictments. In fact, private remedies in their ramifications are gateways to

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<sup>156</sup>Reid [1994] 1 A.C. 324; [1994] 1 All E.R. 1; (1993) 3 WLR 1 143

<sup>157</sup>[1994] 1 A.C 324 at 331-332

compensatory remedies and other potential measures that have serious potentials to deprive the “dirty money” culprit to enjoy the gains. The great advantage of civil law is that there are some speedy procedures in place to freeze the proceeds of “dirty money.”<sup>158</sup> This has been demonstrated in many instances.

#### **2.4 The lubricating role of corruption in enhancing money laundering stages.**

The author notes, that possibly unbeknownst to many, judicial notice has long been taken of the fact that corruption is amorphous and is in certain instances always interacting with money laundering and this has prompted the convergence question. As a result, it has been identified as a dominant facilitative element to the origins, stages or what one may call “artificial stratifications” identified as money laundering processes. The earlier part of this thesis indicated the difficulty associated with finding a conflating acceptable global definition of corruption. This is as a result of divergent jurisdictional differences. In the same vein, one can be excused to assert in a cautious manner that same is applicable in arriving at a definition of money laundering when one takes into cognizance jurisdictional perspectives to this.

In the UK and other common law countries, as well as in continental Europe<sup>159</sup> money-laundering is seen as taking action with any form of property that can encompass intangibles derived from criminal acts that want to obscure the beneficial owners.<sup>160</sup> In the US, 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 include money laundering.<sup>161</sup>

The definition of money laundering, ranges from the authoritative language of statutes to the “punchy” comments of judges. B. Rider indicated that it amounts to a process which obscures the origin of money and its source.<sup>162</sup> Of course, it is because too much attention was directed understandably to the crusade against the drug trade, that the topic of money laundering has been perceived to be somehow synonymous with the subject or debate on

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<sup>158</sup> Ibid No 92 p. 82

<sup>159</sup> See Art.1 Council Directive 91/308/EEC definition

<sup>160</sup> This is under Common Law but Money Laundering Regulations 2017 and POCA Part 7 are more expansive.

<sup>161</sup> A. Deitz & J. Buttle, *Anti-Money Laundering Handbook*. Sydney: Thomson Law Co. 2008. p. 4. See also key US money laundering provisions, 18 U.S.C §§ 1956 and §§1957 which refers to “specific unlawful activity.” See also US Bank Secrecy Act 1970

<sup>162</sup> B. Rider, “Accountability and Responsibility - Reinforcing the criminal law.” Paper delivered at opening ceremony of the Centre of Anti-Corruption Studies and Seminar on 1st April 2009 at 217.

tracing the illicit gains acquired from the drug trade. This, sounds very problematic as not all crimes as we know involve a continuous enterprise.

In point of fact, many people believe that money laundering has a seamless and stratified process - placement, layering and integration. But this view can rightly be said to be just academic in nature. Having said this, the author would want to adopt subsequently, this academic seamless process noted above for the purposes of the analysis. B. Rider captured this vividly. It is noteworthy that we have to be very mindful of the fact that the discussion of the processes involved in money laundering has been very limited and essentially derivative outside the USA. Additionally, it is a fact that a limited few have recognised that even the present traditional way of laundering involves a series of actions and is not classified as a seamless exercise. In the UK for instance, until very recently, the need to intricately examine some sophisticated attempts to obscure the origin and the control of funds were rarely encountered by lawyers and the police. Due to this, there arose the tendency for people to think that the laundering process is simply very simplistic even when drug matters are involved. In fact, laundering usually encapsulates various stages and it is a fact that different legal and enforcement considerations do apply.<sup>163</sup>

It is advantageous to add that the term “money laundering” has been indicated to originate in the modern era from the “Mafia” corrupt ownerships of the various significant and intensive washing saloons in the USA.<sup>164</sup> The gangsters in order to further hide their illicit generated money got from such ventures like extortion, gambling, prostitution and bootleg liquor, had the generated income mixed with the money they earned from the Laundromats. This was competently supervised by Al Capone. It is on record that he was in 1931 convicted for tax evasion. We have to note that money laundering as an offence did not exist at that time.<sup>165</sup>

Aside above, “money laundering” as an expression has also been indicated to have three stages - placement, layering and integration - this is of fairly recent origin. The above term gained serious prominence colloquially during the presidency of Richard Nixon during the

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<sup>163</sup>Ibid

<sup>164</sup>F. Schneider\* U. Windischbaur, Money Laundering: Facts. European Journal Law (2008) 26: p389

<sup>165</sup>The gangsters were a constant worry to the American authorities at that time. They were seen to be a constant threat to legitimate businesses and were always putting up fronts to evade the authorities in US.

‘‘Water Gate Scandal’’ of the 1970s. The expression was first given a judicial mark of approval in a US case - *US v \$4,255,625*.<sup>166</sup>

We should be aware that the processes of money laundering do not necessarily follow this pattern. And that for each academic stage, corruption one way or the other permeates each stage to give it what the author has analysed as ‘‘a stamp of legitimate stance.’’ The players are so criminally imbued or sophisticated that money laundering does not sequentially follow a straight jacket or one dimensional mannerism of the above order.<sup>167</sup>The launderers are very possibly a step ahead of the various anti-money laundering (AML) mechanisms. This is why the law in this area is not static and is always evolving.

### *The academic money laundering stages*

It is vital to bear in mind that money laundering is a process. In fact, without the network of banks and other financial institutions to facilitate the three stages of money laundering and to lend an air of respectability to the proceeds when they eventually reappear, money laundering would be virtually impossible. Therefore, banks and other financial institutions have been positioned in the forefront of the fight against this.<sup>168</sup>This is often a complicated set of activities and mostly not evidenced as a singular act. Of course, it is in an effort to present a more robust analysis of the phenomenon, that it has become somehow academically expositional to present a three pronged approach to the analysis. An Australian Report indicated:

*‘‘Such a scheme would take raw proceeds of crime, held by the offender, manoeuvre them through a process that would conceal their source and confuse and break the money trail, and then return them to the offender legitimised and ready for further safe use.’’<sup>169</sup>*

Placement is the initial stage in which the ‘‘dirty money’’ launderer attempts to put the loot or money into the financial system. Here, the journey starts to transfer the money from the informal economy into the formal economy. Informal is employed here by the author to emphasise that the loot or money was not legitimately acquired. And in order for this loot to be enjoyed, there must be a transition into the legitimate economy where the culprit will be in

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<sup>166</sup>(1982) 551 F Supp.314. See also Gilmore, W.C (1993) Dirty Money. The Evolution of Money Laundering Counter Counter-Measures, Council of Europe Press, the Netherlands, p. 23.

<sup>167</sup>IMF, 2001a

<sup>168</sup>E.P Ellinger etal Modern Banking Law 5<sup>th</sup> Edition p 92 Oxford University Press 2011

<sup>169</sup>National Crime Authority, *Taken to the cleaners: money laundering in Australia*, Canberra, Australia Government Publishing Service, 1991, Vol. 1 p. vii.

a better position to enjoy it. Therefore, for the transition to take place, the ‘‘dirty money’’ starts its journey for legitimisation from the placement stage for the money to be mixed with the legitimate money in the system.

It is good to emphasis here, that the placement stage comprises two stages - primary placement and secondary placement. The launderer will attempt to deposit his cash into the banking system. This is arguably the most difficult of all the stages. The launderer runs a very high risk of being caught with his loot. It is at this stage that corruption steps in to lubricate the process. But the launderer has a very strong potential to evade the regulatory radar placed before him by conniving with corrupt bank officials and other gatekeepers to evade the system or regulations put in place. Primary placement *ipso facto* can involve the use of the ‘‘structuring’’ or the ‘‘smurfing’’ methods in banking jargon. Large quantities of money are systematically broken up into small amounts and deposited to evade the reporting scrutiny from government agencies whilst the officials look the other way - because they have been compromised via bribery. In the US, any sum that is above \$10,000 mandatorily is subject to be reported.<sup>170</sup>

For example in Nigeria, it was noticed that many government officials that have amassed wealth through corruption were able to have their money comfortably placed into the banking system. They could not be able to do this without the connivance of the bank officials that have been compromised by bribery (this is lubrication at work). Some of these people are PEPs and through their influence, were able to place their money into the system. And some also have substantial influence in the financial system they use by way of ownership of these banks - hence the capability to circumvent the system.

Secondary placement can exhibit the characteristics of converting the money into different assets, the use of front men, and the setting up of legal persons or in some instances the use of some insurance policies.<sup>171</sup> On this note, it must be taken into account that the services of some professionals like lawyers and accountants are usually employed to achieve this. Granted that there are bad eggs in every sphere of life, Ibori’s lawyer Mr Badrash Gohil was sentenced to 10 years imprisonment for the part he played in laundering the loot the former governor acquired. This lawyer was described as the ‘‘architect’’ by the judge. The point the

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<sup>170</sup>See Bank Secrecy Act 1970 that contains the requirement for currency transaction report (CTR). See also section 5324 of Title 31 of the United States Code.

<sup>171</sup>Professional gatekeepers have been seriously identified to be using their knowledge to aid these activities.



writer is making is simply that professionals and other gatekeepers are complicit in lubricating the various stages by using bribery to oil the money laundering process.<sup>172</sup> At this stage, the launderer can significantly influence the process by even purchasing the financial institution or dishonestly, setting up one in an offshore centre.

The second stratification is the laundering process itself. And this is made up of two basic parts - washing and layering. Washing refers to the process of removing the illegitimate toga of the loot or “dirty money.” Admittedly, three techniques can be generically noticed here. The launderer can firstly mix the “dirty money” with clean ones. This can be achieved by mixing a lawfully derived income from a business with the unlawful loot in a cash intensive business like a pizzeria<sup>173</sup> or by under-invoicing the exports and over-invoicing the imports of an export/import business having the hallmarks of a commodity company. Secondly, is to transform the medium of the money. For example, cash can be changed into casino chips and back into money. This makes it very difficult to differentiate the “dirty money” and the original casino winnings. Thirdly, the launderers can conceal the beneficial owners by formulating sophisticated financial vehicles designed to cheat the system - these can include fake mortgages, and use of solicitor trust accounts.<sup>174</sup> In all of the above, corruption in different guise is employed to enhance the process.

Layering will require a systematic web of serial and possible parallel transaction concocted in such a manner as to make it very difficult or virtually impossible to trace the paper trail. Here, the previous monetary movement is designed to be lost to the investigators. It is here that the Offshore Financial Centres (OFCs) are involved in a very significant manner. The essence is to make sure that routing money via various jurisdictions would make it very difficult for the investigative and regulatory apparatus to trace the loot. There could be a clash of bureaucratic red tape due to divergent jurisdictional legal undertones. Again at this stage, inefficient cooperation of criminal prosecution, tainted with judicial corruption would enhance the layering stage at the convergence point.

Integration is the last process. Here there is the presence of the illicit money being “brought home to rest” in the formal or main economy. These could include specific stocks and/or direct investment in real estate. There were cases of individuals who attempted to integrate

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<sup>172</sup> Ibid

<sup>173</sup> The idea here is simply to confuse the authorities in tracing the loot.

<sup>174</sup> G. Tett and C. Harris, “Credit Suisse Seeks Talks With Japan’s FSA” in *Financial Times* (April 7, 1999). G. Tett, “Credit Suisse Admits Probe Obstruction” in *Financial Times* (May 22, 1999).

their loot into the legitimate economy. For instance, Dr Erastus Akingbola was found liable in 2012 by a London court for buying real estate in London worth £8.5m. He was a former managing director of a collapsed bank in Nigeria - Intercontinental Bank PLC presently known as Access Bank.<sup>175</sup> Other cases abound. In all the three stages, corruption was actively employed as a lubricating tool in them.

There are other methods of integration and the loan-back technique can also be used. This can be seen to be possibly the neatest way of bringing back the loot home in form of a loan. What happens is that the culprits will arrange dubiously for the money they have in an offshore account to be given to them in form of a loan in their company in an onshore place. This money will now be transferred completely free of taxes and can still be used to cut taxes that are due on domestic income. The borrower has a legal obligation to repay his loan once it is incurred and with its interest. The situation will be that this process can be repeated successfully many times with the consequent result that the money laundering integration process increases in expansive diameter.<sup>176</sup>

Money laundering as we can decipher, involves a series of stages and each has its own characteristics but the dynamics are not well understood. It is reiterated that the money laundering stages must be appreciated to comprise different stages and each has a peculiar characteristics. People that are charged with the detection of such issues must be alert to the implication of a process that has been meticulously designed to minimise exposure and detection. But the truth is that the legislators have severally failed in their appreciation of the nature of money laundering in terms of its character plus objective. It is possibly right to state that in this situation, they have taken for granted a somewhat stylised model which does not really conform to the realities on the ground. The criminals involved in this are often very sophisticated and usually have the capacity for evasion and adaptation for any legislative threat.<sup>177</sup>

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<sup>175</sup> Available on <https://theeagleonline.com.ng/full-judgement-obtained-by-access-bank-against-erastus-akingbola-in-a-uk-court/> accessed on 8<sup>th</sup> November 2018

<sup>176</sup> J.A Blum, M. Levi, R.T. Naylor, and P. Williams, "Financial havens, banking secrecy and money laundering" paper prepared for UNODC 1998.

<sup>177</sup> B. Rider, "The Price of Dirty Money" (Jesus College, University of Cambridge: Private Paper).

## **CHAPTER 3**

### **The domino-effects of corruption and money laundering in less-developed countries**

#### **3.1 Introduction**

##### **Structural approach**

Indeed, we have noticed so far that corruption is amorphous in character and contains various facets. The components (bribery, extortion, embezzlement etc) and other illegal activities (including tax evasion and people smuggling etc) can be said to be very significant contributors to the generation of ‘dirty money.’ The generation of this ‘dirty money’ from the informal economy to the formal one must in most cases transmute via a process. This process is experienced, via a convergence point which brings into play, the money laundering process.

In point of fact, one is tempted to ask the question - what is the motivation for people to go into this exercise - corruption and money laundering? The possible reasons or stimuli in a holistic basis on why people participate in corruption and money laundering can be said to be vast. The participants or culprits have possibly looked into the ‘cost-benefits-scenario’ and also the lax regulatory setups in the respective jurisdictions that they use.

Aside indicating the causative factors, the author will make a significant attempt to show that post-causal affects of corruption and money-laundering, evidently, have some negatives on the various polities that this has been fostered on. The domino-implications in less developed countries are massive, albeit via deprivation of sound standard of living, destabilization of positive economic growth, triggering of reputation risks, disincentive to expected foreign direct investments, distortion of political processes, erosion of proper economic planning, loss of revenue etc. The writer calls this a ‘seismic commercial detonation.’

In the last part of this chapter, aside the causal and the negative effects of the problems due to corruption and money laundering there has been a difficult assessment of the quantum of the damage. Each source or assessment is evidently engaged in guesswork on the actual quantum or figure of the colossal loss. They are all engaged in ‘guesstimates’ as indicated by B. Rider. The present writer agrees with this. Differently stated, the point as he and others are making, is simply that it is impossible to come up with a figure that one can be confident is at all accurate. It is as simple as that. ‘Guesstimates’ are indeed what they are.

### 3.2 Possible causes of corruption and money laundering: A holistic overview

Corruption and money laundering are all facets of financial crime which can also be seen as economic crimes. Corruption is a negative activity.<sup>178</sup> Perhaps, it is right to look into what motivates people to be corrupt and have the temptation to commit crime. It is safe to say or assume that the possible explanations for the causes plus the occurrences of corrupt activities can be located in the interactions of the individual and his societal structures. Attempts have been made to explain the above from a variety of perspectives. There are the public choice; bad apple, organisational culture; clashing moral values; the ethos of public administration plus the correlation theories.<sup>179</sup>

The public choice theory, explains that people are usually portrayed as rationally very calculative in character. They later decide to become corrupt and engage in money laundering. This is because the expected advantages of the corrupt activity outweigh its expected disadvantages. It can be classified as a situation of possible penalty and the chances of being caught during the act. This can be seen as a scenario of cost benefit analysis.<sup>180</sup>

The bad apple theory seeks to justify these economic crimes to be located in the existence of individuals with very faulty character - the so called bad apple. It indicates or postulates that there is a causal chain or relationship from bad character to a corrupt act. Put differently, the cause of corruption and money laundering can be found in a defective human character and a predisposition towards criminal activity.<sup>181</sup>

Organizational culture theory focuses on the culture and structure of the organization that the agent gets his remuneration. In fact, there is this underlying assumption that there is a certain group culture that latently engraves in peoples mind or mental state to follow and participate in corruption and money laundering.<sup>182</sup> This type of behavioural pattern can be noticed in the

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<sup>178</sup>O.M Bakre, (2007) "Money laundering and trans-organised crime in Nigeria: collaboration of local and foreign capitalist elites," School of Accounting, Finance and Management Working Paper 07/03, University of Essex, Colchester.

<sup>179</sup>O. J. Otusanya, "Corruption as an obstacle to development in developing countries: a review of literature" *Journal of Money Laundering Control* p.2 2011

<sup>180</sup>S. Rose-Ackerman, (1978), "Corruption: A Study in Political Economy, Academic Press London. G. De Graaf, (2007), "Causes of corruption towards a contextual theory of corruption," *Public Administration Quarterly*, Vol.31, No. 1/2 Spring/Summer, pp.39-86

<sup>181</sup>Punch, M. (2000), "Police corruption and its prevention," *European Journal of Criminal Policy and Research*, Vol.8,pp.301-24

<sup>182</sup>Ibid

financial sector with particular reference to the banks. It has been noticed that most people that are employed in the financial sector are fundamentally people of “good behaviour.” But once “inside,” they tend to be initiated or influenced in some “anti-regulatory activities” that are present in the sector. They are tempted and eventually join in the corruption and money laundering activities in the banking system. This negative group syndrome quickly catches up with them, and they, in most instances would be caught by the long arm of the law.

The testimony of Mr Antonio Geraldo before the Permanent Subcommittee on Investigation by the United States Senate on abuse of private banking services by money launderers as far back as 1999 elucidates this. By way of introduction, this man was reputed to be of good character. He began his career as a private banker in 1986 at Citibank, worked for Bankers Trust, and American Express in a similar capacity. He was a key participant in laundering money for the likes of former President Omar Bongo of Gambia, Raul Salinas de Gortari - the brother of former Mexico president, Mohammed and Ibrahim Abacha - the sons of former Nigeria president. The man was eventually convicted of money laundering.

The exchange between Senator Collins and Giraldo will help to elucidate the organisational culture impact on Geraldo. It was put to him (Geraldo) that he should be aware that there were a lot of procedures, regulations and policies that CitiBank had in place that should have actually prevented the issue of money laundering that was highlighted in the bank. It was evident that what took place was regarded as a culture of impunity tacitly geared towards neglecting the compliance mechanisms in the bank. It was epitomised with the attitude of indifference on where the bank got its business. The situation with the bank was analysed as a clear turning of blind eye to where they got their business. They were not interested in asking very penetrative questions on the source of funds.<sup>183</sup>

It must be taken into account that the above assertion was corroborated by Geraldo and was necessitated by the prevalent work culture in the financial institution. It was made clear that the attitude was as a result of the engraved work mannerisms that the bankers encountered in their work place.<sup>184</sup>

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<sup>183</sup>United States Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, 80, 2004.

<sup>184</sup>Ibid

The writer, submits, that there are many “Geraldos” in the financial sector who have been caught up with the “cultural bug” exhibited on account of the “ethical indeterminacy”<sup>185</sup> at work in the financial markets. Social norms may be shaped by culture. Policies that are usually put in place by financial institutions like banks to deal with corruption and money laundering, will only be effective, if supported by appropriate work culture that specifically re-instils “good levels of ethical determinacy.” If the work culture in an organisation does not support compliance, the tendency would be that you are not going to get very far in tackling the scourge of corruption and money laundering. The financial sector and other professional enablers are serious participants due to their work culture in this.

In January 2017, German bank Deutsche Bank was fined £500m by the regulatory authorities for using their bank as a conduit for money laundering. The bank allowed gangs to move money from Russia by using the technique of “mirror” trades that involved the purchase and sale of identical securities in different jurisdictions. This was jointly investigated by both London and New York authorities. Tellingly, the New York authorities said that Deutsche bosses allowed a “pernicious culture” to develop, with “control failings that were long-standing and enterprise-wide.”<sup>186</sup>

In the writer’s opinion, there is an overlap that is traceable between those that are caught up in this “cultural bug” and bad apple. In certain circumstances, there are individuals who have never offended earlier in their entire life. This is due to the fact that they do not have the opportunities to do this. However, these people, when they enter the financial sector or government service as the case may be, grab the chance to make money through crime.

It is the above attitude in the financial sectors that usually tend to diminish or neutralise the stigma connected with white-collar crimes. There is an enhanced attitude in this circle to downplay what constitutes immoral or criminal conduct in the financial circle or markets. There is this blinded “air of greed is good mentality” in the circle which obviously may have narrowed a wide range of actions considered to be illegal. Violation of some regulations may be seen in the circle as just “mere infractions” and not really worthy of reprimands - this may be the attitude in certain cases. Possibly, even in situations where there is an

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<sup>185</sup>C. Stanley, “Speculation on Conflict of Discourses: Finance, Crime and Regulation” in *Journal of Financial Regulation and Compliance* Vol.4, No 3,1996 p.242

<sup>186</sup>Evening Standard Tuesday 31 January 2017 “Deutsche pays £500m price for Russian money-laundering scam” by S. English.

investigation or charge for fraud, the word “theft” may not usually be made very significant and may be hidden.

C. Stanley indicated that the investigations of criminality in the financial sectors are usually seen to travel under a lot of labels that can best be seen as asinine. This usually leads to the activities of the culprits in the financial sector to be sort of sanitised and consequently neutralised due to this labelling.<sup>187</sup>

The present writer does not agree with C. Stanley’s view on the above. What he indicated might be the case in the past - possibly more than twenty years ago. This is no longer the case today. There could be a bit of sympathy for those caught up in minor infractions. But in cases of very clear fraud, money laundering, insider dealings etc in the financial sectors, the authorities one can honestly say have been very robust, intelligent and have not folded their arms - the culprits are punished according to the law.

Moving forward in the present discourse, it has been identified, that the ethos of public administration theory are closely related to the theory of organisational structure.<sup>188</sup> However, the correlation theories have been seen not to start from either an implicit or explicit straight forward theoretical explanation model, so to speak as seen in the previous five groups but rather, from specific factors.<sup>189</sup>

Aside the above early theories, some writers and policy makers have also opinionated on the possible causes of corruption which eventually in most cases trigger money laundering. It has been argued that poor institutional setups or structures in less developed countries that are evidently shaped by structural inequalities, morality or state stability can be classified as significant contributors.

In fact, J.P Dobel argues that in certain situations, most corruption incidents do require some individual moral choices. This can depend upon the human capacity for avarice and evil. Nevertheless, corruption of the state, results from the consequences of individual human nature interacting with systemic and enduring inequality in wealth, power and status. In this

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<sup>187</sup> Stanley, C. *Op cit* p. 250

<sup>188</sup> P. Heywood, (1997), “Political corruption: problems and perspectives,” *Political Studies*, Vol.45, pp.417-35  
A. Diog, and J. Wilson, (1997), “What price new public management?,” *Political Quarterly*, Vol.69 No 3, pp.267-76

<sup>189</sup> Supra

situation of such inequality, some group of individuals will eventually have *de facto* or legally sanctioned priority of access to wealth, power and status.<sup>190</sup>

The present writer has noted the above author's comments. I do not agree with the assertion that corruption and money laundering occur on account of inequality. But rather, we should holistically view the template as a spectrum that can range from individual acts. This emanates, through increasingly widespread corruption to the situation where people, whether in or out of government, are enmeshed or entangled in politics brazenly permeated by corruption.

J.M Mbaku argues that in societies, where civil servants' remuneration is low, the propensity is that a sizeable part of the public servants' total remuneration could be derived from engagement in outside activities, resulting in very significant increase in bureaucratic corruption.<sup>191</sup> We have to note that there are two possible causes why civil servants' salaries are low. The first indeed is brazen. Here, the government of the day, may make a decision to pay their public servants very low wages. The reason could be that the government expects these public officers to make up the shortfall through bribery and even extortion. This was basically, the approach that the then late Nigeria military ruler Sani Abacha took during his time. In fact, former military President Ibrahim Babangida utilised the same approach before Abacha.

The other reason is simply lack of resources to pay for the public servants' wages. This is understandable. The government of the day may feel possibly rightly that it would like to pay the public servants handsomely but does not have the money to do so. We should note that this is not true for a country like Nigeria that has the resources to meet this. In the 1990s, Russia and Cambodia are two countries that fit this. Burkina Faso in West Africa is another good example.

There may be instances where if the remuneration is increased it would reflect a significant increase or improvement in revenue collection or could happen after pay reforms in tax

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<sup>190</sup>J.P Dobel, (1978), "The corruption of a state," *The American Political Science Review*, Vol.72 No.3, p. 961

<sup>191</sup>J.M. Mbaku, (1991), "Military expenditures and bureaucratic competition for rent," *Public Choice*, Vol, 71 No. 2, pp. 99-118



administration.<sup>192</sup>The writer agrees with this and therefore submits that poor remuneration can trigger corruption and money laundering in some emerging economies.

J.M. Mbaku is of the view that the possible causation of corruption which in most cases, showcase or result in money laundering may be traced to socio-ethnic and linguistic lineage of people in a given polity. The fact is that peoples' outside behavioural patterns can be associated with their culture and value system. This may eventually lead to nepotistic practises that are associated with bureaucrats.<sup>193</sup>It might not necessarily mean that these people are more dishonest. We need to note that also in some cultures the duty to cater for families comes first in their agenda than their loyalty to their country or duty to the country's laws. So, these people need to cater for their loved ones. Even when the government pays them well, the officers still have bills to pay.

Interestingly, another angle to the above could be this: does it mean that some races are more corrupt or dishonest than others? I do not buy into this. There are sadly others that continue to take this view. And include paternalistic Western commentators on developing countries or even in a developing country itself. Here you may see one ethnic group commenting on the other. For instance, in a developing country like Nigeria, the Yoruba ethnic group may take the view that the Igbo are more corrupt than them. However, the facts on the ground do not reflect this. Every ethnic group has examples of people that take a stand against corruption in Nigeria.

Some scholars have boldly drawn a nexus between the presence of corruption which leads to money laundering to the process of modernization.<sup>194</sup>J.M Mbaku further stated that corruption in LDCs is believed to emanate from the clash or conflict that is noticeable between some entrenched traditional values and the imported norms which do accompany modernization and the social-political developments.<sup>195</sup>

The scenario in the above conflict, has therefore, left a significant space or vacuum. This has created opportunities that have necessitated individuals to continue to exhibit mannerisms not

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<sup>192</sup>C. Van Rijckeghem, C. And B. Weder, (2002), "Bureaucratic corruption and the rate of temptation: do wages in civil service affect corruption and by how much?," in Abed, G.T. and Gupta, S. (eds), *Governance, Corruption and Economic Performance*, International Monetary Fund, Washington, DC, pp.59-88

<sup>193</sup>J.M Mbaku, (1996), "Bureaucratic corruption in Africa: The futility of cleanup," *Cato Journal*, Vol.16 No. 1, pp. 99-118, S.T Akindele, (2005) "A critical analysis of corruption and its problems in Nigeria," *Anthropologist*, Vol. 7 No.1, pp.7-8

<sup>194</sup>J.C Scot, (1969) "Analysis of corruption in developing nations," *Comparative Studies and History*, Vol.11 No. 2, pp.315-41

<sup>195</sup>J.M Mbaku, *op cit* p. 101

justified by modern nor traditional norms.<sup>196</sup>This vacuum is quickly filled with corruption and the perceived largesse acquired is channelled out through money laundering. And this has possibly created the convergence dilemma.

It has been stated by J.D Donahue that it is the government intervention in the private sector commercial activities, that has sparked corruption in a majorly manner.<sup>197</sup>But in contrast to the above, another author, M. Szeftel, has put forward the argument that it was the neo-liberal agenda which came about through the processes of liberalization and deregulation that was responsible in making western donors to proceed and have the ideological assumption that political corruption came about, as a result of growing state intervention.<sup>198</sup>It has been postulated that market forces will through greater competition eventually lead to low levels of corruption and money laundering.<sup>199</sup>

We have to be mindful of the fact that it can be evidenced in this situation, that the prevailing market forces have the capacity to discipline the participants in a more effective manner than the public sector. Here, the ability to succeed is linked to a sound economic policy. The enlargement of the scope and improving market functionality will definitely be a source of strength to the competitive forces. This will arguably reduce or eliminate bribes that the holders of public office may be offered or extort to get them.<sup>200</sup>

The writer does not agree with the above. Let us pause for a minute and reflect on the opinion of M. Szeftel and the World Bank. The evidence or prevailing circumstance does not align with their observations in some developing countries. For example, a country like Nigeria, where there is the view - at least in the mindset of some people that there is a sound economic policy on paper - implementation is another issue. Irrespective of the pronouncements that the government makes, indicating that there is a sound economic policy, cases of rent seeking and bribery in that country has not been significantly lowered, irrespective of the fact that there is the believe that market forces have been left to operate in a competitive atmosphere.

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<sup>196</sup>D.H Bayley, (1966), "The effects of corruption in a developing nation," *The Western Political Science Quarterly*, Vol.19 No. 4, pp. 719-32. M.S. Alam, (1989), *Anatomy of corruption: an approach to the political economy of underdevelopment*," *American Journal of Economics and Sociology*, Vol. 48 No. 4, pp. 441-56

<sup>197</sup>J.D Donahue, (1989),*The Privatization Decision*, Basic Book, New York, NY. Gillespie, K. and Okruhlik, G. (1991), "The political dimensions of corruption cleanups: a framework for analysis," *Comparative Politics*, Vol. 24 No. 1, pp.77-95

<sup>198</sup> M. Szeftel, (1998), "Misunderstanding African Politics: corruption and governance agenda," *Review of African Political Economy*, Vol.76,pp.221-40

<sup>199</sup>S. Rose-Ackerman, (1978), "Redesigning the state to fight corruption: public policy for private sector," World Bank, Washington, D.C

<sup>200</sup>World Bank 1977 "Helping countries combat corruption: the role of World Bank."

Changes in the regulatory mechanisms may trigger corruption and money laundering in developing economies. There may be instances where new staff or employees are put in some sensitive positions when new regulations commence. Some market participants may use this opportunity to handsomely bribe them for a favourable result towards their businesses. Of course, the next natural course of event is for this loot to be laundered depending on the size. This may result in a situation where the overseeing of government functions are moved out of government hands into the hands of independent organisations. Here, the writer has in mind the creation of non-state bodies as regulators.<sup>201</sup>The uncertainty associated with the transition to the market, has the potential to be exploited by corrupt entrepreneurs, even in a more ruthless fashion than those in control of state apparatus.<sup>202</sup>

Irrespective of the fact, that there has been a considerable volume of deregulation and liberalization in transition nations and other developing countries, over the last twenty years or so, corruption and money laundering is still in the high.<sup>203</sup>The continuing causative factors that trigger corruption and money laundering so far identified, seem to have smoothed the path for heavy negative consequences in the economy of developing countries.

It must be noted that the stance taken by the writer in this thesis, is that once corruption is activated by any form of activity, there arises, a very high propensity for money laundering to be the next natural sequential order of events. This usually, will depend on the volume of the acquired loot, hence the convergence matter.

### **3.3 The negative effects of the two phenomena in less developed countries**

It is fair to indicate, that the writer has so far, demonstrated in this thesis that there is a valid correlation or convergence between corruption and money laundering. More so, it has been emphatically stated that there are causative factors for this, supported by views of eminent scholars and theorizations. Obviously, there are domino implications of this. And the stance the writer posits in this segment of the chapter is simply, that granted that the two phenomena are rigorously in most instances, very symbiotically linked, it is therefore arguably acceptable that the negative effect of each can also be attributed to the cause that emanated from the

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<sup>201</sup>P. Heywood, (1997), "Political corruption: problems and perspectives", *Political Studies*, Vol.45,pp.417-35

<sup>202</sup>F. Varese, (2000), "Pervasive corruption," in A.L. Edeneva, and M. Kurkchian, (eds),*Economic Crime in Russia*, Kluwer Law International, London, pp. 99-111

<sup>203</sup>R. Leiken, (1996), "Controlling the global corruption epidemic," *Foreign Policy*, Vol. 105, pp. 55-73, R. Leiken, (1997), "Corruption revisited," *Foreign Policy*, Vol. 108, pp.184-5

other. Simply put, we shall view the negative effects of corruption as same as the negative effects of money laundering - most corrupt money end up being laundered.

One of the significant effects of corruption and money laundering in developing economies is that it slows down the rate of economic growth. The World Bank estimated that the proceeds of corruption of which significant amount is laundered, has equalled loses of 20 to 40% of the Official Development Assistance in developing countries.<sup>204</sup> The Bank also noted that there is evidently, a 0.5 to 1.0% point drag on economic growth. This has been necessitated, on account of the fact that a widespread corruption and money laundering has the potential to create the above percentage gulf in comparison to a similar country that has little corrupt activities.<sup>205</sup>

In Africa alone, it is estimated that the cost of corruption and money laundering, is more than US\$ 148 billion per year. This is thought to represent about 25% of Gross Domestic Product (GDP).<sup>206</sup> Additionally, this increases the cost of goods even as high as 20%.<sup>207</sup> Large amount of money is laundered from corrupt processes, but the exact amount has not actually passed the empirical test. The reason is that it is actually very difficult to keep a tab on the exact sum. In both developed and developing countries, it has been estimated that the annual money that is paid as bribes and which are possibly laundered should be US\$1 trillion and this has been seen as a conservative estimate.<sup>208</sup>

Corruption and money laundering in developing countries do discourage the requisite investment prospects. It has been noted that comparatively, investments in a relatively corrupt country, when compared with an incorrupt one, can turn out to be 20% more expensive.<sup>209</sup>

To conduct business in Nigeria in a very large scale may have strong potential to be very expensive. This is attributed to the corrupt terrain in Nigeria irrespective of the usual anti-corruption stance of the government. Instances are many on this. As at the time of writing, the ‘\$182m Halliburton bribery scandal’ has not yet been judicially settled in Nigeria. This is, irrespective of the fact, that some of the culprits have been sentenced in USA. Although,

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<sup>204</sup>“Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan,” The World Bank 2007, June 2007

<sup>205</sup>Ibid

<sup>206</sup>“Countries to Get Help Recovering Stolen Assets,” *The New York Times* September 17, 2007 by Warren Hoge.

<sup>207</sup>E. Bunt, “Corruption Costs Africa Billions,” *BBC News*, 18<sup>th</sup> September 2002

<sup>208</sup>“*The Cost of Corruption*,” World Bank News & Broadcast, April 2004

<sup>209</sup>D. Kaufmann, “Economic Corruption: Some Facts” 8<sup>th</sup> International Anti-Corruption Conference 1997.

the Buhari administration that has corruption as a focal point of his administration has reopened the matter through EFCC. Time will tell if he is going to succeed on this because very powerful personalities are allegedly implicated, including two former Nigeria Presidents.

A survey of 3,600 firms in 69 countries that was carried out for the *World Development Report* gives impetus to the negatives of corruption and by extension, money laundering. The report indicated that the issue of corruption presented a serious problem (and still presents) to potential investors. More than 40% of entrepreneurs indicated that they actually paid bribes to get things moving. A large number of companies are aware that the fact you have paid the bribe is not actually a guarantee that the service would be delivered. As a result, many have feared that more ‘dirty money’ would be requested by other officials thereby increasing the cost of business and encourages economically unproductive relations.<sup>210</sup>

However, we have to note that foreign direct investment (FDI), may still flow to developing countries in which corruption is systemic. But here, bribery must be affordable and the result must have the characteristics of being very predictable. Indeed, in this situation, it normally is. Corrupt officials generally know better than to ask for bribes that the company cannot afford. But still, corruption can still have a significant effect on foreign investment. Where corruption is seen to be in large scale and systemic, investments may be concentrated in some extractive sectors of the economy where operations can be enclaved or alternatively, in light manufacturing or trading operations that can be relocated if rent taking becomes unbearable.<sup>211</sup> Some foreign investors, may decide to shun the country altogether.

High levels of corruption can act seriously as a disincentive for FDI. On the other hand, to a significant percentage of foreign firms, corruption is seen to be a cost of conducting business to be recovered from revenues.<sup>212</sup> They simply view this as a cost of doing business in that jurisdiction in question. In the writer’s opinion, the perception of a particular country as a corruption-laden-environment is very likely to discourage FDI. Some potential foreign

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<sup>210</sup>World Bank, *World Development Report 1997: The State in a changing World*, New York: Oxford University Press

<sup>211</sup>One of the LDCs countries, notably Nigeria was noted to be the first African country to implement the Extractive Industries Transparency Initiative (EITI). It then took a comprehensive audit of the oil sector. As a result of this audit, at least \$2.4 billion was recovered. This audit revealed outstanding recoverable revenue from 1999 to 2008 in this extractive industry. This was as a result of corruption perpetuated during FDI. <http://www.1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> accessed 27th May 2016

<sup>212</sup>W. Shang-Jin “How Taxing Is Corruption on International Investors?” National Bureau of Economic Research Working Paper 6030, 1997

investors do not like operating in an environment that is corruption laden. The result would be for that “recipient” country to miss out in some FDIs. Additionally, firms that believe that they can bribe their way through may be held back due to sanctions and punishment that await those caught in the act. I do not think that there are sufficient numbers of foreign investors prepared to pay the required bribes due to the fear of being caught.

The positive news is that we are aware that tax deductibility of bribe money for contracts has been taken care of by a Convention. This is a plus for anti-corruption and money laundering crusaders. Prior to the OECD Bribery Convention of 1997, companies deducted the money they paid on bribes in their tax returns and classified this as business expenses. This Convention, later in 2009 made it illegal for companies to do this as this attitude did not present a level playing commercial field. This was binding on OECD members and non-members that have signed up to the Convention and ratified it.

The OECD 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions further strengthens the role of tax authorities to fight bribery. This required explicit legislations to fight this scourge. And many countries have implemented this in their domestic legislations. The UK Bribery Act 2010 forbids bribery to get contracts and has extra-territorial application.

Corruption and money laundering can undermine LDCs genuine privatization efforts to reform their economies. Criminal organizations have the potential and resources to outbid legitimate purchasers of former state-owned enterprises. The scenario is this - illicit proceeds are usually invested in this manner and criminals increase their power for more criminal activities and corruption. They therefore succeed in depriving the country of what should amount to a legitimate, market-based and tax-paying enterprise.<sup>213</sup>

Macroeconomic stability can be undermined. This can happen via the loss of government revenues and excessive spending. It occurs through corruption in tax and customs departments, through debt incurred when the required scrutiny of finance ministries plus Central Banks are bypassed, when contracts that are awarded to high-cost bidders or without competitive tendering, and through the general erosion of expenditure control.<sup>214</sup>

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<sup>213</sup>J. McDowell and G. Novice, Economic Perspectives, U.S State Department, May 2001.

<sup>214</sup>Ibid

This is a serious matter, more particularly, when a well paid CEO of a Thailand manufacturing company during an interview admitted that he would like to be a customs officer. This reasoning was predicated on the fact that the customs officials receive massive gratifications to process goods.<sup>215</sup> The fact is that this observation does not actually come to many people as a surprise if you are aware of what goes on in certain sea ports in LDCs, especially in Nigeria. They have for example in Lagos, Apapa and Tin Can clearing wharfs. It is no secret that massive gratifications are paid to the custom officials to get the goods of importers cleared from the wharf. As a result, many custom officials have become millionaires overnight irrespective of the Nigeria government anti-corruption position.

It must be noted that small entrepreneurs are likely to be affected and caught up in the corruption web in developing countries. Some of the evidence from the private sectors' assessment, have suggested albeit rightly that corruption increases the cost of doing business and the smaller firms, do bear some of the costs of this in a disproportionate way. Bribes obviously, can prevent these firms from growing.<sup>216</sup>

#### ***Negative impact on the environment, the poor and resource depletion***

There is a very serious danger that the environment will suffer due to corruption and money laundering. It must be recognised that many developing countries have passed laws to protect the environment. Not only that, they have also created some special agencies given the responsibility to monitor these laws. However, there is often, disconnect in most developing nations between policy and implementation. Of course, compliance with these environmental regulations, do usually impose on firms some costs that they usually avoid by paying bribes.

In Nigeria for instance, there has been a very noticeable degradation and neglect of the environment as a result of the oil spillage in certain areas of Niger Delta Region. This is as a result of the oil exploration in the region. This area in Nigeria is accountable for over 80% of the oil produced in that country. The oil companies have behaved in such a way that may be suggestive, that they have forgotten that the local community is also a stakeholder. They may not have taken into account the impact of their activities. Of course, the writer is aware they have in mind, the maximisation of their shareholders profit. This should not be to the environmental degradation of the local communities. The neglect of the communities has

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<sup>215</sup>J. Svensson, in "Eight questions about corruption," *Journal of Economic Perspectives*, Vol.19, No.3 Summer 2005, pp.19-42

<sup>216</sup>S. Rose-Ackerman and Andrew Stone, "The Costs of Corruption For Private Business: Evidence from World Bank Surveys," May 1996.

been linked to the cause of armed conflict in the Niger Delta region resulting in the emergence of different armed groups claiming to protect their “natural resources.” The consensus is that the agencies have been compromised by the oil firms as a result of wide spread “egunjeh.”<sup>217</sup> Noticeably, there is also rent to be earned in some tropical rain forests from logging. Here, permits may be obtained corruptly, and inspectors bribed. The effect on the environment can be devastating - air pollution, soil erosion and even negative climate change can come into existence.

It is incumbent on us, to recognize crucially, the fact that, it is the poor that suffer due to corruption and money laundering. Where there is grand and systemic corruption, this filters into petty corruption. The writer submits, that when access to public goods and services requires bribery, of course, the poor are usually excluded and suffer. On account of their lack of political influence, they may even end up, being asked to pay more for some services than people with higher incomes. It is obvious, that the under privileged and destitute, do not have the capacity to pursue some “alternate options.”

Indeed, proceeds of corruption that eventually in most instances get laundered internally and cross-borders have a very serious potential to deplete the natural resources of less developed countries (LDCs). This can be noticed in the primary forests. A typical example is that facilitation payment of US\$50 is paid in bribes for every cubic meter of timber that is felled in Cambodia.<sup>218</sup> More so, in Indonesia, it has been estimated that the lost forest revenue has set back government coffers to the tune of US\$4 billion per year or five times the annual health budget and some of this money was laundered.<sup>219</sup> There is a negative impact on the health sector which can be evidenced in losses in health funds. For instance, there was a time in Ghana, it was estimated that the percentage of allocated funds that do not eventually reach the hospitals and clinics to be 50% of the allocated funds.<sup>220</sup>

### ***Questionable acceleration of economic development, impact on money laundering laws and reputational implications***

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<sup>217</sup>This is a term referred to as bribery in Yoruba or South West area in Nigeria. The interesting thing here is that the term has now been colloquially widely accepted in Nigeria as “bribery” across the ethnic groups in Nigeria.

<sup>218</sup>Cambodia Public Expenditure Review: Enhancing the Effectiveness of Public Expenditure, Vol.11 Main Report, January 8<sup>th</sup> 1999, World Bank, p. 13

<sup>219</sup>“Tracking Corruption, Transforming Lives: Accelerating Human Development in Asia and Pacific,” United Nations Development Program, 2008, p. 98

<sup>220</sup>M. Linlow, I. Kushnarova, and K. Kaisa, 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, p.30



It has been put forward that corruption which also involves money laundering at the convergence point, can contribute to economic development. The argument is that it can serve as an instrument for the allocation of scarce resources and make some investments possible. It can strengthen the private sector by reducing the uncertainty and even the negative effects of bureaucracy.<sup>221</sup> It can possibly fulfil some societal needs. It can include a form of better economic choice and the promotion of the market economy that could with corruption go un-headed.<sup>222</sup>

There is the belief in some quarters that corruption can in certain cases raise the economic growth in two ways. To begin with, “*grease money*” or “*speed money*” has the serious potential to side track delays in red tapes. Again, some workers that are allowed to extort money can work harder, particularly where bribes are allowed to act as a peace rate.<sup>223</sup> It is fair to comment, that this scenario may only be beneficial in short term and is not sustainable long term with regard to economic planning. Of course, the writer is glad to point out, that this view is not a universally held perspective. To buttress this point, we need to note that in the UK, the Bribery Act 2010 does not contain any exemption for facilitation payments. It has a zero tolerance for this.

In some LDCs, Anti-Money Laundering Laws (AML) lack robustness, or bribery is usually used to make them weak. The criminals may bribe the officials of the AML. The banks that are supposed to be positive conveyors of economic development are sometimes acquired by the perpetrators in developing nations. As a result, what follows, is simply that the banks are now used to launder their illicit money to other safe havens.<sup>224</sup> The officials of the financial institutions that are not owned by the corrupt, may be bribed so that the required proper due diligence of customers are not carried out. The result is that suspicious transactions are not reported to the appropriate quarters. The loot is as a result laundered, depleting the scarce resources of the country.

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<sup>221</sup>K. Gillespie, and G. Okruhlik, (1991), “The Political Dimensions of Corruption Clean-Ups: A framework For Analysis,” *Comparative Politics*, Vol.24 No.1, pp. 77-95

<sup>222</sup>Ibid

<sup>223</sup>P. Mauro, (2002), “The Effect of Corruption on Growth and Public Expenditure,” in A.J Heidenheimer, and M. Johnson, (Eds), *Political Corruption Concepts and Contexts*, Transaction Publishers, New Brunswick, NJ, pp. 339-52

<sup>224</sup>The defunct BCCI was a bank that was fraudulently set up by corrupt individuals headed by Agha Hasan Abedi a Pakistani financier. It later turned out to be involved in massive money laundering and other financial crimes. It is believed that the bank did present bribes to anti-corruption agencies in some LDCs to weaken them. The bank was reputed to have 400 branches in 78 countries and assets in excess of US\$20 billion.

Money laundering can increase the probability that the financial institutions will then become corrupt and controlled by criminal elements. Some of the institutions can be small but still can cause economic havoc by way of contagion. This eventually leads to negative reputational consequences that have been caused by operational risks and effects critical investor trust. It is no secret that a reputation for integrity is a hallowed asset for investors anywhere in the world. Different types of abuse that go on in the financial system can rightly compromise financial institutions' and jurisdictions' reputation. This will undermine the investors trust in them and lead to the weakening of the financial system.<sup>225</sup>

It must be noted that a potential user of a financial institution will be hesitant to use that institution if it is widely known that the bank is a criminal institution. When the defunct Bank of Credit and Commerce International (BCCI) scandal unfolded, this made people to terminate their commercial relationships with them. The bank's activities were massively revealed to be shrouded in secrecy with various cases of money laundering levelled against them by investigators. Their reputation one can say was at its lowest level when the authorities moved in.

It is no secret that reputational risks can emanate from operational failures, and also failures to comply with the relevant laws and regulations plus other sources. This is very damaging for banks due to the fact that the nature of their business requires that confidence of their depositors, creditors and the whole market place must be kept at the highest level.<sup>226</sup> It is no secret that this can lead to bank runs where depositors will panic and make moves to withdraw their money plus other domino implications.

Indeed, it is fair to state that corruption and money laundering have contributed in their various manifestations and have the corrosive capacities to undermine the LDCs efforts in their bid to harness the global framework that has been set up in fighting money laundering (ML).<sup>227</sup> It is good to point out that in the inherently corrupt template readily found in some developing countries, the laws, systems set up to tackle corruption, ML and the underlying offences do not operate smoothly or robustly. This is as a result of the weak institutional setups or frameworks and as a result democratic progress suffers massively.

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<sup>225</sup>See IMF Background Paper February 12 2001

<sup>226</sup>BCCI scandal is a classic example of what negative reputational damage can cause to a financial institution. This led to the bank losing out in the sector.

<sup>227</sup>N. Mugarura, (2010) "The effect of Corruption Factor in Harnessing Global Anti-Money Laundering Regimes," *Journal of Money Laundering Control*, Vol.13 p. 1

Furthermore, it is fair to indicate that money laundering in certain situations, can be associated with stimulation of the local economy on the positive side. We are aware that laundered corrupt money often involves the proceeds being exported. But within the country that it occurs, they are used to buy goods that include houses, cars, yachts, or whatever. This, one can say, stimulates the local economy. It is not all bread and butter for the local economy. In certain locations, negatively, this will lead to increase in real estate prices. This will be good for people wishing to sale their houses for very high prices. But on the other hand, the locals wanting to buy are priced out. In certain cases, they do depress the domestic prices of commodities, thereby corroding on the profitability of domestic businesses.<sup>228</sup>This can happen when the launderers, invest in the same goods domestic businesses are involved in and sell at under-cut prices.

We have to be mindful of the fact that if money laundering is allowed to flourish in the financial sector with ease, the result will be a significant increase and enhanced criminal activity in the real economy. The criminals are not interested in pursuing a credible economic policy in tandem with government aspirations. This is irrespective of the jurisdiction. BBC noted that a leading Swiss lawyer warned that the Russia mafia groups infiltrated Switzerland's economy irrespective of the tighter money laundering regulations introduced in that country. The popular view was that Russia criminals established concrete footholds in about 300 Swiss companies. This was as a result of the then Swiss traditional banking secrecy laws. It was feared that there could be high gang violence.<sup>229</sup>It would not come as a surprise that when criminal gangs are in control, there would be struggle for supremacy to control their areas of operation potentially resulting in serious violence amongst them.

There was a time a study of money laundering in Brazil suggested an enhanced penetration of the economy by organized criminal gangs from Russia, Nigeria, Korea and other criminal groups in the early 1990s. This was attributed to the attractiveness of Brazil's 'large and modern financial services sector' that attracted money-laundering activities from abroad.<sup>230</sup>

Above aside, it has been evidenced, that crimes facilitated by corruption and money laundering hinder developing countries' economic growth. Money that is meant for the good

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<sup>228</sup>L. Brent, L. Bartlett, (2002) "The Negative Effect of Money Laundering On Economic Development." Paper prepared for The Asian Development Bank Regional Technical Assistance Project No. 5967 Countering Money Laundering in The Asia and Pacific Region.

<sup>229</sup>*Russian Mafia threatens Switzerland*, BBC, August 8, 1999.

<sup>230</sup>Andrea Frota Machado de Morais, *Money Laundering in Brazil* (2000), p.33.

of the general public is usually pocketed by a few people in power. This obviously drags that country backwards in terms of its development momentum. The Vice President of Equatorial Guinea Teodoro Obiang who is the son of the president at the time of writing settled a forfeiture action that was brought against him in the USA by DoJ in 2014 and relinquished more than \$30m worth of assets in the USA. He is believed to have assets worth more than \$100m.<sup>231</sup> He also faced another forfeiture matter in France. His lawyers in Paris did put up a defence that the properties that belonged to him seized so far should come under diplomatic immunity. He did not succeed. Additionally, he was sentenced to three years imprisonment in *absentia*. The fact here is that his country's development is stunted due to diversion of state assets.

Management Development and Governance Division of United Nations Development Programme has reviewed the conclusion reached in other studies and corroborates that cross country research suggests that high corruption levels are harmful to economic growth. When corruption is associated with organized crime, legitimate business is discouraged, allocation of resources is distorted, and political legitimacy is compromised.<sup>232</sup> Overall, the economic damage perpetuated by corruption and money-laundering in LDCs, has been an unambiguous conclusion or findings in so many economic literatures. And as previously pointed out in this thesis, money laundering is always a key facilitator in this, hence the convergence question.

Money laundering can simply increase the risk of economic instability. The launderers do not have the interest of the economy as their priority. Macroeconomic stability as we know is the fundamental basis of sustainable economic growth. This is because it increases national savings, private investments, improves exports and balance of payment with improving competitiveness.<sup>233</sup> In LDCs, the IMF has indicated that there are two mechanisms by which significant volumes of money laundering can induce macroeconomic problems - hot money and misleading of information to policy makers.

### ***Money laundering and capital flight negativity nexus in less developed countries (LDCs)***

The writer reinstates that money laundering refers to transactions relating to property that is derived from activities that are criminal in themselves. A typical example is simply

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<sup>231</sup>R. Alexander, "Pursuit of criminal property" in Research handbook on international financial crime. 2015 edited by Barry Rider. p. 448

<sup>232</sup>UNDP, *Corruption and Good Governance*, Discussion Paper 3, p.35 (1997)

<sup>233</sup>H. Karnameh et al, (2012), "The effect of macroeconomic instability on Economic Growth in Iran," Macrothin Institute Vol.4 No.3

corruption. Capital flight in itself is the large export of funds from a given place. This is usually evidenced in a large scale and may have a legitimate or illegitimate origin. It is good to note that the perspective of LDCs and developed countries on this is different. The economic negative effect of the two in LDCs is the same because they both destabilise the polity.

Large capital-flight flows through a particular region may be triggered by specific episodes of political flux, like the fall of the Soviet Union or alternatively, the reign of a corrupt dictator. Therefore, the financial flows that would accompany these activities are unstable, and can contribute to the instability of the exchange rate, the amount of money available in an economy and inflation or the general price levels.<sup>234</sup> Also long reigns of some dictators can also increase the money laundering activities in LDCs and impact negatively on their economy. The intensity or volume of money laundering activities through European financial centres during the reigns of Mobutu and Marcus impacted badly on their countries - DRC (Zaire) and Philippines.

We have to understand that some phases of money-laundering transactions are often conducted within the informal economic sectors. Such transactions do not usually appear in the official government data. This therefore, distorts or presents inaccurate information to the policy makers. They then find it difficult to manage such issues like monetary levels, interest rates, inflation and exchange rates.<sup>235</sup>

The obvious effect of illicit capital movement or flight is to worsen the scarcity of capital in LDCs. It is massively noticeable that the costs of this flight include a degradation of productive capacity, tax base and obvious control over the monetary aggregates. It is no secret that this eventually poses a burden on the general public and policy making becomes very difficult.<sup>236</sup>

It has been evidenced that these capital flights have been very enormous. And these can also include non-illicit capital - this is not money laundering. This can include some scenarios where very senior bank officials decide to transfer very sizeable part of their legitimately earned salaries to another jurisdiction. This will have a serious negative economic impact but it is not money laundering as previously pointed out at the beginning of this section. The

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<sup>234</sup>Ibid No. 207 p. 23

<sup>235</sup>P.J Quirk Working Paper for IMF (1996) See also IMF Background paper 2001.

<sup>236</sup>P. Loungani and P. Mauro, "Capital Flight from Russia" IMF Conference on Post Election Strategy Moscow, April 5-7, 2000

overall picture is that the episodes impact negatively on the domestic economy of the LDCs. The UNODC “guesstimated” that the illicit financial transactions that originated from Africa to be more than \$400 billion. And of this amount, \$100 billion was estimated to have originated from Nigeria.<sup>237</sup> Most of the laundered money was never repatriated back to the victim countries.

Corruption and money laundering have not covered themselves in glory in LDCs. The presence of the two phenomena, which notably have helped organised crime to permeate the political structures, has led to social and political unrest within the society. Circumstantially, it has been noticed, that in many transitional economies, there is deep rooted independent link between money laundering, organised crime, politics and the public sector. This can foster a type of significant symbiosis between the state and the criminal organizations.<sup>238</sup> Criminals gain access to political power due to corruption and money laundering. They employ the vast sums accumulated through dirty means and invest in the political process. Political office holders are bribed to enhance access to decisions.

There could be financial donations to political office aspirants. By this, control can be gained over the office holder when he/she comes to power.<sup>239</sup> This is not healthy to developing countries. This was the case in Colombia in the 1990s. The then President Ernesto Samper was accused of collecting about US\$6 million from the Cali Cocaine Cartel to fund his presidential campaign.<sup>240</sup> Money laundering has the capacity to infiltrate the political composition in the society, short of violence. As pointed out above, it can be through the financing of the political process. The Inter-American Development Bank has estimated that the cost of violence generated by organized crime in Latin America to be in the region of US\$168 billion - equalling 15% of Latin America’s GDP.<sup>241</sup>

### **3.4 The problem of quantification or marker on the impact**

Interestingly, this thesis has so far taken cognizance that corrupt proceeds have the hallmarks of undergoing the money laundering process. This can be evidenced in both the internal

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<sup>237</sup>The amount of money taken out is alarming. Most figures presented are estimates (UNODC 2005).

<sup>238</sup>M. Chene, (2008), *Organised Crime and Corruption*, Anti-Corruption Resource Centre Publication, Bergen, May 28.

<sup>239</sup>V.A.O. Adetula, (2008), *Money and Politics in Nigeria*, IFES-Nigeria, Abuja 15<sup>th</sup> December.

<sup>240</sup>G.H Millard, (1997), “Drugs and organised crime in Latin America,” *Journal of Money Laundering Control*, Vol. 1, November

<sup>241</sup>Transparency International Publication, *Keeping Citizens Safe; An Anti-Corruption Agenda for the Americas*, available at : [www.transparency.org/news\\_room/in\\_focus/2011/keeping\\_citizens\\_safe\\_americas](http://www.transparency.org/news_room/in_focus/2011/keeping_citizens_safe_americas) accessed 26th June 2016.

environment that this occurs, plus the allegation that there are some receptive financial institutions situated in advanced countries that accept the loots, possibly knowingly. Indeed, to some, this presents a debatable issue. It was earlier indicated, that money laundering, corruption and capital flights, cause enormous strain on the limited resources of LDCs.

Aside above, various prominent academicians have made some bold attempts to get the exact figures involved. However, the figures presented are not exact and have not been able to positively go through the empirical test. These figures are based on conjectures and estimates in most cases. We have to admit, that corruption as a crime is based on the hallmarks of secrecy and in most of the times, is usually accompanied with money laundering and more importantly due to the secretiveness, is very difficult to quantify.<sup>242</sup> The writer, submits that this is not only difficult but actually impossible to quantify accurately.

We have to be aware, that the statistical information, plus other round numbers that are usually presented or bandied about by various organisations with particular emphasis on law enforcement and other government agencies are mere ‘guesstimates,’ and emanates from the informal economic activities. The figures are themselves very difficult if not impossible to verify or measure. Some are just random figures that are generated to support future funding requests.<sup>243</sup> But we have to make use of some few words of advice here - the fact that they are estimates, do not actually mean that they are misleading.

Admittedly, there is this argument that since corruption which eventually leads to money-laundering is usually triggered by a culmination of societal issues or factors - it is a mountainous task to have a measurement of these social factors.<sup>244</sup> This has contributed to the quantification problems or dilemma. It is as a result of this, that Corruption Perception Index (CPI) was created by Transparency International (TI). Notably, membership cuts across a large number of countries - not less than 180 as at 2019 inclusive of advanced and developing countries. The aim or purpose is an attainment of a qualitative and acceptable assessment of the corruption pervasiveness. Within the cluster of the Non Governmental Organizations (NGOs), TI, with branches in major global areas and was founded by Mr Peter Eigen, a

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<sup>242</sup>J.C Sharman, and D. Charkin, "Corruption and Anti-Money Laundering Systems: Putting a Luxury Good to Work. *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 22, No1, January 2009 p.31

<sup>243</sup>Ibid No 47 pp. 10-11

<sup>244</sup>P. Sikka (2008), "Enterprise Culture and Accountancy Firms: The New Master of Universe," *Accounting Auditing and Accountability Journal*, Vol. 21 No 2, pp.268-95

former World Bank regional director, has arguably, the most comprehensive perception index. This was first launched in 1995.<sup>245</sup>

Each year, TI scores countries on how corrupt their public sectors are seen to be. TI's CPI emits a strong signal to governments and these countries have been forced to take notice. Behind the perception is the daily reality for the inhabitants. Admittedly, the index cannot capture the individual frustration of the reality. However, it can be said to encapsulate the informed views of respectable analysts, business people and experts around the globe.<sup>246</sup>

It must be taken into cognizance, that on a particular level, TI's CPI since its coming into existence, has played a very significant part to raise public awareness about corruption. The CPI on the other hand, has attracted very severe criticisms with regard to the qualitative transparent methodology that it used in its assessment which clearly indicated only the flip side of the cankerworm. This is simply the accepting template and complete ignorance of the private sector.<sup>247</sup> This evidently is a problem.

Another reservation on the CPI is the methodology used. This involves the size of the survey that was used in different countries and the selection of these countries. J. Christenson argued that the CPI has presented a sort of "stereotypical perception" concerning the corruption geography. Additionally, there is the suspicion that the pervasiveness of TI ranking exudes a reflection of probable confusion and bias about the present corruption and money laundering issues. For example, 40% of the countries that were identified as being least corrupt are found in the offshore tax havens, inclusive of major centres.<sup>248</sup> The United Kingdom may have deliberately been silent on proactively tackling the offshore tax havens that are used to tactically hide some "dirty money." There is this perception (in the minds of some people) that the wealthy are deliberately being protected. This is of course very debatable. However, the recent Tax Justice Network's "Corporate Tax Haven Index" (CTHI) 2019 showed that the UK was placed as number 13 and seen as the "greatest global enabler" of corporate tax

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<sup>245</sup>It is noteworthy that a lot of people including both natural and legal persons have come to rely on the annual/usual CPI computation about countries as indicative of that country's efforts to tackle corruption. See also TI website.

<sup>246</sup>Ibid.

<sup>247</sup>OECD Observer, 2000 July.

<sup>248</sup>J. Christenson, (2007), "Mirror, Mirror on The Wall, Who's The Most Corrupt of All," Tax Justice Network, World Social Forum, Nairobi, January.



avoidance. 8 out of overall top 10 that received the highest scores are all British Overseas Territories. This does not look good.<sup>249</sup>

There was a time it was stated that the UK must be placed on the list of most corrupt countries. This is on account of the fact of their historical role as a defender of tax havens of its overseas territories and crown dependencies plus the fact that the UK was somehow perceived to have undermined the EU's attempt to close these loopholes.<sup>250</sup> The present author is of the view that the opinion that the UK should be on top of CPI as the most corrupt is uncharitable and uncalled for. It is evident that the UK has been seen from a long time to be fighting corruption. This is reflected on the various corruption laws that were passed and even mimicked by other jurisdictions as a model to fight the scourge in the UK and extra-territorially. Of course, we are presently witnesses to arguably, the 'most robust ever' corruption legislation in the world - UK 2010 Bribery Act. Needless to say, it contains very robust anti-corruption mechanisms.

It does not mean that there exists a country that is corruption free. In fact, with the revelations and allegations contained in the WikiLeaks and the Panama Papers, there exists the strong believe that these, admittedly may contain some truth.<sup>251</sup> It is fair to submit that the problem cuts across many countries, but to suggest that the UK should be somewhere on top of the list is not welcome - at least in the opinion of many.

The present writer submits that the observation that CPI does not actually represent the true corruption and resultant money-laundering geography may be flawed. The 40% least corrupt countries found in the offshore area is possibly reflected on their compliance mechanisms they have put in place that suited the methodology used. This may have led to the dilemma of quantifying the menace and this is problematic.<sup>252</sup>

It is on account of the quantification dilemma, that there have been some academic papers mainly in the socio-political and economic circles in a bid to assess quantification. These are mainly based on some theoretical frameworks which have been used in the analysis of

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<sup>249</sup> Available on <https://www.corporatetaxhavenindex.org/> accessed on 11<sup>th</sup> June 2019

<sup>250</sup> Ibid, See also The Guardian Unlimited, 2006, 4 September

<sup>251</sup> These are 11.5 million leaked documents that detail financial and attorney client information for more than 214,488 offshore entities. It is about how wealthy individuals and public official are able to keep personal financial information private.

<sup>252</sup> There is bound to be differences of opinion if there is the absence of evidence to comply with anti-corruption stance in countries. The absence of the mechanisms, suggest that rules are not put in place to check-mate the scourge. On the other hand this may be a reflection of lack of resources to put these rules in place.

corruption that would also lead to money laundering. There has been capitalism literature. This is based on capital accumulation as a theoretical lens.<sup>253</sup> Additionally, there is the state theory that is primarily based or focussed on class theory.<sup>254</sup> Some have also employed policy choice theory, whilst others used a public choice approach. The writer submits that it is due to the problems associated with the quantification of corruption, that there have been the various theorizations.

An assessment of the corruption and money laundering scenario, will clearly indicate that most “dirty money issues” will occur in the informal sector of the economy. There is usually absence of statistics and official records of the amount of liquidity involved. This in itself leaves the terrain open to conjectures on the amount of liquid assets involved in transition to the formal economy, since notably, most of the transactions are conducted under the cloak of secrecy. It is therefore, on account of the hazy or opaque nature of corruption and money laundering transactional characteristics, that it is virtually very difficult if not impossible to actually place a marker on the quantum of the amount involved in the process plus the fact that the perpetrators evidently suffer from “honesty poverty.”

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<sup>253</sup>E. Harsch, (1993) “Accumulator and Democrats: Challenging State Corruption in Africa,” *The Journal of African Studies*, Vol. 31 No. 1 pp. 31-48

<sup>254</sup>J.P Dobel, (1978), “The Corruption of A State,” *The American Political Science Review*, Vol. 72 No. 3 pp.958-73

## **CHAPTER 4**

### **The role of corporate governance in the convergence scenario**

#### **4.1 Introduction**

##### **Structural approach**

This thesis has so far attempted to demonstrate that there are multifarious issues involved in corruption. The writer so far has indicated that corruption and ‘‘dirty money’’ have the hallmarks of being chameleonic in their outlooks. The attempt by the orchestrators who have made the money in secrete to transmute the spoils into what the writer calls ‘‘legitimate stance’’ has given rise to the convergence scenario. The issue is simply this - illegitimate money was sourced through some dubious mannerisms in secret, and the most possible next step the culprits usually take is to try to spend the money legitimately. After all, it is of no use, making illegal profits or money, if there is no avenue of spending the loot without being caught by the long arm of the law.

It is no surprise that some inquisitive minds may pause and reflect on the above scenario. Have we tried to ask ourselves some probing questions, why arguably, most of these loots one can convincingly argue emanate and even at the same time pass through many legal persons? In fact, are we to continue to dwell under the mistaken assumption that all is well with the way our corporate entities are managed? The writer is of the view that to think this way is simply delusional in the light of the present corporate circumstances. Assuming the author’s assumptions are faulty, why is it that some corporate collapses were engineered by the way the directors/managers of those companies operated?

In some of the collapsed companies, it was evident that corruption and fraud reared their ugly heads and were significant contributory factors in their demise. Illegal funds were generated through fraud and with the active connivance with the corporate officers and outside influence - the loots were laundered. This again brings into forefront the convergence question. Of course, some of these companies included Bank of Credit and Commerce International (BCCI), Barings Bank in United Kingdom (this bank was the world’s second oldest merchant bank after Berenberg Bank). There were still others that collapsed as a result. In some of these entities and others, there was a lack of cohesive or robust approach in corporate governance issues that necessitated massive corruption and laundering of dirty funds.

This brings into fore the corporate governance matters in dissecting the issues embedded in financial crime. Corruption, fraud and dirty money play significant negative roles. This section of the thesis will dissect what we really mean by corporate governance and its role in check-mating corruption. Efforts will be made to assiduously elucidate the theories that gave rise to corporate governance and juxtapose them with corruption and “dirty money.” Of course, reference will be made to the principal-agent problems with particular insight into the agency theory being pinpointed as crucial ingredient amongst other theories to the convergence problems. It will be elucidated that the managers of the corporate entities have lowered their guide in managing the respective organisations that they were entrusted with. They have as a result, allowed fraud to be less prudently addressed, thereby allowing corruption and “dirty money” to slip through these organisations.

The writer will seek to justify that it is as a result of less prudent or non robust Board of Directors and weak Chief Executive officers that the issue of corruption and dirty money have been noted to be significantly present in corporate set-ups. This section of the thesis will additionally, impute aggressively that if there are prudent Non-Executive directors that act as checks to the excesses of executive directors, there is greater likelihood that fraud could be curbed to the barest minimum in the corporate circles.

Another important angle to the problem that is to be addressed is whether the directors took it upon themselves to make sure that they established the relevant committees in their companies. These include but not limited to the audit/risk and ethical committees. The writer will argue forcefully, that a responsible and robust audit committee will have very strong tools necessary to detect effectively and nip in the bud or at least to a minimalistic level the issues of corruption and “dirty money” in a corporate organisation. It will be the contention of the writer, that on the issues of corporate ethics, the directors should be seen to lead “from the top to the shop floor.” More so, the managers of such entities, have they put in place the right “corporate atmospheric scenario” to encourage whistle blowing?

The financial institutions with special reference to the banks play very significant role in issues of money laundering and corruption. The banks also by virtue of their activities should convincingly, play very significant contributory roles in the economy as a whole. They are not like other generic corporate entities - they provide money to oil the economy on account of the role they play in servicing the Small and Medium Enterprises (SMEs). It is as a result

of this that the writer is of the opinion that the corporate governance in banks must be given a closer or special attention.

Bank corporate governance matters are slightly different from those of the generic companies. If a major bank collapses as a result of some significant issues that include corruption and money laundering, the effect this emits on the general public is not the same compared with the collapse associated with other generic legal entities. The negative externalities or domino implications are quite different. The writer will proceed and put in place a summary of this chapter with the aim of linking the scenario with remaining segments of this thesis.

#### **4.2 Analysis of what corporate governance stands for in the convergence scenario**

When we talk of the convergence scenario, the author is emphasising that whenever illegitimate wealth or ‘‘dirty cash’’ is generated, the criminals, usually in most cases want to use this money by employing the laundering mechanisms. It is at the point of laundering that there is the ‘‘convergence scenario.’’ This is the approach that has been and will continue to be used in this thesis. Any part of benefit derived from that illegitimate wealth is simply criminal property. And derivation of the ‘‘benefits,’’ in most cases will be done by participating in the ‘‘macabre dance’’ that is money laundering. This is usually done through legal persons or corporate entities in secretive manner. This is where lapses evidenced in our corporate governance of legal persons are clearly contributory factors in the convergence process.<sup>255</sup>

Interestingly, and possibly so, corporate governance, has only recently come to prominence in the business world. The term ‘‘corporate governance’’ and its possible everyday usage or lexicon in the financial press is actually a new phenomenon of the last two and half decades.<sup>256</sup> And the use of the term seems to have been on the increase after the last financial crises of 2007/8. Opinions seem to be pointing towards the failure of corporate governance mechanisms in checkmating some corporate collapses of which fraud and corruption were seen to be serious contributory factors to the demise of most of the companies.

#### ***Definitional issues in corporate governance***

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<sup>255</sup>The writer’s opinion is simple - where there are very weak mechanisms in any corporate set-up this is simply an invitation to corporate anarchy of which corruption will be a major player. And dirty funds realised due to this, will undergo the laundering process.

<sup>256</sup>C. A. Mallin, *Corporate Governance* Oxford University Press 5<sup>th</sup> Edition 2016 p.15

It is fair to state that a generally accepted definition of corporate governance has not yet evolved. Traditional concepts describe corporate governance as a complex set of constraints that shape the *ex post* bargaining over the quasi-rents generated by a firm or as every device, institution or mechanism that exercises power over decision-making within a firm.<sup>257</sup> Differently stated, corporate governance deals with the decision-making at the level of the board of directors, top management, the different internal, external mechanisms that ensure that all decisions taken by the directors and top management are in line with the objective/s of a company and its share holders, respectively.<sup>258</sup>

An arguable narrow definition has been given by A. Shleifer and R.W Vishny.<sup>259</sup> They view corporate governance as a process that deals with the ways in which suppliers of finance to corporations assure themselves of getting returns on their investments. An even wider definition has been presented by OECD as: a set of relationships between a company's management, its board, its shareholders and other stakeholders. It also provides the structure through which the objectives of the company are set, and the means of attaining those objectives, and monitoring performance, are determined. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interest of the company and its share holders and should facilitate effective monitoring.<sup>260</sup> Objective that is anti-corruption is one of them.

Transparency International (TI) defines corporate governance to mean the procedures and processes on how private sector organisations are directed, managed and controlled.<sup>261</sup>

A further important definition is that presented by Sir A. Cadbury. He stated that corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.<sup>262</sup>

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<sup>257</sup> J.R Macey, *Corporate Governance* (Princeton and London, Princeton University Press 2008) p. 2

<sup>258</sup> P. O. Mulbert, "Corporate Governance of Banks," *European Business Law Review* 2009 Vol. 10 p.3

<sup>259</sup> A. Shleifa, and R.W. Vishny, (1997), "A Survey of Corporate Governance," *Journal of Finance*, Vol. 11, No 2

<sup>260</sup> OECD (2004), *Principles of Corporate Governance*, OECD Paris.

<sup>261</sup> Transparency International, "Strengthening Corporate Governance to Combat Corruption" TI Policy Position #03/2009 p.2

<sup>262</sup> Sir A. Cadbury, (1999), *Corporate Governance Overview*, World Bank Report, Washington DC

Corporate governance can be seen as a set of arrangements through which organisations account to their stakeholders. In fact, corporate governance and development are strongly related. Research has consistently shown that strong corporate governance supports economic development. This is achieved by the promotion of efficient use of resources and by creating conditions that attract both domestic and foreign investments. We should remember that good corporate governance contributes to the sustainable development prospects of countries, increased economic sustainability of nations, and institutional reforms that come with it, provide the necessary basis for improved governance in the public and private sectors.<sup>263</sup> This may be difficult to attain where there is massive corruption that ultimately leads to laundering of the loot. Part of the negative result is that massive state resources are fraudulently dissipated, thereby impoverishing the public. But good corporate governance reduces this.

The reader may ask what corporate governance has to do with the issues of “dirty money” and private to private corruption. The answer is: if organizations do not exhibit a robust amount of “prudent checks and balances,” this, will be a gateway to corruption, fraud and other negative activities. The unhealthy wealth created as a result will be comfortably laundered, possibly seamlessly, while the general public suffers as funds meant for the developmental projects are frittered away due to lax monitoring mechanisms in state owned enterprises.

### ***Good corporate governance as an antidote to corruption***

When bribery, a subset of corruption, is reduced or checkmated by robust governance, there will be a reduction in money laundering. Good corporate governance is a crucial ingredient in a country’s infrastructure. Proper governance processes are very likely to create an environment that is conducive to success and increase the creation of wealth by improving the performance of honestly managed and financially sound companies.<sup>264</sup> It does not necessarily follow that there exists a perfect corporate governance system that guards companies and their stakeholders from consequences of error. Companies are not immune from failure: corporate collapse happens for different reasons. But lax corporate governance often plays some part in their demise.<sup>265</sup>

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<sup>263</sup>United States Agency for International Development (USAID) & Centre for International Private Enterprise (CIPE) 2009, “Corporate Governance – intersection of public and private reform,” p. 7

<sup>264</sup>D. Arsalidou and M. Krambia-Kapardis, “Weak corporate governance can lead to a country’s financial catastrophe: the case of Cyprus,” *Journal of Business Law* 2015 Vol. 4 p.1.

<sup>265</sup>Ibid

The above is part of the reason why the system of ‘‘checks and balances’’ that are supposed to support corporate governance needs to work reasonably well. In fact, the presence of an effective corporate governance system within institutions and across economies, promotes a level of confidence that is fundamental for the purposes of appropriate functioning of the market economy.<sup>266</sup> The writer posits that when these are adhered to, it reduces bribery and corruption, which of course can be seen as ‘‘dirty money.’’ This will eventually converge and transmute into laundering. When companies embrace and enhance good governance ethos, they have more chances of doing well by eliminating bribery and corruption.

Transparency international has reinforced the writer’s position. This globally respected anti-corruption organisation has indicated, albeit most possibly correctly; that strong corporate governance system is a vital component of a company’s efforts to reinforce the right incentives, practices and to address the corrupt matters they confront.<sup>267</sup> We should bear in mind that there has been an empirical evidence that has shown that without good corporate systems in place, the overall impact of the anti-corruption initiatives are reduced and the growth of companies and the countries where they operate is undermined.<sup>268</sup>

The author is strongly of the view that we should always be aware, that where there are numerous evidence of bribery and corruption, this has a strong potential to drive away investment. Good corporate governance serves as a framework to secure investor confidence, enhance access to capital markets, promote growth and also strengthen economies. By providing for clear game rules and robust checks and balances, corporate governance systems help to lower company costs and do increase economic output.<sup>269</sup> Bad governance generates ‘‘dirty money’’ for laundering purposes of which the overall impact is negative for the economy.

Corporate governance framework differs from country to country. This is usually based on the legal, regulatory and institutional environment, but the similar thing about the frameworks is that they all have one aim - they define the rights, responsibilities, and behaviours that are

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<sup>266</sup>OECD, ‘‘Principles of Corporate Governance’’ (2004), p. 49.

<sup>267</sup>Transparency International, ‘‘Strengthening corporate governance to combat corruption’’ TI Policy Position #03/2009 p.3

<sup>268</sup>A perusal of the study by Wu (2005) is clearly indicative that there is a nexus between corporate governance and significantly minimised corruption levels in a polity. Please see, X. Wu, ‘‘Corporate Governance and Corruption: A Cross-Country Analysis,’’ *International Journal of Policy, Administration and Institution*, 18(2) pp. 151-170

<sup>269</sup>See OECD *Principles of Corporate Governance* (Paris, France: OECD, 2004). This was accessed on 15<sup>th</sup> October 2018 [www.oecd.org/dataoecd/32/18/31557724.pdf](http://www.oecd.org/dataoecd/32/18/31557724.pdf).



needed from the company's owners and managers for the business to operate successfully.<sup>270</sup> It may possibly be rightly said that business momentum is usually slowed down, when there is massive evidence of bribery and corruption. However, we have to always note, as earlier pointed out, that there is never one-size-that-fits-all mechanism.

Above aside, we have to take cognizance that the processes that characterize strong corporate governance systems align in many respects with key elements of anti-bribery tools. Most of these are encapsulated in TI's Business Principles for Countering Bribery, effective risk management, integrity, transparency standards and accountability.<sup>271</sup> We are aware that when bribery occurs within the private sector, it can happen in a company, between companies and in dealings with the public sector plus private citizens. Effective or good corporate governance prevents bribery which is a subset of corruption or at the very least, limits its negative effects. Additionally, good corporate governance is usually grounded on socially acceptable principles. It also promotes honest and responsible behaviour and adheres to its practices to the letter and the spirit of the law. Of course, collectively, these are the antithesis of corruption.<sup>272</sup>

### ***The board of directors role in countering corruption***

Perhaps, it is prudent for us to remind ourselves that in most corporate setups, the board of directors play very significant part in making sure that the entity delivers on the corporate objectives. When there is an efficient board, it follows that this trickles down positively on the corporate behaviour of the organisation. The board of directors leads and controls a company. Therefore, it is not unreasonable to believe, that an effective board is highly fundamental to the success of the company. It is the link between managers and investors and is very important for good corporate governance and investor relations.<sup>273</sup> Very few people will possibly argue that the board of directors is not the engine room of an effective corporate set-up devoid of corruption. It can be likened to a robust combination of very good midfield

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<sup>270</sup>Corporate Governance as we know addresses the classic principal/agent relationship. The owners are the share holders and the agents are the managers. It is through the lax activities of the agents that the issue of bribery and corruption comes up.

<sup>271</sup>This was introduced in 2002 by Transparency International. They are the product of collaborative efforts between companies, academia, trade unions and non-governmental organizations to combat bribery and corruption. We have to note that although TI is an NGO, their pronouncements, are usually given apt attention and have actually made some countries or organizations to "sit up" in matters concerning corruption.

<sup>272</sup>D. Rangaswamy , K.Prabhakar, C. Prabhakaran, "Impact of Corruption on Corporate Governance - An Overview under the Context of Policy Framework against Corporate Corruption"(September 3, 2011) Available at Social Science Research Network (SSRN): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937733](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937733) accessed 25<sup>th</sup> April 2018

<sup>273</sup>Ibid No 257

football players that dictate the tempo of a football match. If they don't play well, the tendency is highly likely that the team will lose the match.

The role of the board of directors was aptly captured by Sir A. Cadbury. It is his observation, that the boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors, the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.<sup>274</sup>

We should also bear in mind that the Code in United Kingdom emphasised that the role of board of directors is to provide an entrepreneurial leadership of the company. This should be within a framework of prudent and effective controls that would enable risks to be assessed and managed. It is the recommendation of the code that directors should receive appropriate training when they are appointed.<sup>275</sup>

There are two types of boards - the unitary board and the dual board. The unitary board of directors is usually the form of board structure that is found in the United Kingdom, the United States and Nigeria. This is characterised by one single board comprising both the executive and non-executive directors. The unitary board is responsible for all the aspects of the company's activities. All the directors are working to achieve the same goals. This includes anti-corruption activities. Of course, when corruption creeps in, which obviously is usually dirty in character, the "benefits" are usually laundered to enable the culprits to enjoy their loot.

In a dual board system, there is the presence of both a supervisory and executive board of management. However, there is usually the presence of a clear separation of functions. The supervisory board is responsible for the direction of the business while the management board is responsible for the running of the business. Here, another interesting thing is that members of one board are prohibited from being members of the other one. There is a clear distinction between management and control.<sup>276</sup> This type of board structure is dominant and

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<sup>274</sup>See Sir A. Cadbury 1992 *"Report on Financial Aspects of Corporate Governance."*

<sup>275</sup>UK Corporate Governance Code 2014 paragraph A.1

<sup>276</sup>C. Malline, *op cit* p.178

can be found in some European Union countries like Germany, Austria and Denmark. And employees are allowed to have representatives in the supervisory section, but this pattern varies from country to country. However, in this thesis, the author has decided to use the unitary board structure or system in the analysis on how boards can impact on corporate governance.

For the display of effective corporate governance, that will hinder corruption, the board of directors headed by the chairman makes sure that they put “strategic positive” things in place. One of these is the presence of board sub-committees. Arguably, the most important of these committees is the audit committee. There are others like the remuneration and the nomination committees. But for ease of analysis, we shall focus on the audit committee. In the United Kingdom, there was the Smith Review audit committee. This was a group that was appointed by the Financial Reporting Council (FRC) as far back as 2003. The committee was of the opinion that while all directors have a duty to act in the interests of the company, the audit committee has a particular role, acting independently from the executive, to ensure that the interests of the shareholders are properly protected in relation to financial reporting and internal control.<sup>277</sup>

What the review did was to define the audit committee’s role in corporate governance in terms of defining their role, “oversight,” “assessment” and also “review” in the corporate set-up. In fact, the audit committee must satisfy themselves that there is a robust and appropriate system of control in place in the company. It must be noted that the committee do not themselves engage in monitoring activities. Once there is a robust assemblage of capable corporate characters, this will provide an excellent check on negative activities in the company. It has what the writer describes as a “positive trickledown effect.” By this, it is submitted that issues of bribery and corruption will be reduced to the barest minimum in that corporate organization.

It is the role of the audit committee to make sure that they review the scope and the outcome of the audit. They must try to make sure that the objectivity of the auditors is always maintained. This will also involve the review of the audit fees that are paid for non-audit work and the general independence of the auditors. In fact, they provide a very useful nexus

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<sup>277</sup> Smith Review of Audit Committee Report 2003 Paragraph 1.5 This group was given the mandate to produce this report by Financial Reporting Council in United Kingdom.

between both the internal and external auditors and the board. They must ensure that all relevant issues related to the audit are relayed to the board.<sup>278</sup>

The audit committee role may also involve reviewing the arrangements for the staff that raise complaints about negative incidents going on in the company.<sup>279</sup> Some of these incidents when eventually and properly investigated do sometimes lead to uncovering of the fraud. These people are usually called whistleblowers. A whistleblower called Sherron Watkins made her concerns known to Andrew Fastow who was the Chief Finance Officer (CFO) at Enron, a United States defunct energy company, and to the firm's auditors, Arthur Anderson. This was about the fraudulent financial irregularities that went on in Enron. On account of this, the US authorities after investigation indicted Enron about the massive accounting fraud perpetuated by its directors in the company.<sup>280</sup> Some countries have passed legislation backing whistleblowers. In her own case, it did not come as a surprise that she was fully covered by the Whistleblower Protection Act 1989.<sup>281</sup>

We have to note that for the whistle blowing to be legitimate, it must contain any of the followings: must be in public interest, the incident is a criminal offence, eg fraud, someone's health or safety may be in danger, risk or actual damage to the environment, a miscarriage of justice, the company is breaking the law, eg does not have the right insurance, and you believe someone is covering something.<sup>282</sup> In fact, in the United Kingdom, this is contained in Public Interest Disclosure Act of 1998 (PIDA 1998) that came into force on 2<sup>nd</sup> July 1999.<sup>283</sup> Interestingly, PIDA has been copied across various jurisdictions as a model in protecting whistleblowers.<sup>284</sup>

In Nigeria, a country that has been menacingly for a very long time besieged by corruption and money laundering; the government in a bid to turn this tide, recently introduced the

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<sup>278</sup> Ibid No 275 p.186

<sup>279</sup> This was recommended in paragraph 5.9 of the 2003 Smith Review of the Combined Code Guidance

<sup>280</sup> This lady has been credited with raising alarm about the negative accounting transactions that went on in Enron. The "Enron Case" is seen as one of the biggest bankruptcies in US corporate history. The lady raised alarm about massive fraud that was going on in the finance department of the company. The company used Special Purpose Entities (SPE) to siphon huge amount of money for the directors. This contributed to the liquidation of the company.

<sup>281</sup> In the USA, the Act was made a Federal Law in 1989. It was made to protect federal whistleblowers who work for government and report agency misconduct.

<sup>282</sup> <https://www.gov.uk/whistleblowing/what-is-a-whistleblower> accessed on 20th May 2018.

<sup>283</sup> This Act amended the Employment Worker Act 1996 in United Kingdom.

<sup>284</sup> P. Stephenson, and M. Levi, (2012), "The protection of whistleblowers: a study on feasibility of a legal instrument on the protection of employers who make disclosures in public interest," Council of Europe Paper, CDCJ (2012) 9FIN.

Whistleblower Act. This was in 2016. The former minister of finance Mrs Kemi Adeosun indicated that the aim of this policy is to enable patriotic citizens to report criminal acts such as mismanagement of public funds or misappropriation of public funds and assets, like properties and vehicles; financial malpractice and fraud. To encourage and motivate Nigerians to participate in the scheme, the policy stated when there is a voluntary return of stolen or concealed public funds or assets on the account of the information provided, the whistleblower may be entitled to anywhere between 2.5 percent (minimum) and 5.0 percent (maximum) of the total amount recovered.<sup>285</sup>

A whistleblower was paid £880,000 (at the conversion rate of 450 naira to a pound £) for the information the person provided that led to the recovery of large amount of foreign currency stashed away in a flat located in a high-brow area of Lagos State - No. 16 Osborn Road, Ikoyi, Lagos.<sup>286</sup> The writer, submits that whistle-blowing is a good mechanism. It will keep employees on their toes because they consciously realise that they are being watched by their fellow colleagues at work and other members of the public. The beauty of this is that you are not too sure of who is watching you. Therefore, if the board via the audit committee are able to set the mechanism to put this in play, it is highly likely that the incidents of fraud which includes corruption of which most of the fraudulent money realised would end up being laundered will be reduced.

Over £1 billion pounds has so far been recovered through the above policy in Nigeria.<sup>287</sup> However, what they do with the recovered funds in Nigeria is a different issue. There have been suggestions and allegations, that ‘‘even recovered loot is looted’’ in Nigeria. That may not be far from the truth given the ‘‘corrupt reputation’’ that Nigeria has been associated with in the past. They have not done well in TI Corruption Perception Index (CPI). Nigeria is ranked 144 out of 180 countries and had a score of 27 out of 100 in 2018.<sup>288</sup> That said, the fact on the ground is that, President Buhari administration in Nigeria has sensitised the general public about the dangers of corruption. Indeed, many arrests were made and corrupt matters charged to court. However, the people are interested in seeing these matters dispensed as quickly as possible with convictions and confiscations where necessary.

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<sup>285</sup> See the Nigeria Whistleblower’s Policy 2016

<sup>286</sup> Ikoyi Cash: Whistleblower gets N421M, jets out of Nigeria. By Charles Kumolu, Vanguard Newspapers 14 December, 2017. Available on <https://www.vanguardngr.com/2017/12/ikoyi-cash-whistleblower-gets-n421m-jets-nigeria/> Accessed on 21/05/2018

<sup>287</sup> See paragraph 12 (b) of the speech delivered on Nigeria Democracy Day, 29<sup>th</sup> May 2018 by President Buhari.

<sup>288</sup> <https://www.transparency.org/country/NGA> accessed 15/06/2018

When the bubble burst in BCCI, there were numerous incidents of fraud, corruption and money laundering in the bank. It has been suggested that had there been an earlier mechanism or whistle blowing law in place, the scandal leading to the collapse, could have been known much earlier. The collapse put in jeopardy, some US\$8.7 billion in international trade because it complicated payments for export contracts managed by the bank.<sup>289</sup> In BCCI, there was an autocratic corporate governance environment. No one dared to speak out for fear of repercussion despite regular instances of illicit activities that occurred. It was this case, together with earlier disasters like the capsizing of Herald Free Enterprise in 1987, the Piper Alpha explosion in the North Sea and the Clapham Junction crash in 1989 that provided the necessary contextual background to the emergence of PIDA.<sup>290</sup> Additionally and comparatively with the past, whistle blowing is increasingly seen as a fundamentally positive force with growing support for its core objectives of deterring and eliminating corporate wrongdoings in many jurisdictions.<sup>291</sup>

### *Corporate ethics as anti-corruption therapy*

Another important area that the board of directors should focus in the corporate set-up to prevent or drastically reduce the incidence of corruption is corporate ethics. Underlying the very foundation or roots of corporate governance and the provision of its moral compass is simply ethical behaviour. Surprisingly, the ethical behaviour of companies is rarely recognised as a solid cornerstone of good corporate governance. But in many ways, ethics underlies much of business behaviour. This is irrespective of the fact that it may be at board or staff level, and also regardless of that company's geographical location, size, or industry. The manner business decisions are arrived at, matters strongly from both an ethical and pragmatic standpoint. This is not only applicable to OECD companies but is inclusive of companies from developing countries that may be involved in regional trade.<sup>292</sup>

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<sup>289</sup>D.F Laifer, (1992), "Putting the super back in the supervision of international banking, post BCCI," *Fordham Law Review*, Vol. 60 No.6p.467

<sup>290</sup>V. Kortekaas, (2003), "Deaf ear turned to most whistleblowers," *Financial Times*, 20 May, 2013. Available at <https://www.ft.com/content/5b58797a-bf00-11e2-a9d4-00144feab7de> accessed on 16/06/2018

<sup>291</sup>D. Rebbitt, (2003) "The dissenting voice: key factors, professional risks and value add," *Professional Safety*, Vol. 58 Issue 4 April, pp. 58-61

<sup>292</sup>J. D. Sullivan, Ph.D, Executive Director, CIPE, A. Wilson, Deputy Director, Strategic Planning, and Regional Director, Eastern Europe and Eurasia, CIPE, A. Nadgrodkiewicz, Senior Program Officer, Global, CIPE. "The role of corporate governance in fighting corruption" – Deloitte available on [https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role\\_corporate\\_governance\\_sullivan\\_eng.pdf](https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/role_corporate_governance_sullivan_eng.pdf) accessed on 20th May 2018

The fact is that there are robust anti-corruption laws in very powerful countries. The USA has Foreign Corrupt Practices Act 1977 (FCPA) and there had been an enactment of the 2004 Revised U.S Sentencing Guidelines that is applicable to corporate defendants. More so, the UK has in place, the Bribery Act 2010 that came into force in July 2011. The above laws one can say, have possibly made the boards to take additional responsibility of directors' ethics compliance and training to reduce liability risk.

Some of these laws have extra-territorial capability that places legal responsibility on both small and large firms for the attitude of their suppliers plus distributors in global value chain. The after effect of the enforcement of these laws has had the impact of putting a hefty pressure on companies to seek effective non-corrupt companies to deal with in their businesses. This has had the effect of strengthening the internal anti-corruption and bribery mechanisms of companies. Internal compliance must be a key element of the board's approach to risk management. The point the writer is making is simply that there are now embedded in companies compliance systems, robust ethical codes against corruption and bribery that are there not merely for "box ticking." The board of directors makes sure that these codes are respected in practice.

Presently, most companies have started looking inwards, and fashioning out ways to make sure that they are not contributing or encouraging the climate of corruption. And a way of demonstrating this anti-corruption corporate posture is that the board of directors through the company's ethical codes sends out a strong message and also leads by example, demonstrating "from-the-top-to-bottom" attitude against corruption. The idea is simply that the board makes sure that the relevant national and international commitments for leadership against corruption trickle down through the whole company to the very last employer on the shop floor. Needless to say, where the external institutions are weak, the combination of corporate governance and ethics do play a much more rudimentary role to facilitate repeat business transactions.

The writer, is of the view that it was the "surprising" corporate collapse of Enron that invigorated or triggered very serious attention by more companies over the establishment of ethical subcommittees and ethics code in firms. There was massive fraud and corruption in Enron. Of course, the directors indirectly hid massive loses and laundered money. Surprisingly, many corporate governance codes are just silent on any explicit mention of

ethics committee. This is not good given the frequent unethical behaviour and breaches (fraud is a typical example) perpetuated by some of the company's employees.

It is on account of the need to be behaving more ethically in business relationships, that some institutional shareholders are being exhorted to engage more with their investee companies - to act more as share holders. It all boils down to the fact that the management of ethical matters can be viewed as a form of risk management. And corruption and fraud fit comfortably in this template.

Companies that have been found negligent or convicted of fraud or other "anti-corporate governance activities," do get a mitigated sentence. This is largely in most of the cases, due to their being compliant and setting up of ethical committees and ethical codes in their organisation. Ethics program may involve a very small cost but in future it saves the firm a lot of money. A. Crane and others indicated that in the United States, for example, corporations can significantly reduce their fine once they have been found guilty in criminal procedures by showing that an effective ethics programme was in place.<sup>293</sup>

The importance of ethical code has also been subtly reemphasised by J. Steven and other authors. They formed the opinion that the extent to which ethics codes are actually used by executives when making strategic choices as opposed to being merely symbolic is unknown. Financial executives are more likely to integrate their company's ethical code into their strategic decision processes if (a) they perceive pressure from market stakeholders to do so (suppliers, customers, shareholders, etc); (b) they believe the use of ethics codes creates an internal ethical culture and promotes a positive external image for their firms; (c) the code is integrated into daily activities through ethics training programs.<sup>294</sup>

Business ethics and good corporate governance one can surmise are deeply rooted in the foundations laid out in global universal values. We have to note that Universal Declaration of Human Rights (UDHR)<sup>295</sup> has established a global consensus on the applicability of shared moral principles across various polities. Many of these principles are now reflected or found in some land mark documents on ethical business behaviour. And they abhor corruption.

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<sup>293</sup> A. Crane, A. McWilliams, D. Matten, J. Moon, and D. Siegel, (2008), *The Oxford Handbook of Corporate Social Responsibility*, Oxford University Press.

<sup>294</sup> J. Steven, K. Steensma, D. Harrison, and P. Cochran, (2005), "Symbolic or Substantive Document? The influence of Ethics Codes on Financial Executives' Decisions," *Strategic Management Journal*, Vol.26, No. 2 pp. 181-195

<sup>295</sup> This is a historic document that was adopted by the United Nations General Assembly at its 3<sup>rd</sup> session on 10<sup>th</sup> December 1948 as Resolution 217 at the Palais de Chaillot in Paris France.



Some of these instruments include but not limited to the followings: OECD Anti-Bribery Convention 1997, United Nations Convention against Corruption 2003 (UNCAC), World Economic Forum Partnering Against Corruption Initiative, Transparency International Initiative Business Principles for Countering Bribery, International Chamber of Commerce Rules of Conduct to Combat Extortion and Bribery (ICC Rules 2005)<sup>296</sup> plus the UN Global Compact 10<sup>th</sup> Principle, to mention but a few.

When companies adhere to the ethical codes or principles devoid of bribery and corruption, the effect is that these companies attract investors. The investors are willing to pay extra for well-governed companies. The Global Investor Opinion Survey that was conducted by McKinsey among more than 200 professional investors that collectively manage approximately US\$2 trillion in assets in 31 countries, including Russia, revealed that a significant majority of investors are more than happy to pay a premium for well-governed companies. These premiums, averaged 12-14 percent in North America and Western Europe, 20-25 percent in Latin America, and over 30 percent in Eastern Europe and Africa.<sup>297</sup> Additionally, UK Institute of Business Ethics found that companies that were implementing ethics training programmes did better than those that just professed only a commitment to only business ethics devoid of implementation.<sup>298</sup> It is the submission of the writer that it is a fact of corporate life, that when companies are publicly associated with bribery and corruption, it corrodes seriously on their reputational value. And one of the outcomes is simply this - a high propensity for loss of commercial deals or businesses. Of course, we need no reminding, that “excellent governance reputation,” is one of the most treasured assets for corporate survival.

Adherence to ethical corporate behaviour may reduce corruption and it is a sign of good corporate governance. It is an important risk mitigation tool that can translate into very palpable benefits to the firm. Evidence of this was demonstrated in a study by Standard and Poor (S&P) 500 firms by Deutsche Bank that indicated that firms with strong or improving corporate governance outperformed those with poor or deteriorating governance practises by

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<sup>296</sup>This ICC Rules qualifies as a “soft Law.” Firms do adhere to the rules on account of reputational relevance and adopt relevant areas into their corporate code.

<sup>297</sup>“Global Investor Opinion Survey: Key Findings,” Mckinsey & Company, July 2002.

<sup>298</sup>U. Kaodi, N. Dando, and L. Moir. 2007. Does Business Ethics Pay? - Revisited London: Institute of Business Ethics, (July).

about 19 percent over a two year period.<sup>299</sup> Additionally, a study conducted by Harvard and Wharton researchers found that 1,500 U.S-based firms with better governance had faster sales growth and were more profitable than their peers.<sup>300</sup>

The author believes and is convinced that there is presently a growing recognition that when there is a corporate culture that encapsulates, encourages ethical behaviour and integrity, the effect is that robust corporate governance will be enhanced. This situation, will naturally translate into reducing the incidents of sharp practices in firms. Of course, sharp practices fuel money laundering in the bid to hide the gains because the proceeds have been illegitimately acquired.

Frankly, and on the flip side of issues, the commercial world has witnessed cases of corporate collapses and massive financial losses that emanated from firms that had very weak or non-existent corporate ethical cultures as pointed out above. This also included very lax governance behaviours. They experienced the presence of bribery, corruption and even staff intimidation as a result of powerful chief executive officer/s. We have to note that companies like human beings do not exercise a consistent moral behaviour. With significant growing transparency and accountability in a globalized economy, well-governed ethical organizations will highly likely acquire sound business advantage in the international business sphere.

### ***The crucial role of non-executive directors in the convergence dilemma***

We have to be aware that legally, all directors are jointly responsible in the eyes of the law for the shortcomings in the corporate set-up. This is as far as their fiduciary duty is concerned. It may be fair to infer that non-executive directors are simply the mainstay of robust corporate governance. The right ones have to be appointed by that particular company to make this happen. Of course, when there is corporate stability and efficiency in the company, this will act as antithesis to fraud and corrupt activities in the company.

Non-executive directors' role in the company is two dimensional. Firstly, and most prominent of these two in the last one and half decades in the corporate world, is that they act as a counterweight measure to the executive directors. The essence is that the presence of the non-executive directors would help to ensure that there is no one person or group of people that

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<sup>299</sup>R. Grandmont, G. Grant, and F. Silva, "Beyond the Numbers – Corporate Governance: Implications for Investors." Deutsche Bank, April1, 2004.

<sup>300</sup>P.A Gompers, J.L Ishii, and A. Metrick, "Corporate Governance and Equity Prices." *Quarterly Journal of Economics* 118(1), February 2003, 107-155.

will have an overbearing influence on the decision of the board. The second one is the contribution that non-executive directors make in the overall leadership and company development.<sup>301</sup>

The writer posits in this segment of this thesis, that it is important that when non-executive directors are appointed in the corporate set-up to help stabilize the firm and combat the trend of corruption and money laundering, it is crucial that these appointments are made on merit. More so, the non-executive director/s must have an excellent background in compliance related matters in the corporate setup. And this is what they will bring on board to checkmate fraud in the company. Apart from their key contributions to the affairs of the board, non-executive directors must be assigned to the key committees like the audit committee. They will be able to monitor the company's financial reports to detect fraud. It is from here that their expertise will be felt and as a result, a positive trickle-down effect that minimises corruption will be noticed. Most of the booty got from corruption and fraud are laundered hence the convergence question.

We have to bear in mind that when the Cadbury Report came out in 1992, it emphasised the massive contribution that non-executive directors bring to the table:

*'The committee believes that the calibre of the non-executive members of the board is of special importance in setting and maintaining standard of corporate governance.'*<sup>302</sup>

Aside this, the OECD Principles, also echoed the importance of non-executive directors more particularly in monitoring financial reporting. It implored boards to assign sufficient number of non-executive board members that are capable of exercising independent judgement to tasks where there are potential for conflict of interests. Typical examples include financial reporting, nomination and executive remunerations.<sup>303</sup> Financial reporting can be doctored or fiddled to hide fraudulent activities that help to fritter funds away from the company through the laundering process.

The UK Code also recognises the swift importance of non-executive directors in the corporate set-up more especially in monitoring financial statements. The Code emphasised that the non-executive directors, should always try and satisfy themselves on the integrity of

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<sup>301</sup>Ibid No. 280 p. 192

<sup>302</sup>See paragraph 4:10 of the Cadbury Report of 1992

<sup>303</sup>See 2015 OECD Principles of Corporate Governance launched at the meeting of G20 Finance Ministers and Central Bank Governors in Ankara on 4-5 September 2015.

the financial information. Additionally, the company's financial controls and systems of risk management must be robust and defensible.<sup>304</sup>

The writer points out that the message this Code sent out is simple - fraud can be hidden in companies by presenting false financial reports by the accountants. The money that is fraudulently made will eventually be laundered to camouflage the fraud and enable the perpetrators to spend the money in the legitimate economy. But the presence of capable non-executive directors in the audit committee that are financially very literate by their training has a very good potential to checkmate this happening. In reality though, the aim is to reduce corruption in the corporate circles from the contributions of non-executive directors.

A. Muravyev et al in a study of the UK companies, find a positive link between the presence of non-executive directors who happen to be executive directors in other companies and the positive accounting performance of those companies. They indicated that the effect is stronger if these directors are executive directors in firms that are performing well. There is a positive effect when these non-executive directors are members of the audit committee. Overall, the results are broadly consistent with the view that non-executive directors that are executives in other firms contribute to both the monitoring and advisory functions of corporate board.<sup>305</sup> Needless to say, excellent non-executive directors will always add very positive qualitative anti-fraud posture in companies. This will definitely check the frittering of the firm's financial resources that usually happens through very dubious manner.

#### **4.3 Corporate governance theories and visible linkage to the convergence scenario.**

In this segment of this chapter, we have to bear in mind that in the corporate setup, the aim or objective of every company is to keep afloat and generate sufficient money from the business. One of the fundamental reasons to set up a business organisation is profit maximisation. However, behind the above aim, there have always been some theoretical permutations that have given rise to the idea that the company or firm as the case maybe, germinated from a "theoretical perspectives." Granted that the company may have "germinated" from these, it does not mean that the people that have been given the responsibility to "look after" the company should be doing this in a "careless manner."

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<sup>304</sup> Paragraph A.4 of United Kingdom Corporate Governance Code 2014

<sup>305</sup> A. Muravyev, O. Talavera, and C. Weir, (2014), "Performance Effects of Appointing Other Firms Executive Directors to Corporate Board: An analysis of UK firms," IZA Discussion Papers 7962, Institute of Labour Economics (IZA).

This section will showcase the fact that of all the theoretical permutations, the agency theory aside from others has been the most dominant one that has been used. The writer, in the analysis, will be using this theory to bring to fore the difficulties it has brought into the company setup. The author will seek to justify or convince the reader that the agency theory, though prominent in playing a part in the company set-up, is also to blame in most corporate failures that suffered from a lot of fraudulent practices in their demise. The author will be using the case of defunct Enron in the USA prominently and repetitively in the analysis.

The reason is simple: the facts and circumstances that were dominant in the demise of Enron are emblematic of key areas of the agency theory and others. This is irrespective of the fact that Enron demise happened more than fifteen years ago. But it still has the crown of being decorated as the ‘‘greatest corporate bankruptcy’’ in USA history. It was not only Enron that was identified with issues of corporate theory in their demise. There were the cases of Arthur Anderson, WorldCom, Tyco International, Quest Communication, Computer Associates in USA and others places. The fact here is that fraud and corruption took place. As a result, money was obviously laundered in order to hide the source, thereby justifying the convergence question that is central to this thesis.

### ***Back ground metamorphosis***

The first recorded non-financial institution that was established in the 17<sup>th</sup> century was the Dutch East India Company. It had a diffused share capital<sup>306</sup> with over 1000 investors, leading to an important issue of corporate governance: how their investment was to be looked after without misappropriation. Massive financial scandals followed in the French Mississippi Company and English South Sea Company in 1720.

Adam Smith in the late 18<sup>th</sup> century took a dim view of the corporate set up.<sup>307</sup> He stated that as directors of such joint-stock companies are the managers of other people’s money rather than their own, it cannot be expected that they will safeguard it with the same vigilance as partners of a private partnership. They will often see small details as unimportant and hence not pay attention to them. Negligence can follow.<sup>308</sup>

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<sup>306</sup>P. Frentrop, (2003) *A History of Corporate Governance 1602-2002*, p.46, Brussels: Deminor.

<sup>307</sup>See A. Smith, (1776) ‘‘An Inquiry into The Nature and Causes of The Wealth of Nations,’’ W. Strahan, T. Cadell p.700

<sup>308</sup>Ibid. This intellectual work by Smith has been considered as a ‘‘magnum opus’’ among his works.

The author submits that this has close relevance to this thesis. There is no full-proof-guarantee that when you leave an “outsider” to look after what does not belong to him, he will exercise an “optimum attention” to do this with the aim of actually protecting the interest of the owners. As a result, there is the tendency that sharp practices will be present. This possibly means that some of the money generated through this venture has very strong potential to be hidden or undeclared. This same undeclared money will eventually resurface to present a legitimate stance.

In the United Kingdom, incorporation with a limited liability status was eventually granted in 1862. Due to this, there was a rapid surge by people to incorporate companies. However, there were numerous incidents of early collapse of these companies evidenced by incidents of massive fraud.<sup>309</sup>

It was likely in the emerging markets of the United States of America that what we now see as a robust form of corporate form that matured early towards the colossus it later became.<sup>310</sup> The pattern or form that characterised the formation of the USA largest enterprises in the twentieth century was this: entrepreneurs would found a business, succeed and eventually make the business grow with money raised from the banks. The business went public and issued new stocks. For some of the firms, the stock market raised capital for them. Others role was to provide an exit rout to the founders and their heirs when they intend to cash out or diversify. Although, the descendants sometimes were involved in the management of the companies by taking over from the founders, sometimes, they hired managers for this purpose. Some heirs sold off their stakes and the managers raised new capital in public markets. However for many other companies, the stock market initial role was neither to raise new capital nor to directly allow for initial exit when the founders diversified, but to finance the massive mergers at the end of 19<sup>th</sup> century.<sup>311</sup>

A. Chandler made an influential analysis of how the “visible hand” of management eventually took over the proposition of the “invisible hand” of management earlier on propositioned by the notable great economist Adam Smith. With the advent of new technologies in the USA and the world, it became evident that individual entrepreneurs

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<sup>309</sup>This was as a result of improper management of the resources of these companies. Fraud was perpetuated and the money realised was laundered. R.I. Tricker, op. cit p. 36

<sup>310</sup>T. Clark, (2004) *Theories of Corporate Governance, The Philosophical Foundations of Corporate Governance.* p.2 Routledge Taylor & Francis Group publishers

<sup>311</sup>M.J Roe, (1994) *Strong Managers Weak Owners – The Political Roots of American Corporate Finance* p. 4 Princeton: Princeton University Press.

lacked the requisite tools to make things happen. The task was very gigantic as exemplified with the construction of railroads across the USA.<sup>312</sup>

On account of the above, the ownership and management soon separated. The capital that was required to build railroads was obviously more than that needed to start a plantation, a textile mill or even a fleet of ships in the USA. This made it very difficult for a family or a single entrepreneur to build a railroad. Even the many stock holders or their representatives could not actually manage this. The administrative tasks were to say the least very complex to manage. This could only be done smoothly by some fulltime salaried managers. It was only in the raising and allocation of capital, setting of financial policies and the selection of top managers that the owners of railroads had a real say in railroad management.<sup>313</sup>

Gravitating towards the convergence question at this stage of evolution, still presented the dominant question of how these managers were able to manage the firms' resources without recourse to fraud. This was and still is a big issue in the corporate set-up. There were incidents of fraud. Needless to over emphasis, the extra money they made, was conveniently laundered or transmuted into the "legitimate economy," hence the relevance to the central term of my thesis. It has been noticed by the author that whatever tempo or evolvement of the corporate theoretical stage, there is always the issue of some managers trying to cut corners and enrich themselves illegitimately to the detriment of the owners.

In the twentieth century, the work of prolific writers like A. Berle and G. Means was possibly one of the most influential to analyze the evolvement of corporate governance. Their work focussed on the idea that the growing concentration of economic power plus the increased dispersion of stock ownership had made the public firms in which there was the presence of separation and ownership, central to the economic activity in the USA.<sup>314</sup> It took almost a century in 1932 for the above authors to add their input on the first salvo fired by A. Smith in 1838 about the possible problems in company ownership and control.<sup>315</sup>

Suffice to say that the translation of possibly of about two-thirds of the industrial wealth from individuals to the ownership of very large public funded institutions virtually changed the

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<sup>312</sup> A.D Chandler, (1977), *The Visible Hand*, p.87 Cambridge Massachusetts, Belknap Press

<sup>313</sup> Ibid

<sup>314</sup> A. Berle, and G. Means, (1967) *The Modern Corporation and Private Property*, p.xli, Harcourt, Brace and World, Inc. New York

<sup>315</sup> The work of Berle and Means has been accredited with as being one of the best explanations in issues concerning the investors and corporate ownerships.

lives of property owners, individuals and the methods of handling property tenure. This basically meant that there must be a new form of economic organisation within the larger economy.<sup>316</sup> Interestingly, it was their classic effort that was accredited with influencing the legal and economic theory plus some US laws. But the law setting up the Security and Exchange Commission (SEC) was influenced by the Wall Street crash and subsequent US Congress efforts. Their work one can say was also very influential to the practical achievements of President Roosevelt's New Deal that happened from 1933 to 1940.<sup>317</sup>

Of course, it may be possibly right to say that the whole thing hinged on how managers controlled the assets to the overall benefit of some passive owners. The author posits that it is the work of A. Berle and G. Means that could possibly be used as a foundation of a new corporate governance theory - agency theory. Surprisingly, this potential was not quickly noticed by other subsequent writers.

It is my submission that whatever postulation put forward by various writers, are all directly or indirectly contending on how managers manage the resources. The problem that is usually encountered is the diversion of the firm's resources to other corrupt uses. When this happens, the proceeds will be hidden. The next natural course of event is for the managers or the culprits to reintegrate their "fraudulent gains" into the legitimate economy. And this is done by laundering, tacitly approving the convergence question that is the subject of this thesis.

### ***Agency theory and nexus to the convergence matter***

The development of corporate governance came from various disciplines. And the theories often postulated by different people emanated from different academic disciplines like finance, economics, accounting, law, management, and organizational behaviour.<sup>318</sup> We also should not be tempted to lose focus of the fact that agency relationship covers other areas like the company and its creditors, the employer and the employee.

Another important thing to bear in mind is that whatever the theory that is out there, may not be applicable universally due to the diverse nature of the global economy. In this thesis, we are focusing on the Anglo-American corporate set-up, which tilts towards the maximisation of profit and also protection of minority shareholders.

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<sup>316</sup> Ibid

<sup>317</sup> O. Nodoushani and P.A Ndoushani, (1999) The debate on Corporate Governance: An Historical Analysis of Berle and Means Contributions, *The Journal of Behavioural and Applied Management*, Summer / Fall, 1.1, 55-64

<sup>318</sup> Ibid no 256 p.15



It is fair to state that the background of the agency theory started with the work of A. Beale and G. Means. It is usually identified with companies that are set up with the characteristics of separating the owners and the control mechanisms. In fact, the theory later emerged from the seminal inputs of prominent authors like A. Alchian and H. Demsetz<sup>319</sup> and M.C. Jenson and W.H Meckling in particular.<sup>320</sup> The firm was explained as a nexus of contract that is located among individual factors of production. Agency theory explained that the company is a scenario of some constantly renegotiated contracts by individuals that have the aim of maximizing their contributions.<sup>321</sup>

The essence of the agency theory is predicated on the problem of the management and finance. Here, the managers would raise funds and try and put them to a productive use or may even cash out their “interests” in the company. The financiers also need the managers’ “special gift of management” to make positive returns to the funds invested. In principle, both sign some pacts that will elucidate what the managers will do with the funds, and the modality to divide the returns between them and the financiers. The problem here is that unforeseen contingencies are hard to decipher. It is then difficult to get “a complete pact.” This prompts a situation, where the managers are now allowed to have a say in the “residual decisions.” This is a right to make “substantial discretionary decisions” without recourse to the financiers. Interestingly, and from this point, there is no guarantee that decision would be made in “good faith.” And it concerns much of the constraints that the managers will put upon themselves or the investors put on them to reduce misallocation and induce the financiers to provide more funds.<sup>322</sup>

In this agency set up, the shareholders are regarded as the “principals” in whose interest the company should be run. The managers are seen as the “agents.” The shareholders are usually classified as “residual risk bearers.” It means that before they get their return on the funds that they have put in the company, other stakeholders should have been “settled.” This is irrespective of the fact that the shareholders contributed handsomely to the “fund base” of the firm or company.

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<sup>319</sup> A. Alchian, and H. Demsetz (1972) Production, Information Costs, and Economic Organisation, *American Economic Review*, 62, 777-95

<sup>320</sup> M.C Jenson, and W.H Meckling, (1976) Theory of the Firm, Managerial Behaviour, Agency Costs and Ownership Structure, *Journal of Financial Economics*, October, 305-60

<sup>321</sup> S. Learmount, (2002) Theorising Corporate Governance: New Organisational Alternatives, ESRC Centre For Business Research, University of Cambridge Working Paper no 237

<sup>322</sup> Ibid No 313 p.5

We have to note that in this theory, there are a number of drawbacks. This is hinged on the opportunism of what may be classified as self-interest of the agent. Let us take for example, the so called agent may not actually act in the best interest of his so called principal or may in fact act only on a partial capacity to his principal's interest. The agent may have different "risk appetite" compared to his principal. He may use his powers to his own pecuniary advantage against the principal's interest.<sup>323</sup>

There is also the problem of imbalance information between the agent and the principal, fondly identified or tagged "information asymmetry." The principal is perhaps always identified as having in his possession fewer level of information and therefore at a disadvantage. Perhaps some people may begin to wonder how this fits into this thesis. The writer submits, that when the owners of the firm or company as the case may be, allow the managers to take control of the firms by way of management, some of these managers have very close proximity to different levels of information needed to defraud the company. They will make use of the information to the detriment of the shareholders. When they make this money, they will not want people to notice. They will devise different ways of hiding this loot which may include devising various forms of obscure financial vehicles in order to eventually end up using the illegal proceeds. They cannot get round this without being involved in laundering to reuse the money.

In the context of control to minimise or avoid corporate lapses that brings in negativity in firms, agency theory adds a good momentum geared towards minimising the agent/principal issues. How this is true in reality is a "different cup of tea" as there are instances of corporate collapses with "Enron issues." The expenses that are incurred to checkmate this going ahead are known as "agency costs."

M. Blair did indicate that managers are supposed to be the "agents" of a corporation's "owners." However, these managers are supposed to be put under the radar to make sure that they do not abuse their powers. It is all these expenses, inclusive of the ones used to discipline the "messengers" to checkmate abuse that are classified as stated above, agency costs.<sup>324</sup>

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<sup>323</sup>There have been cases of the managers being identified as misusing the corporate position that they occupy by illegitimately enriching themselves. Enron is a typical example.

<sup>324</sup>M. Blair, (1996), *Ownership and Control: Rethinking Corporate Governance for the twenty-first Century*, Brookings Institution, Washington.

E. Fama emphasised the irrelevance of ownership in a company as far as agency theory is concerned. The ownership of the money used to set up the firm should not be confused with the ownership of the firm. Each factor in the firm is owned by someone. The company is simply the set of contracts that covers the manner inputs are joined together to give rise to outputs and the manner receipts from outputs are shared among inputs. In the ‘nexus of contracts’ perspective, ownership of the firm is to say the least an irrelevant matter.<sup>325</sup>

### ***Other relevant theories connected with the convergence question***

We have had a possible encouraging view concerning the agency theory and its connection to the issues of corruption or fraud. This may be seen from the perspective that the managers abused their position on account of their contractual positions and advantaged assessment of information available to them.

Very interconnected or closely viewed with the agency set up is the theory that has been classified as transaction cost economics (TCE). The work in this was expounded by the input of O.E. Williamson.<sup>326</sup> The agency theory is all about ‘the nexus of contracts.’ TCE sees the company or the firm as a governance structure. O.E Williamson built on the earlier work done by R. Coase in 1937 which presented an economic explanation why people choose to form partnerships, companies and other business concern instead of trading in a bilateral manner through contracts in the markets.<sup>327</sup>

There was a justification in this theory for large firms or companies that usually provide their own internal capital markets. Here, the cost of any ‘improper action’ by the managers may be reduced by what is termed erudite and excellent governance structure instead of realigning some incentives and then price them out. It may be interesting to ascertain what is meant by ‘improper actions’ by the managers. One does not need to look far to infer, that this simply involves ‘hidden misconduct’ by the managers. It is likely a case of some corrupt activities that usually brings ‘additional benefits’ to the managers’ pockets that will eventually be reintroduced into the lawful or legitimate economy.

P. Stiles and B. Taylor have pointed out that the agency theory and the TCE theory are both concerned with managerial discretions. Both assume that the managers are given to self-

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<sup>325</sup>E. Fama, (1980) Agency Problems and the Theory of the Firm, *Journal of Political Economy*, 88, 288-307

<sup>326</sup>O.E Williamson, (1975), *Markets and Hierarchies*, Free Press, New York, Williamson, O.E, (1984) ‘Corporate Governance,’ *Yale Law Journal*, Vol.93, pp.197-229

<sup>327</sup>R.H Coase, (1937), ‘The Nature of the Firm,’ *Economica*, Vol. IV, pp.13-16

interest-seeking, moral hazard and that managers operate under ‘‘bounded rationality.’’<sup>328</sup>The writer surmises that this means in the context, that the people entrusted with the management matters are likely to put in a ‘‘non-maximised-effort’’ that is not in the interest of the owners or shareholders. And the author may be possibly excused from classifying this attitude as one that is tainted with corruption on the part of the managers. But the truth of the issues is that in this instance, the ‘‘agent’’ usually takes advantage and get involved in illicit activities. The recurring decimal is simply that the managers whenever there is some window of opportunity, there is the tendency, some of them engage in corruption that brings into the context, ‘‘dirty money’’ into their pockets.

We should not lose sight of the fact that there is another relevant theory that has relevance to the issue of corruption in the corporate setup. This has been classified as the stakeholder theory.<sup>329</sup>Here, the idea is that a wider group of constituents are focused on. The issue here is that it is not only the shareholders that are supposed to be granted or rather given greater attention by the ‘‘agents’’ or managers as the case may be, but rather a more enlarged ‘‘interest groups’’ such as the employees, the providers of credit facilities to the firm, customers, suppliers, government plus the local community. The result or end product of paying attention to only shareholders is that their interests are usually seen to be very paramount to the ‘‘agents.’’

The writer points out that when the managers’ focus is on the larger constituent, the interest of the shareholders becomes less visible. But this does not mean that they do not get back some of their dividends after all other people have been settled. In other words, the shareholders in this context are known as ‘‘residual risk bearers.’’ This means before the shareholders are paid, the agents must have settled other people like loan creditors. It can be interpreted as a situation where the shareholders have a vested interest and ensure that the larger society is also taken care of beneficially. It does not mean that many companies do not still focus on ‘‘maximising the shareholder value’’ and concurrently, focus on the larger constituency.

The situation may arise where the shareholders and the stakeholders prefer different governance mechanisms. In the Anglo-American type of governance that has been tapped in

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<sup>328</sup>P. Stiles, and B. Taylor, (2001), *Boards at Work: How Directors View Their Roles and Responsibilities*, Oxford University Press, Oxford. p.90

<sup>329</sup>Generally, the stakeholder theory has been seen as being in juxtaposition with the popular agency theory.

some less developed economies like Nigeria and Ghana,<sup>330</sup> the emphasis is on the shareholder value. This comprises a board of directors that is made up of both executive and non executive directors mostly elected by the shareholders. However, in certain places some stakeholders like employees are by law, have their representatives on the company board - Germany is a good example.<sup>331</sup>

Notably in this theory, it has been argued that the people responsible for managing a company must first of all take note of the interests of all the people in the company - stakeholders. However, the theorists have not been able to present a convincing case on how this can be achieved, for example by trading off one interest group with the other. Here, there may be no defined measurable objectives. The effect then culminates in leaving the managers unaccountable for their actions.<sup>332</sup> M. Jensen<sup>333</sup> believes that enlightened maximisation of value is identical to enlightened stakeholder value. The same structure is used in both. It is the belief or expectation that the requisite trade-off between the stakeholders will be successful if the managers use the long run value of the company or firm.

The writer does not agree with this view. To begin with, where were the “managers” in the case of Enron? The company managers were aware that there were various stakeholders like the employees, the larger communities and others. Yet the company still found it convenient to behave in such a manner that completely jettisoned the stakeholder theory. It is no longer news that Enron was projected as a “new model” in the USA of how a modern firm should be run, before it collapsed. It was showcased as a “second to none corporate structure” in the Anglo-American corporate set up before the bubble burst. There have been suggestions that other jurisdictions, notably located in the “common law axis,” were beginning to find a way to mimic what Enron was supposed to exemplify. The company made enormous profit by defrauding the investors. There was glaring falsification of financial reports and the setting up of special purpose entities (SPEs) used to dock the regulatory radar. The state of California in the USA had a very negative dose of this “Enron treatment.”

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<sup>330</sup>This is not surprising as the United Kingdom was their colonial master. The tendency is to follow the United Kingdom model.

<sup>331</sup>This is referred as “Codetermination,” and it applies to both private and public companies provided there are more than 2000 employees. It is deeply rooted in German corporate governance traditions.

<sup>332</sup>M. Jensen, (2001), “Value Maximisation, Stakeholder Theory, and the Corporate Objective Function,” *Journal of Applied Corporate Finance*, Vol.14, No. 3 pp. 7-21.

<sup>333</sup>Ibid

The author submits that it was due to the fraudulent activities of the managers in Enron that the company collapsed. The company betrayed not only its shareholders, but its employees and customers. It was part of the reason that the USA promulgated the Sarbanes-Oxley Act in 2002 (SOX) by the 107<sup>th</sup> USA congress.<sup>334</sup> Chief Executive Officers (CEOs) were held accountable for the financial statements of their firms and could end up twenty years in jail.<sup>335</sup> The Securities and Exchange Commission (SEC) in the USA uses this legislation in civil suits to crack down on CEOs. SOX also addressed the corporate scandals in WorldCom, and Arthur Anderson - the company that acted as Enron's auditors.<sup>336</sup>

Another significant theory is the stewardship theory. The theory draws its strength on the assumption underlying the agency and transaction cost economics (TCE). Writers like L. Donaldson and J. Davis in their opinion cautioned against "swallowing" the agency theory in its entirety. The *locus* of their paper is that the agency theory emphasized the control of managerial opportunism by having a chairman that is totally independent of the CEO. The company uses incentives to bind the interest of CEO to that of the shareholders. They stress that the stewardship theory is for the combination of the two roles (CEO and the board chairman). This will help the shareholder returns. The essence is to give greater control to managers to take autonomous executive actions.<sup>337</sup> The "psychological state" of both the agent and the principal is also a crucial factor here. The manager may "decide" to act as an "agent" or a "steward," while the "principal" can also "elect" to allow the "agent" do so.

The author does not buy into the views of the above authors in the stewardship theory. They have taken a more relaxed approach to the issue that there should be the separation of CEO and Chairman in the company. My take, is that this has the potential to create a very powerful "agent" that can be very dictatorial in the management of the firm. This will give rise to autocratic style of management. This has the potential to materialise into a situation of "sealed lip management." Indeed, there is the likely tendency that others may be afraid to

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<sup>334</sup>SOX was primarily brought into play to crack down on corporate fraud in the USA. It also created the Public Company Oversight Board to oversee the accounting industry.

<sup>335</sup>See Section 404 of SOX 2002

<sup>336</sup>It is on record that WorldCom was charged by SEC in June 2002 for massive accounting fraud and ironically, the company was named by Fortune magazine as one of the most admired companies in the world in 2002. See also T. Clark, (2004b) Cycles of Crisis and Regulation: The Enduring Agency and Stewardship Problems of Corporate Governance, – An International Review, 12, 2, 153-61. Arthur Anderson was reputed to have acted beyond the scope assigned to external auditors in collusion with fraudulent directors in Enron.

<sup>337</sup>L. Donaldson, and J.H Davis, (1991), "Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns," *Australian Journal of Management*, Vol. 16 No. 1. pp.49-64

confront the “agent” that has these powers when fraud occurs. And this provides unnecessary edge to the “agent.” It is an avenue to possibly engage in corrupt activities knowing that you are very powerful.

So far, the writer has outlined the four major theoretical perceptions about corporate governance and their interconnectivity to the possible corruption question. These four are the agency, transaction cost economics (TCE), stakeholder and stewardship theories. However, amongst the lot, there is the prevailing view that it is the agency theory that has had the most profound effect, hence the emphasis on it. However, it is good to note, that there are other theories that may have also been credited as having “less impact” in their theoretical assessments. The author will mention them in a cursory manner. They include - management hegemony and class hegemony theories, resource dependence, path dependence, institutional theory, and network governance theory. The writer therefore submits, that the crucial noted issue with the theories is simply that whenever there is a “little loophole” with the “agent,” or managers, the tendency is that they are likely to engage in “sharp practice.” What this translates to is simply, that they generate “undisclosed wealth,” which usually ends up being “transmitted” into the formal economy. Of course, the “agents’ criminal ingenuity,” is usually brought into play to cheat the company.

#### **4.4 The essence of corporate governance in financial institutions: the bank as a model and implications in the convergence matter.**

In the preceding segment of this dissertation, emphasis was laid on the various major theorizations that may have impacted corporate governance. The salient point being that the “custodian of the company’s governance structure” would eventually when the opportunity creeps in, most possibly, will find a way to increase the “contents of his pocket.” Of course, this is usually to the detriment of the owners. It has been pointed out in this thesis that there is need for a positive corporate governance presence in companies to help checkmate the “negative attitudes of managers.” The basic thing to note is this: it is arguably better to have a more intrusive form of governance in financial institutions with particular reference to the banks than there is in other generic companies for reasons that the writer will elucidate in this segment.

More so, we should also bear in mind, that in generic companies and financial institutions, the “managers,” when they succeed in defrauding the firm, will eventually, launder the proceeds. The reader may be surprised at my continuous emphasis on this. The reason is

simple - it goes on to justify the convergence of ‘‘dirty money’’ with corruption, irrespective of the manner used to corruptly enrich the ‘‘agent’’ in the above circumstance.

### ***Why accord special attention to banks?***

The writer posits that the financial institutions with particular reference to the banks should be accorded a ‘‘special status’’ as far as ‘‘corporate monitoring’’ is concerned. They are special in the sense that the people entrusted to manage them, (mostly applicable to the directors) have to exercise the fiduciary duty. Of course, this is applicable to other non-financial setups. But the distinctive difference with the banks is that this fiduciary task is more expansive in the industry.<sup>338</sup> The managers of banks, as well as having a fiduciary duty to their depositors, who in all honesty, are exposed to risks of losing their money (risk averse), are also confronted with their duty to their shareholders (who are also risk prone). On account of this, the issue of trying to solve the task of ‘‘owner messenger issue’’ or ‘‘principal agent matter’’ that is fundamentally aimed at maximising the shareholder value is not appropriate.<sup>339</sup>

The banks as a whole are the main or most important source of external finance in the economy, with particular reference to the small and medium enterprises (SMEs). This therefore puts them in a very strategic position to allocate capital and also in the corporate governance (CG) of non-financial companies in certain jurisdictions. The banks’ participation in the governance structures of the non-financial firms in the Anglo-American axis is not particularly visible. This is in contrast with jurisdictions like Germany and Japan where big banks hold large shares. This enables them to be institutional investors, and consequently, do have a say in the management of those firms.

We should not forget that the banks are in the forefront of the payment system. Therefore, when we have systemic crisis, it is usually very costly to the society. If there is protection for depositors, this will usually help to dampen the effect. However, this increases the moral hazards<sup>340</sup> and possible adverse selection on the part of the depositors on which banks to

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<sup>338</sup> A. Mullineux, ‘‘The corporate governance of banks,’’ *Journal of Financial Regulation and Compliance* (2006) p. 1

<sup>339</sup> Ibid

<sup>340</sup> Here, a party to an agreement engages in riskier behaviour or fails to act in good faith because he will not bear the effect of his behaviour.



deposit their money. The above, will make the government to take drastic steps to protect the tax payers.<sup>341</sup>

It probably, goes without saying that “excellent regulation” and “supervision” of the banking sector must form part of its corporate governance. These, will make it more difficult for the ‘agent’ or ‘manager’ as the case may be to manipulate the system and gain massively from it. The absence of robust bank governance structure can lead to systemic crisis. If managers are unrestrained in compliance matters (this is part of governance issues in my opinion and possibly other people) by taking unnecessary risks to make more money, without taking into account the ‘externalities’ to the larger society, this may be a passport to bank failures. Hence, the particular attention to systemically important banks (SIBs).

Funny though it may sound, the lax control in the failed Investment Bank, Barings, can be attributed to lack of corporate and compliance issues that eventually contributed to its collapse in 1995. The collapse was substantially caused by one man.<sup>342</sup> He traded fraudulently and incurred massive losses in betting on futures contract that was linked to the Nikkei 225 stock index - more than £850m was lost. The Bank of England (BoE) on this occasion decided not to bail the bank out and allowed it to fail. Prior to above, it was BoE that bailed it in 1890 when it defaulted in its highly leveraged loan portfolio to the then Argentina government. There had been instances that the “Bankers Bank” stepped in to rescue banks due to their systemic importance. In the 1980s, the US authorities came to the assistance of Citibank and Chase Manhattan banks when it was apparent that they faced huge losses on account of the excessive lending that they granted to many Latin American countries (also referred to as Latin American sovereign debt crisis). This was done with the support of both the IMF and the World Bank. In the UK, Royal Bank of Scotland (RBS) was rescued with £45b in October 2008.<sup>343</sup>

The domino effect of bad governance in the banks can generate what is known as “creditor runs.” In “bank runs” people will be tempted to withdraw their money from the banks. Only the very first creditors to withdraw their money may receive a payout in time and in

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<sup>341</sup>It is envisaged at this point that the authorities, will endeavour to formulate better regulations aimed at the banks to reduce excessive risk taking.

<sup>342</sup>This has been dramatised in a film known as the “Rogue Trader.” Nick Lesson covered his loses fraudulently, until it was not possible for him to do so.

<sup>343</sup>The Guardian, “The RBS Crisis: a timeline of events” by Jill Treanor 22 May, 2017. Available on <https://www.theguardian.com/business/2017/may/21/royal-bank-of-scotland-a-timeline-of-events> accessed on 23<sup>rd</sup> September 2018.

full.<sup>344</sup> Here, the readily available liquidity will be exhausted in time. This can even be started by a very small group of depositors or other banks in the inter-bank market. As a very practical issue, once a run is started, the three notable bank creditors - depositors, bondholders and other banks will be withdrawing their money.<sup>345</sup>

There were bank runs by small depositors in the United Kingdom's Northern Rock. The "down fall" of Lehman Brothers and the eventual take-over of Merrill Lynch were all attributed to imminent runs by banks in the inter-bank market. The availability of depository insurance can serve as mitigation to these runs. But its effectiveness, in this respect, will depend on the exact details of the policy taken out. Prior to the 2008 unforgettable global financial crisis, most depository insurance companies were geared towards taking care of the "small depositors." But with the "Lehman issue," most countries were forced to make readjustments that enabled banks to issue bonds that were backed by states. For example, banks in the USA were and still being backed by Federal Deposit Insurance Corporation (FDIC).

In Nigeria, this is the responsibility of Nigeria Deposit Insurance Corporation (NDIC). The idea is to avoid minimal disruption to the financial setups or markets and calm the general public. Sometimes, the bank can be "calmly" taken over to secure depositors funds and also to save jobs when the institution is under capitalised. There may be the feelings that this will also lead to "bank runs." In September 2018, the licence of Skye Bank in Nigeria was revoked by the regulatory authority Central Bank of Nigeria (CBN) and the bank was replaced by another bank known as Polaris Bank Ltd. NDIC assured that the depositors' money was safe. This calmed frayed nerves in that country.<sup>346</sup> Interestingly, the minister of finance in Nigeria has called for the prosecution of the directors of defunct Skye Bank on suspicion of stealing.<sup>347</sup> This may be a timely reminder that the authorities are willing to act when things go wrong.

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<sup>344</sup> P. O. Mulbert, (2009) "Corporate Governance of Banks," *European Business Law Review*, Vol.10 (3), p. 6

<sup>345</sup> Ibid

<sup>346</sup> Skye Bank: CBN's intervention will ensure depositors' funds safety, says NDIC  
<https://www.vanguardngr.com/2018/09/skye-bank-cbns-intervention-will-ensure-depositors-funds-safety-says-ndic/> accessed 5<sup>th</sup> October 2018

<sup>347</sup> Defunct Skye Bank: Finance minister wants CBN, NDIC to prosecute directors.  
<https://www.vanguardngr.com/2018/10/defunct-skye-bank-finance-minister-wants-cbn-ndic-to-prosecute-directors/> . Accessed 5<sup>th</sup> October 2018

In the United Kingdom, directors that have fallen short of their fiduciary duties as enshrined in the UK Company Act 2006<sup>348</sup> will usually when caught by the long arm of the law face consequences. This could be disqualification. If it is a criminal matter, they will face criminal liability. In October 2018, two directors were convicted by the court in London for taking kick-back from a company. The two directors were top executives of the now defunct oil company Afren and were found guilty of fraud and money laundering. Osman Shahenshah, the former CEO of Afren and Shahid Ullah, took \$45 million from a secret deal that they made with their company's business partner in Africa (Nigeria). SFO director L. Osofsky said the directors, Shahenshah and Ullah:

*'failed in their duties as company directors, abused their positions, and lied to their board, ...instead of acting in the best interest, they used Afren as personal bank account to fund an illicit deal, with no regard for the consequences.'*<sup>349</sup>

The message is clear and simple - when directors fraudulently abuse their positions, they will not go free. 56 years old Osman Shahenshah was sentenced to a total of 16 yrs in prison, while Shahid Ulay, 59 got 14years.<sup>350</sup>

Aside banks' systemically very important status<sup>351</sup> and their early vulnerability to runs, they are heavily regulated entities. These regulations are arguably basically directed to check-mating the amount of risks they may take and to minimise, the effects on the tax payers.

### ***Other compressed matters arising***

It has been shown that the core corporate governance matters that came up during the last financial crisis were mainly related to lax board issues. There were question marks about leadership and oversight of risk management<sup>352</sup> in those banks and financial institutions that

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<sup>348</sup>See s172 of UK Company Act 2006

<sup>349</sup>UK enforcement: Former oil execs convicted of \$45 million kickback scheme by R. L. Cassin Wednesday October 24, 2018 available on [http://www.fcpablog.com/blog/2018/10/24/uk-enforcement-former-oil-execs-convicted-of-45-million-kick.html?utm\\_source=feedburner&utm\\_campaign=%3A+fcablog%2FsLbh+%28The+FCPA+Blog%29](http://www.fcpablog.com/blog/2018/10/24/uk-enforcement-former-oil-execs-convicted-of-45-million-kick.html?utm_source=feedburner&utm_campaign=%3A+fcablog%2FsLbh+%28The+FCPA+Blog%29) accessed on 29 October 2018.

<sup>350</sup><http://www.fcpablog.com/blog/2018/10/29/long-prison-terms-for-former-uk-oil-company-bosses.html> accessed on 30<sup>th</sup> October 2018

<sup>351</sup>J.R. Macey and M.O'Hara, "The Corporate Governance of Banks," 9 FRBNY *Economic Policy Review* (2003) pp.91-107. See also R. Levine, "The Corporate Governance of Banks: A Concise Discussion of Concepts and Evidence," World Bank Policy Research Working Paper 3404, 2004.

<sup>352</sup>V. V. Acharya, J. N Carpenter, X. Gabaix, R. John, M. Richardson, M. G Subrahmanyam, R. K. Sundaram and E. Zemel, "Corporate Governance in the Modern Financial Sector" in V. Acharya and M. Richardson (eds), *Restoring Financial Stability: How to Repair a failed Financial System* (Chester: Wiley Finance, 2009) at 185

failed or were witnesses to severe stress.<sup>353</sup> These are vital in banking. The banks are in the business of “risk taking” to make their profits. A situation where some of the “managers” in order to circumvent the system and possibly make “hidden money” by “foul means” is not a welcome development. Risks are taken without adequate consideration for the interest of “other people.”

As a result, there has been regulatory control to contain this because it does not make any sense for the “agents” to be taking a deliberately “blind folded” attitude to manage risks in the name of making better profits. As at the time of writing, the functions of the board in risk management and certain aspects of executive and non-executive directors has led to the fruition of Capital Requirements Directive IV (CRD IV).<sup>354</sup>

The board functions of regulated credit institutions, including banks, are now unequivocally to comprise of: a) the overall responsibility for strategic objectives, risk strategy and internal governance; b) the responsibility to make sure there is integrity in accounting and financial reporting; c) the responsibility to ensure compliance with laws and regulations; d) the oversight of disclosure and communications in the company; e) the responsibility to make available oversight of senior management; and f) the periodic review of all governance arrangements.<sup>355</sup>

CRD IV makes provisions for all directors to critically challenge senior management.<sup>356</sup> The directors (they are part of “agents” paradigm in the writer’s opinion) are to be independent in their discharge of functions. Should we now take this to mean that this is a move from a formal independence as such? However, empirical study has indicated that it is alright to have formal independence status on mitigation of risk-taking in financial firms.<sup>357</sup> In the UK, there is the view that the non executive directors have an important role to play in challenging critical company executive decision making.<sup>358</sup> Part of the reason that “Walker Review” came into play in the UK in 2009 was to specifically address corporate governance issues in

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<sup>353</sup> I. H-Y Chiu, “Corporate governance in banks – is it special?” *Company Lawyer* 2014, 35(6) 161-162

<sup>354</sup> This is Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activities of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directive 2006/48/EC and 2006/49/EC

<sup>355</sup> The Basil Committee’s recommendations on international best practices are in tandem with this – *Principles for Enhancing Corporate Governance* (October 2010).

<sup>356</sup> CRD IV art 91 (8) and Recast MiFID Art 9(1)

<sup>357</sup> B. A. Minton, J. Taillard and R. Williamson, “Do Independence and Financial Expertise of the Board Matter for Risk Taking and Performance?” (2011) at <http://www.ssrn.com/abstract=1661855> Assessed on 20 September 2018

<sup>358</sup> See the Walker Review 2009, Recommendation number 10.

banks and other financial institutions that may have contributed to the last financial crises. The board functionality and risk management were some of the issues identified. Some of the recommendations can still be applied to non financial companies.<sup>359</sup>

The UK Financial Services (Banking Reform) Act 2013 introduced the senior persons regime (SPR). The Act laid emphasis on the managers that are in a position in the bank and are seen to hold very significant portfolio to make decisions that may have the risks of very serious consequences to the bank.<sup>360</sup> These persons can be approved or given the stamp of authority to function as such by a regulatory agreement that will indicate the specific responsibilities that they will handle. This can also be altered or amended in future with the regulators if the focus or area of responsibility changes. The Act was mainly based or guided by the recommendations of the Parliamentary Commission on Banking Reform in the UK.<sup>361</sup>

The Act is an avenue to punish the senior persons that have contravened the Code of Conduct that is applicable to them, and are knowingly involved in a regulatory contravention by the said financial institution<sup>362</sup> (although to prove knowledge will require a significant amount of evidence).

“Agents” in financial institutions are also part of the board. In fact, they have the legal obligations to exercise their fiduciary responsibility under company law, as directors under ss172–174 of the Companies Act.<sup>363</sup> It is aimed to checkmate “corporate excesses” by the firms. On the other side of the coin is the regulatory law, exemplified by the UK’s Financial Services (Banking reform) Act 2013. A situation has arisen where both the corporate law and the regulatory law are all pointing towards the same direction: to contain the activities of the directors and by implication “agents.”

Perhaps, it may be right to posit that we are entering (or already entered) a new phase of “containment” against the “agents” to checkmate them with both corporate and regulatory laws. My take is simple - both approaches should be accommodated to “checkmate fraud” in

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<sup>359</sup>J. Green, L. Johnson, B. Williams, (2007) “Corporate governance in financial institutions” *Compliance Officer Bulletin*, 146 (May) p.3

<sup>360</sup>Section 59ZA Financial Services and Market Act as amended, is very clear on this.

<sup>361</sup>House of Lords and House of Commons, *Changing Banking For Good* (Report of Parliamentary Commission on Banking Standards) (12 June 2013)

<sup>362</sup>See 66A, 66b, Financial Services and Markets Act 2000 as amended by the Financial Services (Banking Reform) Act 2013.

<sup>363</sup>Sections 172- 174 of the UK Companies Act 2006 contain specific fiduciary duties of company directors. Directors are expected to promote the success of the company, exercise independent judgement, and to exercise independent skill, care and diligence. This Act replaced the Companies Act 1985.

financial institutions. To quote a proverb, “it does not matter where a bullet is fired from; the important thing is that it hits its target.”<sup>364</sup>The targets here are the fraudulent “agents” that eventually launder their “spoil” to cheat the system. A situation has reached in the corporate governance of banks, where we may be witnesses (possibly, we are witnesses already) to regulatory liability taking the “upper hand” over company law liabilities. We are watching! And applicability of the two to address the issues should not be seen as being improper.

The truth is possibly that the regulations and the corporate law should be welcomed. It does not matter even if this is directed towards the financial markets. We should not forget that these regulations will enhance reputation, trust and integrity. As pointed out by R. Alexander, a situation where the investing public or suggestively the depositing public does not have confidence in the financial system, the effect will be that they are not likely to invest in them. Institutions and their professionals must make sure that they operate with integrity.<sup>365</sup>

#### **4.5 Conclusion**

It may be an undeniable element in this section of the thesis that aside other matters, the issues of “checks and balances” have repeatedly resurfaced in different ways. The possible primary aim of the checks and balances, have been geared towards limiting or stopping the so called excesses of the “officers” that are entrusted with the operation of the firm or company as the case may be. And this has been demonstrated by the legislations or laws that were issued by the relevant authorities. Some of these are still corporate or regulatory in character. In other words, they are encapsulated in corporate or regulatory laws.

From the manner that things are happening in the corporate circles, with particular reference to financial institutions, the author predicts that in the near future, the corporate and regulatory laws will be amalgamated. Already, there is really no difference: a lot of company law is now regulatory in outlook. The essence will be to curb the fraudulent activities of the “agents” entrusted with the responsibility of moving the firms, including financial institutions, forward. These include the activities of the members of the board of directors and others entrusted with the running of the legal persons, as well as those to whom management functions are delegated.

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<sup>364</sup>This is an African adage or proverb with special reference to the eastern part of Nigeria mainly inhabited by Igbo ethnic group with a population of more than fifty million people.

<sup>365</sup>R. Alexander, (2016) “The fact that it was technically legal doesn’t necessarily make it OK” *Company Lawyer* 37 (8), 233-234

More so, it has been indicated that the board of directors play a crucial role to suffocate the occurrence of corruption in legal persons. Focus was directed to the importance of good display of ethics or ethical matters. The writer agrees with this. In order to add additional momentum to this, it is submitted that additional drive is needed in this area. By this, I mean that the authorities should start from a very early period in the society to address this. If it is possible, even from a kindergarten stage of a person's life, ethical "behavioural mechanisms" must be taught in different stages of a person's academic journey. By this the concept of what is right should be learnt properly. Gradually, the individual, it is hoped as he progresses academically before maturity, may be able to transmit this into the larger society. It is my hope that the moral principles that can govern a person's behaviour in conducting various activities will be learnt. The suggestion may sound elusive or a long term project, but it is worth embarking on in my sincere observation.

The issue of whistle blowing was identified as an avenue that can be used to report infractions in corporate organizations anonymously. This is covered by legislations in some countries. In the UK, the Public Interest Disclosure Act (PIDA) 1998 covers this. The USA also has a similar legislation. The feeling is that they probably do not go far enough to cover whistleblowers. It is suggested that the various jurisdictions amend their law to specifically allow for a stated monetary emolument for the individual that "blew the whistle." The "whistle" if finally proved to be authentic or correct should attract a minimum of fifty percent (50%) of the recovered sum. This should also be applicable to financial institutions with special focus on the banks. The percentage may look astronomical to some people. But the truth of the matter is that some individuals are likely to be motivated to report what they believe is an inappropriate act to the authorities. I am aware there may be instances of frivolous reports. But at the end of the day, it is highly likely, that this will yield the needed results.

On the other side of the thinking spectrum is the fact that instead of "losing" the money to the culprits, it is better to motivate whistle blowers to report the "incident." At least if 50% of the recovered sum goes back to the organization or the government as the case may be, it is better than not getting anything back from the culprits via the report initiated by the whistle blower. With this, it is highly likely that the whistleblowers will be motivated, protected and ready to take the risk of reporting the corrupt incident, comfortable with the fact that he is protected by the law plus the anticipated largesse or windfall.

At the moment in European Union, only 10 EU countries have a comprehensive law protecting whistleblowers.<sup>366</sup>The good news is that on 16<sup>th</sup> April 2019, the European Parliament voted in favour to back the Whistle blower law in EU. All that needs to be done is for it to be approved by Council of Ministers, then transposition will take place over the next two years.<sup>367</sup>It covers a wide range of policy areas and inclusive of money laundering, banking and tax avoidance issues. When it comes into play, it is envisaged that it will save up to £9b in public procurement. People that want to report corruption in both private and public sectors can go directly to law enforcement or regulatory bodies. It is my suggestion that the ‘‘50% rule’’ be included.

Additionally, in some jurisdictions with reference to Nigeria, memberships of some crucial corporate committees are not on merit. This, in some instances is applicable to the external auditors as well. In certain cases, this will depend on favouritism. It is suggested that the authorities should be bold enough to tackle this by exhibiting a robust corporate and political will. The after effect of not tackling this may eventually lead to ‘‘corporate corruption’’ and the resultant effect of hiding the proceeds; and eventually undergo the laundering process.

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<sup>366</sup>See <https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/> accessed on 15<sup>th</sup> April 2019

<sup>367</sup>See <https://euobserver.com/social/144685> accessed on 17th April 2019



## CHAPTER 5

### The efficiency of the combative mechanisms

#### 5.1 Introduction

##### Structural approach

So far in this thesis, the writer has tried to present a number of issues relating to ‘‘dirty money’’ which typically also involves corruption. The previous chapter highlighted the importance of the role that corporate governance can play in corruption matters. Without it, the tendency will be that there is likely to be a situation where the people entrusted to ‘‘look after’’ the corporate set up will take advantage and abuse their roles. This occurs in form of engaging in activities that are totally incompatible with ‘‘fair play.’’ When this occurs, the ‘‘officers’’ enrich themselves, and also eventually engage in ‘‘washing’’ their illicit acquisitions.

This is highly damaging to a country. Putting a halt to this, or at best reducing this therefore becomes a priority. The author is aware that such issues will not be eliminated completely. The truth is that whatever legislation that is out there, is directed to check the momentum of the negative anti-social activity.<sup>368</sup> This is why there have been some forms of ‘‘anti-unjust enrichment mechanisms.’’ And these, can come in various forms.

The writer will endeavour, with regard to the above, direct the reader’s attention to the issue of ‘‘soft laws.’’ The role it may have played and likely still playing to reduce the incidents of accumulation of ‘‘dirty money’’ by various means will be highlighted. Indicative examples and explanation of what ‘‘soft law’’ is and its connection or importance to the convergence question in this thesis will be harped on. The fact that there are other sources of law that have also impacted on the control of bribery will be mentioned when appropriate. These can be called ‘‘hard laws.’’

Also of importance to the issue of ‘‘dirty money’’ that will find its way into the legitimate economy, will be the role that is also played by Bank for International Settlement (BIS) which has issued various pronouncements that impact on the subject of this thesis. These are usually done through the Basel Committee on Banking Supervision (BCBS). The author will

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<sup>368</sup>Irrespective of the fact that corruption has various/different meanings, the consensus amongst many people, inclusive of academic writers like B. Rider, R. Alexander, D. Chaikin and others, is that it has a negative effect to the society.

focus on some of the pronouncements of this committee that are of particular relevance to the subject of corruption or bribery in banks and measures that can be taken to reduce them.

This committee, issued the first anti-bribery or corruption “soft law salvo,” from which other notable “soft law bodies” built upon. They are therefore arguably the pacesetters. Their “pronouncements,” are seen in financial circles with special reference to the banks as a sort of “good mechanisms” that can be used to move the banking activities to a positive level and are generally adopted by the country’s regulatory financial apparatus (usually the central banks).

Also introduced is the work of the Financial Action Task Force (FATF), generally seen as the most effective organization dedicated to the reduction of money laundering and terrorist financing. Initially when it was set up, the focus was on drug money laundering. It picked the “anti-money laundering soft law momentum” from the initial pronouncements of BCBS - 1988 Statement of Principles.

The author will also inculcate the issue of the financial institutions with particular focus or reference to the banks making “stringent checks” on customers that they are about to enter into business relationship with, sometimes known as customer due diligence (CDD) or know your customer (KYC). This has metamorphosed into an acceptable mechanism that can be employed to wage war against “under the radar transactions.” The initial checks have therefore become very necessary provided that they are properly done without deliberately “looking the other way” by the officers involved.

Also noteworthy are the activities of two of the key International Financial Institutions (IFIs): the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (the World Bank), set up as part of the reconstruction efforts after the 2nd world war. Although there are other respectable IFIs, our focus will be on the IMF and the World Bank due to the “unique products” that they have brought to the convergence table. The impetus or the “added value” they have uploaded to tackle the convergence question will be analysed. There may have been signs that the two organizations have employed a “tactical back door style” or “carrot and stick approach” directed towards achieving their objectives or intention when carrying out their activities.

The writer will also provide a tactically compressed analysis or view on the activities of the Financial Intelligent Units (FIUs). These units are part of the Egmont Group. Their activities

have provided the required or necessary financial intelligence needed to subvert the harm done to the society by the issues of “dirty money” that are “washed” by the perpetrators for integration into the formal economy. Their continued presence in various jurisdictions, has contributed in harnessing extra information needed to check the malaise; although the emergence of the FIUs in some countries has presented a significant financial burden on them. We shall also have a look at the Wolfsberg Principles and how far they have contributed to stem the tide of money laundering. There may be the argument in some circles, that their activities may be classified as being sort of duplicative of other initiatives engineered possibly by other organizations. Their members have increased over the years. They are more than 12 powerful private banks.

The contributory essence of the Vienna Convention and Palermo Convention will also be highlighted as they are regarded as important precursors to other initiatives in the containment of money laundering. Of similarly great importance is the impact that the European Union Directives have had. The contributions they have made to reduce the circulation of “dirty money” will be elucidated.

## **5.2 The essence of international soft law interplay in the convergence dilemma.**

Any discussion or analysis of the essence of soft law and the role it has played in controlling corruption may be inchoate without firstly linking it within the context of the examination of the sources of public international law. This is important. It is a fact that most international rules or standards for financial institutions have actually evolved from a sort of nonbinding and “freely consensually” given mandates. This may also be seen to be in the context of the inadequacies that can be associated with sources of public international law.

We may now turn our attention as indicated above to the sources of public international law and eventual “gap closing” by soft law to control corruption. In fact, there is an increasing feeling or recognition that traditional sources of international law are not adequate or clinical enough to explain and describe the normative developments of various areas of the interstate relationships.<sup>369</sup> The traditional sources of international law are embedded in Articles 38 (1) (a)-(d) of the Statute of the International Court of Justice (ICJ).<sup>370</sup> The contents of the above

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<sup>369</sup> Ibid No 7 pp. 267-321.

<sup>370</sup> Article 38(1)(a)-(d), ICJ Statute, in D.J. Harris, *Cases and Materials on International Law*, Appendix 1 (London: Sweet and Maxwell, 1991), pp. 990-1002. The traditional sources include – (a) international conventions, whether general or particular, that establish (b) rules expressly recognized by the contesting states; (c) international custom, as evidence of general practice accepted by law; (d) the general principles of law as

Article are always seen as definitive statements with regard to the sources of international law. However, the two most cited sources of international law are treaties and customs.<sup>371</sup>

Treaties in international law usually create binding legal obligations that are specifically between states. These may come in form of multilateral, bilateral or even regional agreements. Many of these may contain specifics for the way disputes that may arise between the state parties are to be addressed. Differently stated, there are usually provisions for state responsibility<sup>372</sup> to be invoked in most of these treaties. This happens or occurs when there is a breach of obligation under that treaty that may result in liability and/or reparations as the situation demands. And this may depend on the subject of the dispute brought forward.

As things presently evolve, there is the feeling that the general sources of international law have become inadequate or not very convincing to solve or rather explain certain matters in the financial sectors or institutions and even between nation states (this can be in the context of international relations). The above observation can rear its head in the various sectors of the economy. These may include but not limited to the banking sector, the telecommunication industry plus the perceived prudent regulation of some big firms or the multinational industrial organizations. In these areas, it is possible that different multilateral nonbinding legal codes play significant (they have actually played this out) part in directing the conduct of the countries. The author's attention in this is in the financial and corporate organisations with particular reference, sometimes, to the banks.

It is probably obvious that in the financial sector, there is the non-presence of the traditional sources of international law that may have helped to tidy things up and to fine-tune financial standards. It is as a result of this, that many countries around the globe consented to implement certain standards generated by organisations from outside the scope of the traditional customary sources of international law. The implementation and possible acceptance of the various segments of the "Basel tutorials," can be categorised as a significant pointer to the inadequacy of the traditional customary sources of international law. This, the author will provide further explanation later. Of course, we have experienced the

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recognised by civilized nations; ...judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rule of law.

<sup>371</sup>Oppenheim's *International Law* states that "customs and treaties.... are the principal and regular sources of international law" (Jenning's and Watts, 1996, p.24).

<sup>372</sup>State responsibility law are the principles that govern when and how a state is held responsible for a breach of international obligation.

germination of the ‘‘OECD pronouncements,’’<sup>373</sup> which is also in the mould of the ‘‘Basel tutorials.’’ It is on account of the gaps exhibited or created in the traditional customary international law platform, that these other sources reared their heads. These sources, one is happy to observe, are not in the ‘‘hard law domain.’’ This may be debatable from a different perspective.

### ***The potency of soft law in prompting binding norms and principles***

The concept of international soft law as earlier indicated can be referred to include those legal norms and principles, including the codes of conduct, and also those transactional orders of state behaviour. These have to be accorded recognition in either a formal or an informal agreement that are seen to be multilateral. One can therefore, indicate that it is on the basis of the above, that it may possibly be right to stick to the observation that soft law usually presumes voluntary consent of the parties to carry out the stated issues enumerated in the arrangement. This may be with the intention of adopting it into national regulatory laws as the situation may demand. But the important thing to note here is that the agreements do not have the stated ‘‘*opinio juris*’’ as in customary international law source/s.

It is well known fact that international organizations, formal ones like the United Nations (UN) as much as the informal ones like the G8 and others, more and more make use of the rules that their original drafters do not consider to be ‘‘legally binding.’’ These will have all the textual characteristics of the binding international treaties or resolutions of international organizations.<sup>374</sup>

One is aligned to the observation that the international soft law exhibits the characteristics of being flexible. It is an avenue for states to embark on measures or steps focussed on regulating very sensitive or complex areas of international interactions between countries. The result, may be seen or classified as that soft law has the strong potential to fashion out the right mix of issues between it and the ‘‘hard law’’<sup>375</sup> in regulating a specific problem area.

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<sup>373</sup>See OECD Guidelines for Multinational Enterprises of June 21, 1976 which was later updated for the 5<sup>th</sup> time in 2011 since it came out. These are recommendations for responsible business conduct from 44 adhering governments. This represents all regions of the globe and accounts for about 85% of foreign direct investments (FDIs). This is a solid example of a code of conduct (soft law) directed towards both natural and legal persons. Its part 1 section 7 is directed at bribery and extortion.

<sup>374</sup>M. Goldman, (2012) ‘‘We need to cut off the head of the king: past present and future approaches to international soft law’’ *Leiden Journal of International Law* 25 (2), 335-368

<sup>375</sup>‘‘Hard law’’ actually refers to the binding legal instruments and laws. It gives countries, states or international players the actual binding responsibilities and rights, and can trigger a cause of action before the International Court of Justice.

The probable result will be that the soft laws will eventually be very noticeable in facilitation of the development of standards that will guide financial supervision. This can be anti-bribery standards in banking. Interestingly, these are done in such a way as to at least give an impression, even if it is in theory, to be seen to protect the states' sovereignty or independent status. Of course, it will be surprising to see a nation that will like its sovereign status to be violated, however weak the state may appear to be seen. They will always want to be seen to be "flexing their muscles" in international relationships with other countries.

There may be some very evidential circumstances, where the soft laws will end up being promulgated or legislated into the national laws of countries the way it suits them. These are usually done by the countries sometimes to avoid some "international regulatory sanctions." OECD issued its Convention on combating the bribery of foreign public official in 1997. This is a soft law mechanism. It also has its recommendations that came out in 2009 on tax deductibility of bribes of public officials. Prior to this, bribery money handed out to secure contracts were later deducted as business expenses by the people or companies involved. In order words "bribery money" had "tax deductible status." Some of these companies were involved in transacting businesses in foreign jurisdictions with particular reference to the developing economies or less developed countries (LDCs). OECD as an economic block or organization was not comfortable with this idea and actually frowned at this vehemently, hence in 2009, it issued its recommendation on Tax Deductibility of Bribes to Foreign Public Officials as indicated above.<sup>376</sup>

Some hid under the impression that bribery was a way of life in developing countries (again this is debatable because it depends on which section of the developing country you are focussing on) and therefore, it was justifiably correct to "grease the elbows"<sup>377</sup> of public officials in securing contracts. The impact, this had on other non-OECD states was for them to be seriously persuaded to find a way of reflecting the essential provisions in their local legislation. At this juncture, it is pertinent for us to remind ourselves once more about the subject of this thesis which has focussed on converting the corrupt proceeds into legitimate use by the culprits through money laundering.

The "legislating" of OECD anti-bribery convention that is a soft law into national legislation in one form or the other will help dampen the velocity of the "dirty money" process. The

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<sup>376</sup>This was adopted by Council of Europe on 11<sup>th</sup> April 1996 at its 873<sup>rd</sup> session / CM(96)8/PROV

<sup>377</sup>In certain LDC countries like Nigeria it means to bribe people. It is corruption.

national legislation may have been done or in certain instances embarked on by some of the LDCs due to the fear of being denied market access into the OECD countries. You can imagine what it means to be denied economic or commercial interaction with many of the world's most advanced economies. The consensus is that, the consequence/s will be economically devastating to the countries.

Closely related to the "OECD Convention" is also another soft law mechanism - the FATF provisions. Countries do not like being left behind in the implementation of the recommendations that are usually issued by this organisation. Although, it has a soft law status, but contravention of its recommendations, usually attracts very negative commercial or financial global consequences to the defaulters. They are not comfortable when FATF "barks" in their usual way through peer review assessment. FATF can recommend that "defaulters" be excluded from entering financial relationships with banks or "other bank-like-set-ups" located in developed countries. In fact, the adherence to FATF recommendations that has a soft law status, the author submits is the "beginning of wisdom" in financial circles.

We should always bear in mind that the concept of soft law has been seen from various lenses by the academia and has "suffered" from being analysed from various perspectives. It only goes to indicate its complexity possibly when looked at as a social science concept. Nevertheless, it may not come as a surprise, that on account of the above, international lawyers have therefore called into play, legal doctrines that directs attention to the main elements of the legal system. These include rule precision, quantum of obligation, delegation of authority that is used to apply compliance, and the sanctions involved.<sup>378</sup> All these, are flexible in nature and not static; and at the end, depends on the degree of their application by the states or organizations involved.

When the rules are not precise, there is the tendency for the addressee to behave in such a manner with regard to the soft law to avoid compliance. There are usually provisions that are seen to be ambiguous in the agreement between the parties. The absence of precision will therefore be a window or excuse for the state to interpret it the way that suits them. In a sensitive area like banking regulations, parties could possibly involve themselves in going after vague agreements with the intention of avoiding their commitments and to interpret the

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<sup>378</sup>K.W Abbott, et al, (2000) "The Legalization of International Soft Law." *International Organization* 54, no. 3 401-419. The three elements of precision, obligation and delegation were used by the authors to assess the degree of legalization of a certain set of international rules or norms.

issues in a manner that protects their interest. The writer notes, that if there is much precision, this may not be to the advantage of a party. It is better to have a little bit of ambiguity, more particularly, when a party or state may not be in a position to know how this can be interpreted in future. So a little bit of “ambiguous indulgence” will be recommended. It enables a party to wriggle out of contentious or very tight situations.

When you have a look at the issue of obligation, it may extend from a legally binding one and to even some few ambiguous contents that are designed to be hortatory in content. At the end of the day, they are seen not to generate “specifics that can be enforceable.” However, they are toned into very “soft forms.”<sup>379</sup> The idea will be to create a sort of nonbinding commitments that can generate at most an “accommodated pressure” but will in all honesty lack the needed binding international legal obligation in a very strict manner. But when this attitude is compared to obligations under international law, at least the states or the international bodies or parties involved actually have the competence to do so. And the parties must or do acknowledge that the source is authentic, authoritative and above all should have enforceable capacity.<sup>380</sup> Both precision and degree of obligation can be seen to be correlated.

There is a third dimension to the legal system which is delegation. The settlement of grievances may be dependent about how the parties are willing to accept a third party to fashion out amicable acceptable solution. It is a fact that in public international law, the rights and the obligations that the parties have are usually used by the arbitral tribunals and judicial bodies as legal basis in arriving to their settlement for the parties. Contrast the above with dispute or “settlement of differences” in soft law. Issues are usually mediated upon by the participants involved themselves. A situation where you find out that third-party-dispute resolution is lacking; it now falls on the relevant international organization and states to use soft and hard law international standards or norms to deal with the situation.<sup>381</sup>

There is the provision of sanctions to address or evaluate the state’s legal scope in its international obligations and commitments. The issue of administering sanctions can either be in form of a directly or indirectly executed format. This will usually come into play if the indicated acts are deemed to be incompatible with the stated soft law. Here, certain benefits

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<sup>379</sup> Ibid No. 7 p. 270

<sup>380</sup> S. Oscar, (1977) “The Twilight Existence of Non-binding International Agreements” *American Journal of International Law* 71:295-304

<sup>381</sup> A. Aust. 2000 *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press p.70



may be withheld or there will be the imposition of penalty to the state or its citizens including its legal persons. But suffice to note that sanctions that have been attracted due to the enforcement of rights that arose under international law are not applicable in the soft law context. What this implies is simply that “state responsibility” will not arise in a strict sense. The liabilities that are made available under that scope of international soft law can come in “soft manners.”<sup>382</sup>

This can require the culprit to conform using a particular procedural style like reporting, consultation and sometimes a negotiation that is seen to be mandatory. The essence will be to harness a tangible manifestation of an honest assessment of that particular soft law. The sanction will usually have the capacity to influence the economic or financial conduct of that state or organization. There was a time when Austria, used the system of anonymous passbook in banking process (in 1999/2000). This angered a soft law body - FATF. The anti-money laundering body was not happy with this. Austria was placed in their “bad book”<sup>383</sup> and was subsequently threatened with sanctions. This was to come in the form of recommending that Austria be suspended from doing business with OECD countries. The good news during that period was that Austria subsequently adhered or positively responded to the demands of this soft law body.<sup>384</sup>

This demonstrated the vast influence a soft law can have to sway certain financial issues more particularly when it involved the laundering of money. The fact is that some of the soft law bodies with special mention of FATF has over the years, cultivated a lot of respect from countries around the globe to necessitate the carrying out of their financial pronouncements or recommendations. Whether this respect is usually “voluntarily” given is a different matter. Countries are expected to adhere to these pronouncements without even questioning the “legitimacy.”<sup>385</sup> The writer will later indicate why this has been the case.

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<sup>382</sup>J. Seidl-Hohenveldern 1979. “International Economic Soft Law.” *Recueil Des Cours*: Vol. 11 pp. 169-246

<sup>383</sup>FATF, at that time had a designated group of countries captioned “Non Cooperative Countries and Territories” (NCCT). Once a country finds its way into this list, the tendency is that it will find it difficult to transact financial business with other countries especially the developed ones. It was not and still is not good news to be associated with this. They are known as high risk jurisdictions. See [http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)) assessed on 4<sup>th</sup> October 2018

<sup>384</sup>Organization for Economic Cooperation and Development (2000), “Financial Action Task Force on Money Laundering Welcomes Proposed Austrian Legislation to Eliminate Anonymous Passbooks” OECD press release, June 15

<sup>385</sup>The thinking is that some LDC’s are afraid of sanctions that can come in various manners which may be obscured.

However, conceptually, international soft law has the ability and strength as far as regulations in banking and other financial institutions are concerned; to make available, an opportunity between the hard and soft laws to solve matters. In banking, the particular soft law that has emerged involves arguably consultations and also negotiations among the parties in fashioning out the acceptable formulae amongst the national regulators.<sup>386</sup>

Aside the fact that most states implement some soft laws into their respective national legislation, some notable economic blocks have agreed or committed to implement some financial regulatory soft laws within their block. The European Union (EU) is a typical example of the above. The EU has been implementing the various ‘Basel Accords’ into the union with their various Directives.<sup>387</sup>

However controversial the issue of soft law may be, we have to continue to bear in mind that their contributions in influencing the regulatory template in financial institutions, was recognised by leading international financial lawyers.<sup>388</sup> For example, J. Gold, during his evaluation of whether some IMF regulations on currency could be regarded as soft law had this to say:

*‘The essential ingredient of soft law is an expectation that the states accepting these instruments will take their contents seriously and will give them some measure of respect. Certain other elements are postulated. First, a common intent is implicit in the soft law as formulated, and it is this common intent, when elucidated, that is to be respected. Second, the legitimacy of soft law as promulgated is not challenged. Third, soft law is not deprived of its quality as law because failure to observe it is not in itself a breach of obligation. Forth, conduct that respects soft law cannot be deemed invalid.’<sup>389</sup>*

It is important to note that the above author’s assessment of what a soft law should look like has been applied in international banking regulations. This will suffice if the particular instrument or report has at least a quasi-legitimacy attached to it. And it is evident that the instrument has a collective intent derived from the participants.<sup>390</sup> This is understandable and it would be unreasonable to expect those that have not participated in the initial formation of

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<sup>386</sup> Ibid No.6 p. 142

<sup>387</sup> Ibid.

<sup>388</sup> J. Gold, (1982). “Developments in the International Monetary System: The International Monetary Fund and International Monetary Law since 1971” *Recueil des Cours*.

<sup>389</sup> Ibid at p.156

<sup>390</sup> J. Norton, (1995) *Devising International Bank Supervisory Standards*. Dordrecht: Kluwer. p.216

the soft law to be willing ‘performers’ of the contents. However, some countries have found themselves in this bracket as far as financial regulation is concerned.<sup>391</sup>

Indeed, the issue of ‘soft law’ and the role it has continued to play, both directly or indirectly, to checkmate the tidal waves of corruption, will be with us for a considerable length of time to come. Therefore, the reader should not express much surprise, if this resurfaces in subsequent section/s of this chapter. It is actually on account of the issues involved in transposing certain ‘pronouncements’ into national laws that has made it difficult to shy away from the debate surrounding the soft laws.

### **5.3 The role of Bank for International Settlements (BIS) in the convergence issue**

We have above had an insight into the role that has been accredited to soft laws in fashioning out some recipes to counter corruption. This occurs mostly through legal persons with particular reference to financial institutions, mostly epitomised by the banks. The banks have over a long period of time acted as intermediaries or as one of the gatekeepers in financial circles. They have actually cultivated the impression that the economy cannot in the real sense of the word, do without them. In truth, they are key players in any economy and as such the relevant authorities should as far as possible do the needful in monitoring and keeping them in check. By this, ‘negative activities’ will be minimised in these legal persons. As a result, corruption and its other ‘subsets’ will possibly, be reduced drastically in financial circles and the society as a whole. It may be unreasonable to expect that corruption that brings with it money laundering will be ‘completely wiped’ off the slate. The sensible approach would be to expect in the society for criminalities to be reduced, even if this is achieved through ‘some sort of indirect mechanisms.’

This links with the role that BIS plays in reducing corruption and money laundering via ‘indirect pressure.’ Originally established in 1930<sup>392</sup> as the ‘Central banks Banker,’ the Bank has played a key role in promoting economic stability. The bank gradually changed its role to tally with the economic tides of the period. Since the 1930s the bank has cultivated the cooperation of central bank governors. This has been evidenced by the regular meetings in Basel by central bank governors and experts from central banks and other agencies. As a result of the above cooperation, BIS was able to develop its own research in financial and

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<sup>391</sup>This has prompted the question of legitimacy of the ‘imposed soft laws’ amongst academic commentators.

<sup>392</sup>Established by Belgium, France, Germany, United Kingdom, Italy, Japan and Switzerland. Available on <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280167c31> Accessed on 2<sup>nd</sup> November 2018

monetary economics. This research has aided in a very tremendous manner the dissemination of both economic and financial knowledge that can possibly be said to have also aided the fight against money laundering and corruption.

The bank focussed during the 1970s and 1980s on managing the trans-border capital flows of countries. This was as a result of the oil crisis and the international debt crisis of the period. Interestingly, it was the crisis that we had in the 1970s that triggered the interesting issues that concerned the regulatory supervision of the internationally active banks. This eventually led to the emergence of the Basel Capital Accord in 1988 and subsequently its revision to ‘Basel II’ and presently ‘Basel III.’

### ***The Basel Committee on Banking Supervision (BCBS)***

Amongst the most important of the BIS’s various committees is the Basel Committee on Banking Supervision - BCBS. This is an “indirect mechanism” that the central banks of most countries listen to when they make their “pronouncements” and thus another “tool of soft law” within the financial institutions with particular reference to the banks.

Some of the pronouncements have focussed on the way banks are to be regulated and governed, including how to improve the banks’ corporate governance mechanisms and indirectly focussing on how to combat fraud and to suggest ways on how the banks should have sufficient reserves to keep them afloat when there are downturns in their business environment.

This committee is therefore possibly the primary global standard setter for the prudential regulation of banks. In fact, it provides a forum for the regular cooperation on banking supervisory issues. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions. It came into existence in 1974 as a result of the aftermath of disturbances in the international currency and banking markets.<sup>393</sup>

The Basel Committee has become one of the most influential international financial standard-setting bodies. Tellingly, it initially focussed on the G10 countries but has now expanded to focus or include all the jurisdictions where international banking activities are carried on. It has issued three key frameworks: Basel I, II and III. The regulatory capital reform package is a reflection of how the G20 in tandem with Financial Stability Board (FSB) plus Basel Committee clearly operate as a non-hard-law making entity. The aim is to promote sound

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<sup>393</sup> Available on <https://www.bis.org/bcbs/history.htm> accessed 3<sup>rd</sup> November 2018.

prudential regulatory benchmark on banking practices that will not be characterised by a casino-like or style business model that substantially contributed or worsened the 2008 Global Financial Crisis (GFC).<sup>394</sup> While a higher capital level was considered as a welcome anecdote, almost none of the big or mega banks that could not find their feet in 2008 crisis, stumbled due to capital inadequacy but rather due to a lack of liquidity and an equally large deficit of confidence due to financial frauds as amply demonstrated in the GFC.<sup>395</sup> This thesis previously indicated that where there is a demonstrated evidence of fraud, the natural tendency is for the perpetrators to hide the benefit. They therefore launder the corruptly received benefits of the fraud. So what the BCBS brought to the table as anti-corruption tool is that the regulatory authorities utilized its adherence to reduce corruption in the financial circles.

### ***Possible reasons why polities adopt or use BCBS to control corruption or fraud***

One of the reasons the committee was called into play by its originators was to make sure that the banks have sufficient capital to withstand turmoil in the financial sector. It is also good to always bear in mind that the countries that have ‘‘agreed willingly’’ to adopt this have actually in the real sense of the word little or no choice than to ‘‘flow with the dictates.’’ This is particularly applicable to the countries that are outside the G10. Critically, the use of sanctions by the international organization has in the writer’s opinion clearly undermined the so called voluntary nature of the BCBS adaptation. The rules are not enforceable in international law but are clearly sustained by certain number of both market and official measures which have contributed to make them sanctionable and still retain their soft law status.<sup>396</sup>

Most countries have little or no choice than to toe the line of adhering to the ‘‘Basel pronouncements.’’ This has been possible due to the fact that these countries are exposed to certain pressures or disciplines. The essentiality of market discipline readily comes to mind. Here, its primary objective will be to indicate that if countries comply with international financial standards, there is the tendency that funding or running costs are likely to be

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<sup>394</sup>E. Lee, ‘‘The soft law Nature of Basel III and International Financial Regulations.’’ (2014) 29 J.I.B.L 603

<sup>395</sup>C. Whalen, ‘‘BankThink Regulate Bank Behaviour, Not Capital, to Prevent Next Crisis’’ (May 2018) American Banker. Available on <https://www.americanbanker.com/opinion/regulate-bank-behavior-not-capital-to-prevent-next-crisis> accessed on 5<sup>th</sup> November 2018. See also P. Yeoh, ‘‘Global banking reforms: mission accomplished?’’ J.I.B.L.R 2018, 33(9), pp305-313

<sup>396</sup>M. Giovanoli, 2002. ‘‘Reflections on International Financial Standards as ‘‘Soft Laws.’’ In J.J Worton and M. Andenas (eds), *International and Monetary Law upon Entering the New Millenium – A Tribute to Sir Joseph and Ruth Gold*. London: British Institute of International and Comparative Law.

reduced by the country and its financial setups. But this was criticized by P. Kenen<sup>397</sup> on the basis that the observations of the Financial Stability Forum<sup>398</sup> (FSF) which was later replaced by Financial Stability Board (FSB) that suggested that the market participants and the Rating Agencies (RAs) are more concerned with the total compliance or adherence with international standards and less with the progress that a nation made towards implementation.

There is official sector discipline. This can take the form of the International Monetary Fund (IMF)/the World Bank assistance. It has been noticed that the IMF used the Basel Principles and classified them to be the benchmark for a good banking regulation. The IMF members are usually evaluated under the IMF's Article IV for surveillance programs. The IMF evidently has discretion to make compliance to BCBS as a parameter for good banking regulation. Not only that, they can use compliance to BCBS pronouncements as a condition precedent before they can consider a country as being fit to be granted financial aid. The IMF permits a country to draw from its rich General Resources Account up to a specified amount over a certain period. As previously indicated, the member country will give something in 'return.'<sup>399</sup>The member country is usually 'directed' to adhere to what can be classified to be "prudently clean focussed best international behaviour" in banking circles. This will usually mean that they have to follow the BCBS banking 'pronouncements.'

The World Bank has in its stead sent out the signal that it would use or rather has used the Basel Accord as a sort of bench mark in its lending programs. Indeed, the World Bank once indicated that it expects that the international community is likely to expect all countries to adopt and implement the Basel Committee recommendations.<sup>400</sup>The Bank negotiates conditions in its Financial Sector Adjustment Loans. Indeed, the equation is fairly simple. If you want a loan for developmental matters in your country, you have to go to the World Bank. It is like a *quid pro quo* setting. Differently put, financial or lending favour will be granted to countries that go to the World Bank for financial assistance, but it must be in return for something from those nations - you have to abide by the BCBS 'pronouncements' to get the World Bank's money. For example, the World Bank did adopt in the past, Core

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<sup>397</sup>P. Kenen 2001. *The International Financial Architecture: What's New? What's Missing*. Washington D.C: Institute for International Economics.

<sup>398</sup>Financial Stability Forum report 2000. "Report of the follow-Up Group on Incentives to Foster Implementation of Standards" FSB has replaced FSF.

<sup>399</sup>International Monetary Fund 2004b, "IMF Completes First Review Under Gabon's Stand-by Arrangement and Approves US \$20 Million Disbursement" (September 20, 2004).

<sup>400</sup>Basel Committee on Banking Supervision (BCBS) 2001a "The New Capital Accord." Basel: Bank for International Settlements.

Principles for Effective Banking Supervision 1997 (BCBS 1997) as a condition for releasing their money. Irrespective of the fact that the World Bank has continued to use financial sector adjustment loans in influencing a country's development regulatory policy, it started as far back as many years ago (actually from the 1990s) to utilize conditionality programs less in prudential regulations but more for banks' privatization and recapitalization programs.<sup>401</sup>

In financial circles, another respectable reason that can be put forward as to why countries take up BCBS standards is the issue of market signalling. It may be expected and a likely valid point, that many countries on account of reputational reasons would want to be seen to have adopted the "Basel pronouncements." They see this as a mark of excellent regulatory practice within their financial institutions. They also believe that it would enhance their chances in interacting favourably with other market participants by helping them to access the low cost-funding from banks and the capital markets. In short, some of the countries would want to present a sort of 'we have arrived stance' to the world that they now have in their stead a sophisticated apparatus and that they have the approval of the G10 countries.

Behind the scenes in the above market signalling, national regulators may have the feeling that they may not in actual fact save costs by adopting BCBS, but they would want to get involved with this just simply to signal to others that they are now very sophisticated. This attitude is laughable but that is the reality on the ground. And whatever version of the requirements that is expected of them, a solution would be for the countries to try and implement the version that may be less harsh.<sup>402</sup>

Another reason may be the issue of trans-border spill-over of negativities. Here you are probably going to generate matters of bad externalities from lax jurisdiction that evidently has a more relaxed financial atmosphere than that of the G10 countries. Some banks will now have the tendency to move to the environment that has a lax regulatory atmosphere. This can be called regulatory arbitrage in financial circles and this is what the BCBS will seek to reduce or avoid. There is the fear that the area with the relaxed financial regulations may end up being the dumping ground of underpriced financial assets. This will not be good for the overall financial global banking setup.

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<sup>401</sup>See R. Cull, 1997. "Financial Sector Adjustment Loans: A Mid-Course Analysis" World Bank Working Paper No 1804 Available on <https://siteresources.worldbank.org/INTINTERESTBEARINGNOTES/Resources/bcull.pdf> Accessed 6<sup>th</sup> November 2018

<sup>402</sup>J.Ward, 2002a "The New Basel Accord and Developing Countries: Problems and Alternatives." Working Papers No. 4 Cambridge Endowment for Research in Finance. Available on <https://www.repository.cam.ac.uk/handle/1810/225212> Accessed on 5<sup>th</sup> November 2018

We may quickly consider the factor of restricted access to the markets. This is important and arguably and realistically a valid reason for the banks in the non-G10 countries to be eager to adopt and accommodate the BCBS “pronouncements.” The fact is that a national authority’s decision to restrict its own market access is highly likely to influence other (United States of America fits this bill) countries to adopt International standards. Of course, the country must be seen to have solid international financial clout to persuade other less sophisticated financial countries to follow suit and “fall in line” with what is required of them to do. When the “Basel I” came up, the Core Principles and the Capital Accord described “being adequate” to be in tandem with compliance with Basel Committee. In the European Economic Area (EEA), the Second Banking Coordination Directive allowed members to restrict access to third-country banks whose home country banking mannerisms fell short of EU standards.

Interestingly, in the US the Federal Reserve is granted the power to issue licences to operate banks to foreign banks. But this is on the condition that they have to be subjected to, on a consolidated basis to a close scrutiny in terms of supervision by their home country regulators.<sup>403</sup> They must be sufficiently capitalised and also excellently managed. The US authorities can withdraw banking licences of foreign banks operating in the US if they feel that those banks are not adhering to what the US classifies as good international standard. Of course, the US authorities will expect these foreign banks to adhere to international standard like those that are issued by BCBS. This therefore increases the importance that is attached to Basel Committee pronouncements.

The US, the UK, and the EU have laws in place that are mirrored towards stipulating that for foreign banks to gain access into their jurisdiction and operate their banking, they must be seen to have adhered to the BCBS standards. The implication of this, is that the supervisory regimes in the non-G10 countries will be seen to be adequate if they embrace or adopt the “Basel pronouncements.” Financial Stability Forum (now changed to Financial Stability Board) captured the above this way when it stated that national authorities should be encouraged to give greater consideration to a foreign jurisdiction’s observance of relevant standards as one of the factors in making market access decision.<sup>404</sup> The relevant standards

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<sup>403</sup>US Financial Services Modernization Act 1999 is clear on this. This Act is also known as The Gramm-Leach-Bliley Act which is an act of the 106<sup>th</sup> United States Congress. It repealed the Glass-Seagall Act 1933. See also the Foreign Bank Supervision Enhancement Act 1991 (FBSEA)

<sup>404</sup>FSF Report 2000b. FSF was set up by the G7 in 1999 on the recommendations of the Tietmeyer Report. It has since been replaced by the Financial Stability Board. It brought together national regulators, central banks,



here include but not limited to the “BCBS pronouncements.” And in fact some of these when they are made, if the national banking authorities adopt them, and the tenets are practiced by the banks, will assist in checkmating corruption. An example is the BCBS guidelines on corporate governance.<sup>405</sup>

Governance plus compliance issues matter a lot in reducing corruption even in non-financial institutions. It is my submission that some of these Principles (they are 13 Principles) of bank governance put forward by BCBS in its entirety, will surely be very beneficial in curbing excesses in the way the banks are run. For instance, Principle 1 emphasised the importance of the board’s responsibility. The approach on corporate culture and values as indicated in paragraph 29 of Principle 1 urged that acceptable and unacceptable behaviours have to be defined. The firm should disallow such behaviours that could lead to any reputational risks, fraud, anti-competitive practices, bribery, corruption and money laundering or the violation of consumer rights to mention but a few.<sup>406</sup>

When this is achieved, there is highly likely to be a positive impact in checking the corrupt activities that go on in the banking sector. Of course, this transmits to the society as a whole due to the important role that the banks play in the economy. The authorities will be taking a great risk if they ignore the banks. It will be to their peril. And we are all witnesses, to the negative outcomes during the various financial crises with the effect of the 2008 still lingering around the society.

In addition, in December 1988, the committee issued a Statement of Principles.<sup>407</sup> This was done by the committee in full recognition that criminals do infiltrate the banking institutions. They see them as primary targets to be used to launder criminal proceeds. It was here that major concern on customer diligent identification was raised including other issues like legislative compliance, high ethical matters or standards of conformity, record keeping and systems, staff training and cooperation with national enforcement organs without the breach of customers’ confidentiality. This pronouncement was the galvanizing push that other

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treasury departments and international financial institutions to tackle international financial problems in a more coordinated fashion. There is the suspicion in some quarters that it is “a mere talking up shop.”

<sup>405</sup>See Basel Committee on Banking Supervision Guidelines on Corporate governance principles for banks. The final version was published in July 2015. It has 13 principles. Available on <https://www.bis.org/bcbs/publ/d328.htm> accessed on 7<sup>th</sup> November 2018. This supersedes the one published in 2010 by Basel Committee.

<sup>406</sup>Ibid

<sup>407</sup>Prevention of Criminal Use of The Banking System For The Purpose of Money-Laundering (December 1988) available on <https://www.bis.org/publ/bcbssc137.pdf> accessed on 7<sup>th</sup> November 2018.

subsequent non-hard-law bodies adapted as a foundation to prepare their anti-money laundering literature or pronouncements after 1988. This presented a solid foundation or resource platform for subsequent anti-money laundering organization to develop their literature. Readily and with special reference, FATF comes to mind. Also other pronouncements like Basel Committee on Banking Supervision (2001) - Customer due diligence for banks, and General guide to account opening and customer identification 2003 are equally very important.

Regulatory cost/s is a reason. It a well known fact that designing a regulatory apparatus or regime can incur a lot of financial costs for the countries involved. This is so due to the fact that high expertise is usually required for regulators and staff to fashion out the regulatory policy. Most non-G10 countries with particular reference to some developing countries may find it very difficult to provide the funds to set this up. On account of this, there is the possibility, that a global regime will be viewed as being less expensive because it has been taken off the shelf even when implementation and enforcement may still present additional burden to some countries.<sup>408</sup>

The voluntary nature that has long been attached to the adherence of the BCBS is not actually in the real sense of the word so. The non-G10 countries with particular reference to the developing ones were “forced” to accept these norms that are not necessarily suitable to their “economic and financial banking local practices.” These countries have not been allowed to be part of the inner caucus that makes the decision. They are “forced” to follow the dictates of the G10 on the outcome due to the fact that they are aware of what would befall them if the reverse is the case. This in my opinion calls for the examination of the legitimacy of these pronouncements. How can somebody that is not part of the decision making body be “forced” into accepting these pronouncements. It does not embrace equity and fair play. The development one can say has not been an inclusive one. Of course, other opinions abound.

#### **5.4 The relevance of Financial Action Task Force (FATF) as a necessary player**

##### ***The background and formation***

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<sup>408</sup>There is the idea in some circles that when the rules are seen to be precise, it would be easier for these to be carried out. This contrasts with rules that are vague by nature and will require robust skills for interpretation. Therefore, it may be better for countries to adopt international precise rules.

It is on account of globalization, that some economic and financial barriers were softened to enable quick transfers of goods and services in various sectors. There were instances of corrupt activities and criminal ventures that generated a lot of ‘‘under the radar incomes.’’ However, there was the problem of the illegally generated money that was laundered across the globe, having the probable ability or very serious potential (actually studies have indicated that disruption is real) to disrupt the economy if not checkmated. The relevant global authorities were obviously alarmed and concerned about the disruption that money laundering would cause to both national and trans-national economies. We have to remember that the laundering of money is the convergence point in this thesis.

To add credence to the possible fact that disruption is real, the IMF’s executive board once indicated or emphasised that money laundering is ‘‘a problem of global concern’’ that threatens to undermine the stability and integrity of financial markets.<sup>409</sup>The comment made does not surprise some, as it has been noticed that combating money laundering has become IMF ‘‘core responsibility.’’<sup>410</sup>The amount of criminal money that is laundered across the globe from criminal activities which of course includes drug related matters is very vast. It is very difficult to state categorically the specific amount. However, certain reports have indicated that this could be in excess of billions of US dollars a year.<sup>411</sup>It was noted or estimated (by the World Bank) that the proceeds of corruption of which much is laundered has in actual fact equalled loses of between twenty to forty percent (20% to 40%) of the Official Development Assistance (ODA) in developing countries.<sup>412</sup>Also in Africa alone, there is the estimate that the cost of corruption and money laundering has been put to more than US\$ 148 billion per year. This is believed or thought to be a representation of 25% of Africa Gross Domestic Product (GDP).<sup>413</sup>But we have to warn ourselves that these figures presented, are just estimates. It is on account of the fact that the process is very opaque, that it is difficult to put down a specific amount that is laundered, but one thing is certain, it is a

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<sup>409</sup>IMF, 2001a. IMF Information Notice 01/41 (April 29)

<sup>410</sup>See IMF Policy Paper (April 2001): ‘‘Enhancing Contributions to Combating Money Laundering.’’

<sup>411</sup>The use of correspondence banking that was investigated as far back as 1999 by the US Senate Committee noted that money laundering has permeated the US banking system. In UK the predecessor to FCA, FSA found out that money laundering in UK banks amounts to more than £3 billion annually and could possibly exceed £700 billion worldwide. (FSA, 2001)

<sup>412</sup>‘‘Stolen Assets Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan,’’ The World Bank 2007, June 2007.

<sup>413</sup>‘‘Countries to get Help Recovering Stolen Assets,’’ *New York Times* September 17, 2007 See also <https://www.nytimes.com/2007/09/18/world/18nations.html> accessed 7 November 2018

colossal amount. We should bear in mind, that the fact that some of the figures come from the World Bank or the IMF do not make them critique free.

It is as a result of the negativities associated with the issue and threat presented by money-laundering to global financial stability (initial efforts was on drugs) that a group of countries known as the G7 came up with the formation of FATF in 1989.<sup>414</sup> The G7 countries that had interest actually prior to the formation mandated a task force:

*“to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purposes of money laundering, and to consider additional preventive efforts in the field, including the adaptation of the legal and regulatory systems so as to enhance regulatory judicial assistance.”*<sup>415</sup>

The consensus was that the problem ‘‘has reached devastating proportions.’’<sup>416</sup> The FATF is located or shares the same office with OECD in Paris. As of 2018 it was made up of 35 member jurisdictions plus 2 regional organizations. The organisation represents most major financial centres in the world.<sup>417</sup> Without much possible contradiction, the FATF is the only international body that was set up or established that is solely dedicated to the fight against financial crime. In its bid to contain this, it expanded into regional bodies located in strategic regions of the globe. These are known as Financial Action Task Force Style Regional Bodies (FSRBs). They are nine in number namely - Asia Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF) based in Port of Spain, Trinidad and Tobago; Eurasian Group (EAG) based in Moscow, Russia; Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG) based in Dar es Salaam, Tanzania; Central African Anti-Money Laundering Group (GOBAC) based in Libreville Gabon; Latin America Anti-Money Laundering Group (GAFILAT) based in Buenos Aires, Argentina; West Africa Money Laundering Group (GIABA) based in Dakar Senegal; Middle East and North Africa Financial Action Task Force (MENAFATF) based in Manama Bahrain; and finally, Council of Europe Anti-Money Laundering Group (MONEYVAL) based in Strasbourg, France

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<sup>414</sup>See FATF, 1990: Introduction. These countries consist of Canada, France, Germany, Italy, Japan, United Kingdom and United States of America.

<sup>415</sup>G7 Information Centre, “Economic Declaration (16<sup>th</sup> July 1989), para.52. Available on <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html#drugs> accessed on 7<sup>th</sup> November 2018

<sup>416</sup>Ibid. See also C. Nakajima, “Are we ready for integrity governance?” Comp. Law. 2016, 37(10), 297-298

<sup>417</sup>See <http://www.fatf-gafi.org/about/membersandobservers/> accessed on November 8 2018

(Council of Europe). They all constitute a global network to combat money laundering, financing of terrorism and the financing of weapons of mass destruction.<sup>418</sup>

FATF initial mandate when it was set up in Paris in 1989 in response to the growing threat posed by international money laundering was to examine money laundering techniques and trends. Other reasons, included but not limited to setting out measures to combat them and then to review the action taken at both national and international levels. In fact, as terrorist financing has risen up in the international agenda, the FATF's role has naturally and incrementally extended to encapsulate Counter Terrorist Financing (CTF). And as of 2012, its remit was extended to include the proliferation of weapons of mass destruction (WMD).<sup>419</sup> We should note that laundering of money that FATF is poised in tackling involves illegitimate source of funds whilst terrorist financing is concerned with the illegitimate use of the funds. FATF as a result of the post 9/11<sup>420</sup> terrorist event in the USA had to incorporate anti-terrorist recommendations to accommodate the dictates of that event.

Indeed, FATF was initially designed to broadly cooperate in a cross-border or trans-national manner anti-money laundering efforts. And to put in place standards that would make countries to embrace both legal and regulatory steps that would prevent their financial set-ups from being used for criminalities.<sup>421</sup> This anti-money laundering outfit recognises the monumental issue of money laundering plus other financial crimes as a serious threat to the continuous systemic wellbeing of the global financial systems. It is on account of this, that it directed its area of focus, not only to drug related matters but to other areas of crime that the culprits would want to disguise the profits, with the aim of reusing the gains.

Initially, serious attention was directed to the matter of drug dealing and as a result, the general public may have had the impression, albeit erroneously, that money laundering was synonymous with drug dealing. Indeed, money laundering scope extends beyond this. And is inclusive of other financial or economic crimes that have the potential or ability to permeate and simultaneously impact the stability of the banking, securities and the insurance markets. The writer, is quick to point out that there are ways that money laundering if allowed to

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<sup>418</sup> Available on <http://www.apgml.org/fatf-and-fsrb/page.aspx?p=94065425-e6aa-479f-8701-5ca5d07ccfe8> accessed on 7<sup>th</sup> December 2018

<sup>419</sup> T. Parkman, A compliance guide for practitioners, Mastering Anti-Money Laundering and Counter Terrorist Financing. FT Publishing 2015 p.25

<sup>420</sup> This was a set of coordinated four terrorist attacks against the US by the al-Qaeda terrorist group. More than 2000 people lost their lives.

<sup>421</sup> FATF 1990

continue, can negatively have a detrimental effect on the financial system with special reference to the banks. A typical example is the use of alternative payment systems like the use of smart cards and the internet banking when not properly monitored.

We should also be aware that initially, there were the serious issues of the Offshore Financial Centres (OFCs). Some of them posed (although it can be said now that the gap has been closed by legislations) serious threat to the financial system due to inadequate regulations. They encourage regulatory arbitrage in some instances and lack the required tools to do proper customer identification. Indeed, there was a time that there was increase in the number of jurisdictions due to the integration of the financial systems that did offer services that were devoid of the required control or regulation. So, the coming into play of FATF one can honestly submit should be seen as a welcome relief to help control the financial excesses that occur due to money laundering.

### ***FATF coercive status***

Part of the principal issues, is simply, that when corrupt money is generated, the perpetrators will engage in money laundering to enable them disguise the proceeds and enjoy the fruits of their perceived labour. It is very difficult to separate corruption with money laundering. They complement each other. Once the money reaches the money laundering stage, there is the convergence of the central term of this thesis. Indeed, one of the institutions or organizations that can be used to minimise or prevent the laundering gaining ground is through the use of the FATF Recommendations. But the interesting thing to note here is that FATF as a body does not have the legitimate status to actually enforce its mandate in true legal sense.

It must be noted, that FATF is simply a “soft law organization.” But the curious or interesting aspect is that it has been given “sufficient teeth” to attack non-principal members (and mostly non-members) from the developing world from the support it got from some International Financial Organizations (IFIs).<sup>422</sup> Apart from this, the core members of this body are also part of the OECD and basically the members of the developed world. The trajectory is like this: for the non-principal members to access support from the recognizable global financial institutions, they are made to agree to accept as part of pre-conditions, the contents of FATF Recommendations.<sup>423</sup> To be fair in the analysis, this is also applicable to the

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<sup>422</sup>The IMF and World Bank are the notable International Financial Institutions that are the backbone of FATF.

<sup>423</sup>FATF as at 2018 has 40 Recommendations. Most of these are tailored into combating money laundering, terrorist financing and prevention of proliferation of weapons of mass destruction (WMD) Available on

principal members, but the only difference here is that not everyone is part of the decision making organ and certain matters may be possibly masked by their peer review process put in place by the organization.

FATF, can use its internal mechanism of labelling a country as non-cooperative to demonstrate its “coercive tendency” or can call into play one of its potent recommendations. The organization is made up of not less than 130 members worldwide and all the members of OECD are automatically FATF members. You can imagine what it will look like if a nation is excluded from conducting financial business with all other members of the above group. I guess no one will be willing to be caught in “anti-FATF web.” The truth is that FATF has a sort of incremental coercive mechanisms that it uses to bring an earring member to abide by its recommendations. The ultimate one is expulsion,<sup>424</sup> but FATF has not actually used this coercive tool. It can use the recommendation that would notify other members to closely monitor any financial transaction with another recalcitrant member.<sup>425</sup>

The above readily calls for attention whilst FATF recommendations were metamorphosing, how some countries got some “doses of FATF medicine.” As far back as 1996, Turkey was involved. Turkey, still possibly nurses the intention of joining the European Union. After what looked like FATF had used other options to make Turkey pass a law to prohibit money laundering failed, the organisation resorted to issuing a press release. FATF advised their members to be wary of entering financial transactions with Turkey. And they were advised to closely scrutinize these financial relationships with businesses and individuals based or domiciled in Turkey.<sup>426</sup> The public reputational setback or opprobrium this brought to Turkey was sufficient for that country to immediately change their mind and comply. Turkey not only enacted anti-money laundering law, it also complied with other required standards.<sup>427</sup>

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<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>

accessed on 9<sup>th</sup> November 2018.

<sup>424</sup>Financial Action Task Force 1996a. “International Anti-Money Laundering Recommendations.” Paris: Organization for Economic Corporation and Development.

<sup>425</sup>See Financial Action Task Force 1990. “Directorate for Financial, Fiscal and Enterprise Affairs, Organization for Economic Corporation and Development, Financial Action Task Force on Money Laundering Report.” Sections 2(B), 3(A)-(D), Paris: OECD. This involved the then Recommendation 21

<sup>426</sup>Financial Action Task Force 1996b. “Directorate for Financial, Fiscal, and Enterprise Affairs, Organisation for Economic Cooperation and Development, Financial Action Task Force on Money Laundering. FATF V11 Report on Money Laundering Typologies”

<sup>427</sup>FATF 1999c. “FATF Statement about the lack of Anti-Money Laundering Law in Development.” September 19, 1996.

In Austria in 1999, the government or the banking institution was involved in a system of banking secrecy. Simultaneously at that time they were also investigated for being in serious breach of the EU money laundering Directive by European Commission. It was not a good period for them. Consequently, in 2000, the FATF brought in their sledge hammer. FATF wanted to suspend them from OECD unless Austria agreed to perform two things. One was for it to immediately indicate that all matters concerning the system of anonymous bank passbook must be suspended forthwith before June 2002 in tandem with the then 40 Recommendations. Secondly, Austria must put in place a legislation that prohibits opening of anonymous passbook bank accounts and must eliminate or wipe off all existing anonymous bank accounts. The government finally caved in and responded to FATF demands.<sup>428</sup>

The “good catch” is that we are aware that FATF may not have the power to sanction erring non-members. But it can direct its members to stop or review their financial relationships with banks in the jurisdiction of the non-member. It can call into play its R21.<sup>429</sup> This was the case with an offshore jurisdiction known as Seychelles. Here, the government enacted a law which basically encouraged money laundering. This was called the Economic Development Act (EDA).<sup>430</sup> This law granted immunity from any criminal prosecution to the “so called investors” of \$10m or more in approved investment schemes! Not only this, their assets were protected from government compulsory acquisition or sequestration (taking over of assets). Laughingly, an exception to the above immunity was only applicable to drug dealing or acts of violence only in Seychelles. What came next was that on account of FATF warning, this attracted international attention or “anti-Seychelles-feelings.” Many governments advised their financial institutions not to enter into financial transactions with them. Of course, the pressure was sufficient for them to rescind the negative legislation.

Indeed, the “devilish purpose” of the above EDA was captured clearly in the words of the then FATF President, R. K. Noble, then US Treasury Under-Secretary for Enforcement:

*“the clear design of the Seychelles law is to attract capital by permitting international criminal enterprises to shelter both themselves and their illicitly-gained wealth from pursuit by legal authorities. Drug traffickers and other criminals can enjoy the spoils of their illegal activities secure in the knowledge that Seychelles authorities will protect them. This poses a*

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<sup>428</sup> OECD 2000, “Financial Action Task Force on Money Laundering Welcomes Proposed Austrian Legislation to Eliminate Anonymous Passbooks.” OECD press release, June 15

<sup>429</sup> This was the Recommendation 21 prior to the 2012 Recommendations that encapsulated the 9 special recommendations.

<sup>430</sup> This was enacted in February 1995 in Seychelles.



*grave threat to efforts to combat money laundering and maintain the integrity of the world's financial systems.*'<sup>431</sup>

The implication of FATF action, illustrated the fact that when it stings, it can be financially venomous and reiterative of its coercive status. And this is clearly very helpful in tackling the convergence question at any point in time, the writer submits.

On the above, it was also indicated that:

*“nasty noises from abroad has had their effect...The initial batch of interested “investors”- some South Africans, Italians and Britons among them - have fled, many leaving high piles of large and unpaid hotel bills behind them to show the height of their calibre.*'<sup>432</sup>

Indeed, as indicated, as far back as 2000 the FATF used its coercive tool of “identify and shame”- the list of Non Cooperative Countries and Territories (NCCTs). These were jurisdictions noted for not participating in the general move towards financial regulations plus greater international cooperation. As pointed out, they were countries that offered financial services under strict banking secrecy and without control and regulation by the authorities. Of course, the NCCT initiative proved to be successful. At least, it got the countries to address the issues through legislation and infrastructure. Of the 47 countries that their systems were initially reviewed as at 2000 and 2001, a total of 23 were listed as NCCTs. This number reduced to 15 and by 2001, there were only eight. And by the end of 2007, the list was empty.<sup>433</sup>

On a critical perspective, the writer notes that the NCCT was seen to be a sort of blunt instrument characterised with less tact. In fact, countries were either on the list or were not. It made no distinction between the various levels of deficiencies.<sup>434</sup> It was as a result of this that FATF replaced it with a friendly and acceptable mechanism of coercion known as International Cooperation Review Group (ICRG) as far back as 2007. This group has instead aimed to engage erring countries in dialogue with the intention of making them to improve

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<sup>431</sup>FATF Lifts Warning On Seychelles Investment Law, Global Tax News by Mandy Robinson 16 October 2000 available on [https://www.tax-news.com/news/FATF\\_Lifts\\_Warning\\_On\\_Seychelles\\_Investment\\_Law\\_1003.html](https://www.tax-news.com/news/FATF_Lifts_Warning_On_Seychelles_Investment_Law_1003.html) accessed on 19<sup>th</sup> November 2018. See also Organization for Economic Corporation and Development 1996a. “Financial Action Task Force on Money Laundering Condemns New Investment Law in the Seychelles” OECD Press Release, February 1.

<sup>432</sup>See The *Economist* London of 17<sup>th</sup> February 1996, p. 59

<sup>433</sup>T. Parkman, *Mastering Anti-Money Laundering and Counter Terrorist Financing*. 2015 Person FT Publishing p.271

<sup>434</sup>Ibid

AML and CTF regimes.<sup>435</sup>The result is still that no country engaged, has demonstrated its willingness to be caught in ‘‘FATF cobweb of shame.’’ They have always wanted to comply and indeed, have actually ‘‘complied officially.’’

Nigeria was not spared with the FATF possible hammer on suspension. Nigeria Financial Intelligence Unit (NFIU) operated under the auspices or possible close supervision of that country’s corruption agency EFCC. As a result of this, Nigeria got suspended by the Egmont Group.<sup>436</sup>FATF subsequently wrote Nigeria and informed them that as a matter of necessity and deep concern, NFIU must be separated from EFCC. If not, FATF would have suspended their proposed visit to Nigeria as at 2017. The Nigeria government quickly got the message, passed a legislation that separated the NFIU from the EFCC.<sup>437</sup>And part of the galvanizing tonic or fillip to do this, is or rather was the electioneering anti-corruption posture presented by President Buhari administration.

The administration made the issue of tackling corruption and money laundering to be its principal focus. In any case, whether the war was won should be judged by history. At the time of writing, there were negative responses from some people and organizations on how the corruption war and money laundering was fought in Nigeria. There was the impression that it was selective and partial. For you to be shielded, you had to cross-carpet to the ruling party. And instances of this abound as typically evidenced by the cross-carpeting of Godswill Akpabio. He was a former governor and the opposition minority leader in Nigeria senate (he was in People Democratic Party) from the oil rich state of Akwa Ibom. He crossed the floor to the president’s party - All Progressive Congress (APC).

It has been alleged that in his own case, he deposited close to £2billion pounds in three banks; namely Polaris, Fidelity and United Bank for Africa (UBA) located in his state capital. In these three banks, there were no records of who the depositor was. They were just unrecorded deposits which the three bank managers kept in their respective bank vaults. It was as a result of discrete investigation by officials of the regulatory authority of Nigeria - Central Bank of Nigeria, possibly and evidently after a tip off, sent auditors to the banks. The managers were not able to present a credible explanation on why they kept such huge unrecorded cash in

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<sup>435</sup>Ibid

<sup>436</sup>This is the parent organization of the World’s financial intelligent Units. They have their headquarters in Toronto Canada.

<sup>437</sup>See <https://www.thisdaylive.com/index.php/2017/09/18/nfiu-fatf-threatens-to-suspend-its-mission-to-nigeria/?amp> Accessed on 10<sup>th</sup> November 2018

violation of known banking practices in their respective vaults for about four good years. The findings will be passed on to the prosecuting authority.<sup>438</sup>At the time of writing, the allegations about his corruption and money laundering issues were ‘put in the cooler’ by the corruption prosecuting authority in Nigeria- EFCC. Indeed, people are watching to see how this is going to pan out!

The implication of FATF action could have had very serious negative impact on Nigeria who has not had a comfortable position in the Corruption Perception Index (CPI) ranking done by TI (it ranked 148 out of 180 as at 2018). FATF indicated that non-compliance would definitely have an effect in the mutual evaluation that Nigeria would undergo in future. It would have meant that Nigeria would have been at cross-purposes with FATF Recommendations. FATF antecedents with erring members, indicate that countries will end up on the wrong side of the template and the embarrassment accompanied with reputational financial negative implication is usually massive. The message then was and is still very clear - the respect of FATF 40 recommendations is the beginning of wisdom if some countries want to belong to the international financial circle.

FATF can really cajole countries with its big stick by threatening to suspend a member. The organization is fully aware of the negativities or financial consequences that this action can attract to a country, hence the effectiveness of the ‘indirect coercive style’ in checking money laundering. From whatever angle one looks at it, these actions will go a long way in checking the negative matters in the convergence of “dirty money.” Come to think of it, when laundering is confronted through the adherence of the relevant FATF recommendations which have undergone various updates to keep pace with the global changing scenarios, the society will be better.

The tool of mutual evaluation that FATF uses is a very significant cohesive and coercive mechanism to put the countries in check. R. Sansonetti, flows with this observation when he indicated that this process is one of the cornerstones of FATF and has proven to be the most successful element of its activities.<sup>439</sup>The truth is that countries prepare for this evaluation and will not want to be caught off-guard. FATF visited the UK in October 2018 for this

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<sup>438</sup>See CBN probes Akpabio’s N865b unrecorded deposits in 3 banks. The Fact Reporters, available on <http://thefactreporters.com/2018/11/18/cbn-probes-akpabios-n865b-unrecorded-deposits-in-3-banks/> accessed on 20<sup>th</sup> November 2018

<sup>439</sup>R. Sansonetti, “The Mutual Evaluation Process: A Methodology of Increasing Importance at International Level.” *Journal of Financial Crime*, Vol. 7, 2000, p. 218

mutual evaluation. Prior to this, the UK had one in 2007. In December 2018, FATF indicated that the UK has a well-developed and robust regime to effectively combat money laundering and terrorist financing. However, it needs to strengthen its supervision, and increase the resources of its financial intelligence unit.<sup>440</sup>

### **5.5 Customer due diligence (CDD) as an unavoidable recipe in the convergence question**

The writer has tried to draw the reader's attention to the importance of the application of FATF "suggestions" in combating money laundering. FATF has 40 recommendations presently, which effectively since 2012 had subsumed the previous 9 special recommendations into the present condensed 40 recommendations. Since the formation of FATF in 1989 it has gone through various transformations. The society is not static and commercial interactions are bound to change in tune with the dictates of the time. As it changes and laws and legislations come into play, both legitimate and criminally minded people flow through the same legitimate financial channels to conduct their activities. Some of these "antidotes" were all geared to check the "purity" of the "profits" that people or criminals make in their business or financial activities. Of course, the financial institutions with special attention to the banks have a strong role to play here. The reason is possibly very simple to grasp. The banks are in most cases, the first line of legal person that the culprits will want to deposit their loot or gain.<sup>441</sup>

The banks will not fold their hands and be adamant without trying to at least ascertain the "quality" of the customer. The writer posits that if the bank feels that it is unnecessary to ascertain the quality of their customers, this will be arguably to their peril. This scenario, therefore, presents the essence of financial institutions being prudently engaged to find out who they are dealing with. It is on account of the dangers inherent in the above, that FATF has indicated in its usual manner, the importance of engaging or scrutinizing the quality of the customers when the banks are at the point of starting financial relationship with them. This is embedded in FATF recommendation 10.<sup>442</sup>

FATF sets international standards to be met by countries, financial institutions and even designated non-financial businesses and professions with the intention of combating money

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<sup>440</sup> Available on <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-kingdom-2018.html> accessed on 10th December 2018

<sup>441</sup> In money laundering, placement stage is considered to be the first step to put the illegally acquired profit in the banking system. It is the most risky stage and classified as dangerous for culprits.

<sup>442</sup> Financial Action Task Force, 2012, "International standards on combating money laundering and financing of terrorism and proliferation: the FATF Recommendations." FATF, Paris.

laundering and terrorist financing. It is as a result of this that FATF has set out requisite customer identification requirements. The intention is to prevent anonymous business interactions with the purpose of increasing transparency with the financial services offered.<sup>443</sup>

FATF Recommendation 10 when perused with its interpretative notes indicates what are required to undertake the exercise. These help in sorting the convergence issue. The banks are expected or required to prudently engage themselves in doing the followings in terms of CDD: when they are establishing financial relationships; carrying on occasional transactions that are certain limits (USD/EUR 15000 now EUR 10,000) or certain wire transfers; if there is a suspicion of money laundering and finally if there is a suspicion or doubts about the previously obtained information about the customer.

From CDD's perspectives, it is mandatory for the banks to undertake certain processes in order to tackle the convergence question in this thesis. They should in all honesty identify the said customer and must use a reliable source of document, data or information. If there is a beneficial owner,<sup>444</sup> the bank must make a reasonable move to know who this person is and must be satisfied. The ownership and control structure if the beneficial owner who is not a natural person must be understood. Again the direction or the purpose of that business must be known by the bank. Additionally, the CDD exercise must be continuous in order to keep tab on the financial relationship between the bank and the customer. This should include the source of the business funds.<sup>445</sup> These measures have to be done on a risk-based system or approach. And it is the responsibility of the bank to gauge the risk-level in order to ascertain or know how to handle the particular banking relationship.

We need to warn ourselves, that the fact that the stated standards have been met (in this context by the banks), does not necessarily or possibly guarantee that a proper identification has been undertaken. But when these are adhered to by the banks, this will have a positive impact in reducing the convergence question, the writer submits. What this means is simply that there may be instances where both natural and legal persons slip through the net of CDD possibly on account of connivance with corrupt bank officials (instances of this abound with

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<sup>443</sup>L. De Koker, "The FATF's customer identification frame work: fit for purpose?" *Journal of Money laundering Control*. Vol.17 No. 3 204 pp.281-295

<sup>444</sup>Having a controlling stake of 25% or more will qualify you to be classified as a beneficial owner in a business set-up.

<sup>445</sup>FATF Recommendation 10 2012

special reference to Nigeria) to establish a working relationship with the bank. The public is aware of this and it is not a secret in the Nigeria financial sector.

### *Applying standard/enhanced and very simple CDD*

From FATF perspectives, as far as R10 is concerned, this implies that when banks are interacting with their customers, it entails that there must be a standard CDD that must be applied. Variation on this standard will depend on the particular situation. Interestingly, FATF is silent on particular standard measure that the banks are expected to perform. Perhaps, a quick perusal of FATF guidance document on this may be helpful:

*The FATF Recommendations do not specify the exact customer information (referred to by certain countries as ‘identifiers’) that business subject to AML/CTF obligations should collect to carry out identification process properly, for standard business relationships for occasional transactions above USD/EUR 15,000. Domestic legislation varies, although common customer information tends to consist of name, date of birth, address and an identification number. Other types of information (such as the customer’s occupation, income, telephone and email address, etc) are generally more business and/or anti-fraud driven and do not constitute core CDD information that must be collected as part of standard CDD - although such information could appropriately be part of an enhanced CDD for higher risk situations.<sup>446</sup>*

However, it must be kept in mind that even if the standard checks have been done, an enhanced CDD has a strong potential or may involve a more scrutinizing exercise about it. The transactions need to be closely and prudently monitored. This is on account of the riskiness that may be attached to that. In the circumstances that the risks are classified to be some how low (whatever that means in the eyes of the banks), the banks can undertake to use a more “relaxed” approach to mitigate the relevant risk. They are not expected to limit the nature of the simplified measures or standards.<sup>447</sup> Once there is a suspicion of the presence or a sign of money laundering, or terrorist financing activities, a simplified CDD is automatically not applicable.<sup>448</sup>

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<sup>446</sup>Financial Action Task Force, (2013a), paragraph 67 “FATF guidance: anti-money laundering and terrorist financing measures and financial inclusion,” FATF, Paris.

<sup>447</sup>Financial Action Task Force 2012, INR 10 par 21. These include examples where the risks are classified to be simplified and lower. For example - reducing the frequency of customer identification updates and also reducing the degree of ongoing monitoring and scrutinizing of transactions, based on a reasonable monetary threshold.

<sup>448</sup>Ibid

There is the question of Politically Exposed Persons (PEPs). PEPs were described and first targeted in 2003 by FATF.<sup>449</sup> There have been admittedly a lot of controversies surrounding this. Banks are expected to trigger their enhanced CDD mechanisms when dealing with foreign PEPs. The impression, (not really very correct per se because there are numerous PEPs out there that are clean) is that they are considered to be of higher risks in financial transactions with the bank.

The author posits that the fact that you are classified as a PEP does not literally mean that you should be precluded from conducting normal banking transaction with your bank or a financial institution. The signal it usually sends is that PEPs have greater opportunity to engage in corruption because of their position and possible easy access to funds. However, it does not mean that because you are a PEP you are automatically a corrupt person that engages in money laundering. This is not necessarily correct or right and we should try to distance ourselves from this negative mind set.

In instances involving wire transfers, it is expected that they are to be excluded from the confines of the generally based risk-measures.<sup>450</sup> However, the banks are expected to employ a bit of simplification if the amount involved is not that high. Less than USD/EUR 1000 is seen as acceptable. This can be termed a sort of *de minimis* threshold. Here the customers' identity need not be unnecessarily put under a stringent spotlight and limited information is usually accepted.

### ***Clarifying FATF's identification and verification process and its purpose***

One may be excused to digest the impression that because the FATF has indicated that the customers should be made to undergo CDD, therefore the process should be seen to be very smooth. As a starting point, FATF failed to specifically define what is its own understanding of the term "identify" or "identification." This may have led to conjectures on the part of the banks when they attempt to identify a customer.

In the context of FATF (there may be the possibility that some people may disagree) it simply means to establish a prospective customer's specific or unique identity. FATF is not only concerned with identifying a customer, but is also involved on "verification" of that customer. In all honesty, this simply means in FATF terms the authentication of the

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<sup>449</sup>See FATF 40 Recommendation 6 (2003)

<sup>450</sup>Refer to Recommendation 16 of FATF 2012.

identifying particulars of the customer.<sup>451</sup>The financial institution (bank in this context) is legitimately expected to refer to the reliable, independent documents, including information and data to check the customer's particulars. We have to bear in mind that the process of identification and verification are very clearly inter-related. But they are separate processes.<sup>452</sup>

To clarify, the process of identification is usually completed when sufficient information has been provided that would enable the bank to establish who the customer is. Verification processes on its own are then done with the intention on the part of the bank to get assurance that some of the information or all got on the person is in the real sense of the word correct and that they are who they have claimed to be.<sup>453</sup>FATF in its recommendations, do usually advice banks to avoid accounts that are anonymous or have fictitious connotations linked to them. But the surprising dimension to the above is that they do not actually have a clear focus or clarity on the concept of anonymity. The result is that you may come across situations where FATF representatives have actually used the terms ‘anonymous’ and ‘not correctly identified’ to purport the same meaning. Of course, this has the potential to generate a bit of difficulty in the process.

However, CDD does not end with just identification and verification of the customer. It is a continuous process that starts from “birth to death” in the relationship with the customer immediately it has been established. It is to know your customer throughout the duration of the relationship. This was given legislative backing and made to be on risk sensitive basis.<sup>454</sup>

### ***Information the bank collects and FATF/BCBS possible differences on profiling***

Prior to 2003 CDD was referred to as “Know Your Customer” (KYC). It is pertinent to note that in financial circles, CDD and KYC are more expansive than mere verification. FATF's CDD principles are more attuned or refer to customer profiling. It is focussed on monitoring the customers' activity to ensure that the transactions do not deviate from the banks' knowledge of the customer, their business and risk profile and of course, their source of funds

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<sup>451</sup>Financial Action Task Force (2013a par 66), “FATF guidance: anti-money laundering and terrorist financing measures and financial inclusion” FATF, Paris.

<sup>452</sup>P.L Chatain, A. Zerzan, W. Noor, N.Dannaoui, and L. De Koker,.(2011), *Protecting Mobile Money Against Financial Crimes: Global Policy Challenges and Solutions*, World Bank Publications, Washington, DC. p.77

<sup>453</sup>When these are got reasonably correct in the banks, it helps to check money laundering, thereby dampening the convergence issue.

<sup>454</sup>Regulation 7(2) of the 2007 Money Laundering Regulation in UK is clear on this point. But note that this regulation has now been recently subsumed by Money Laundering Regulation 2017 which transposed the 4MLD of European Union into United Kingdom.



when necessary. But we should be aware that it was BCBS that was the pioneering body that engineered anti-money laundering issues in the financial circle as far back as 1988 when it released its literature.

BCBS views profiling as being the central issue or substance with regard to CDD and customer risk mitigation. This is very important. From their perspective, the usual identification and verification should not only be seen as recording of the customers' correct name. This must include getting sufficient or significant information aimed at drawing the right business and risk profile of the said customer.<sup>455</sup> Profiling will in the real sense, should be of great assistance to the banks in ascertaining the level of the risk and the way to mitigate it. Here, the deviating transaction patterns of the customer can be easily dictated. When this occurs, the Financial Intelligence Unit will not be surprised to receive their reports.

BCBS stated the information required for profiling that can be obtained from the customer for the purposes of CDD - the legal name and any other name, correct permanent address, telephone number, fax, and email address, date of birth, nationality, public position held and/or employer's name; an official personal identification number present in an official document (passport, ID card, residence permit, social security record, driving licence) that has the customer's picture, the type of account and the nature of the banking relationship and finally the signatures are needed.<sup>456</sup> It is usually the expectation that the bank must draw from the above information to assess the customer's profile. However, where there is suspicion of a higher risk profile, the bank is expected to employ more stringent enquiries - like the source of income or prior banking history or relationship.<sup>457</sup> The expectation on all these is that it will in one way or the other impact on slowing down the tempo of money laundering. It is important we keep this in mind whilst progressing into further analysis.

There is possibly no doubt that the BCBS guidance has shaped the current practises and also the supervisory expectations. There was a time that the process of customer identification services was put under a survey. This was in 2013 among some (six) developing countries. The survey reflected on the extensiveness of the BCBS impact on the countries with regard to the standard risk-profiling. Interestingly, South Africa which participated was found to have

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<sup>455</sup> Basel Committee on Banking Supervision (2001), *Customer due diligence for Banks*, Bank for International Settlements, Basel

<sup>456</sup> Basel Committee on Banking Supervision (2003), para. 10)

<sup>457</sup> Basel Committee on Banking Supervision (2003), *General Guide to Account Opening and Customer Identification*, Bank for International Settlements, Basel

used just the barest minimum of information compared to other countries.<sup>458</sup> The BCBS it should be noted still emphasis on profiling as a very important step in risk-taking customers. This is understandable and in tune with the expected fraudulent activities this can potentially open up.

The writer notes that the 2013 FATF guidance on financial inclusion went as far as discussing the minimum particulars that a customer should furnish for profiling. According to FATF, details like customer's occupation, income, plus the contact details do not make up or constitute the core CDD information that must be collected to make up a standard CDD.<sup>459</sup> Contrastingly, BCBS does not concur with this approach. They are for a more robust and inclusive information.<sup>460</sup> The author is of the opinion that it is going to be a disservice to the spirit and intended purpose of the "profiling exercise" to open an account for a customer and fail to ask about his profession and his present or intended income. They all jell together. The writer therefore suggests that it is in the best interest of FATF to reconsider their style.

A perusal of FATF's "relaxed" CDD is in variance with that of BCBS profiling style. BCBS is in favour of gathering sufficient, robust and enough information from inception or beginning of the relationship. If, it is noticed that there is threat of higher risk, additional steps should be employed. Contrast this with FATF's style. It allows for just upfront, towards mainly product-inclined profiling for just limited information on situations when risks are assessed to be on the lower strata. This possibly indicates that there are risks no doubt, and that monitoring of the required transactional activities will have the ability to fail in a simplified CDD. Of course, this occurs when there is not sufficient information to embark on customer profiling. The result would be that the ability of the bank to monitor suspicious or unusual banking activities is bound to suffer.<sup>461</sup> Interestingly, FATF has spotted this potential scenario but is yet to furnish guidance or the way forward to get over this issue.

It is therefore suggested that the general impression from the existing circumstances, could be that the FATF does not in actual fact, unlike BCBS, regard profiling and extensive collection of the customers' identifying particulars as central to general CDD. There is the impression that it does not recognize its value in relation to customers that are seen to be of higher risk.

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<sup>458</sup> Alliance for Financial Inclusion (2013), *Balancing Financial Integrity and Financial Inclusion: Lessons Drawn from Regulatory Experience on Implementing a Risk-Based Approach*, AFI, Bangkok

<sup>459</sup> Financial Action Task Force, (2013a, par. 75 and 102), "FATF guidance: anti-money laundering and terrorist financing measures and financial inclusion," FATF, Paris.

<sup>460</sup> See Basel Committee on Banking Supervision, 2013 par. 30 for clarity.

<sup>461</sup> Ibid no. 465 par. 76

However, this may not be the case with customers classified as being lower-risk or standard-risk customers. We should also take cognizance that in situations where the bank has very few information on the customer, the capability of the bank to confront potential or real fraudulent threats in relation to identity fraud, will heavily depend on the quality of the information that the bank has. This may be seen as a common sense approach.

In 2012, FATF adopted a risk-oriented approach that embraced a simplified CDD for lower risk scenarios. However, BCBS in that same year came up with a more stringent approach. This was contained in its Core Principles for Effective Banking Supervision 2012.<sup>462</sup> It indicated thus:

*“supervisors should determine that banks have adequate policies and processes including strict customer diligence (CDD) rules to promote high ethical and professional standards.”*

It is my submission, that the above is not particularly clear on the subject or concept of “a very tight” CDD rules as possibly envisaged by BCBS. And should in its entirety be inclusive or encapsulate a simplified CDD in lower-risk instances. However, one is tempted to align with the impression that both FATF and BCBS differences seems to go beyond the profiling to a level of the general CDD.

Indeed, from whatever dimension that may be employed, it is advisable to bear in mind that profiling in AML/CTF parlance is simply the collection of sufficient data. This is all about the customer and should in the final analysis, empower the bank to be capable to dissect risks thrown into the financial ring by the customer and at the same time anticipatively be capable of predicting the pattern and conduct. In fact, even when variation does not occur or happen the bank may use profiling to manage money laundering and terrorist-financing-risks. Interestingly, profiling has been used to determine the likelihood of the repayment of a small loan when the customer does not have a credit record.<sup>463</sup>

## **5.6 The International Monetary Fund and the World Bank as twin-like-mechanisms**

### ***Formation and essence in the convergence matter***

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<sup>462</sup>See Core Principle 29 on Abuse of Financial Services.

<sup>463</sup>K. Kumar, and K. Muhota, (2012), “Can digital footprints lead to greater financial inclusion?” *OGAP Brief*, World Bank, Washington, D.C.. See also K. Lobosco, (2013), “Facebook friends could change your credit score”, *CNNMoney*, 27 August. Available at <http://money.cnn.com/2013/08/26/technology/social/facebook-credit-score/index.html> accessed on 18<sup>th</sup> November 2018.

The fact that the two institutions have come to be classified as very important International Financial Institutions (IFIs) is no longer news. This is with regard to the respective roles they have played and still playing in economic growth and development amongst comity of nations through “assisting on balance of payments issues and developmental financial assistance” to countries. Institutions play very important roles in economic growth and development.<sup>464</sup> Institutions can be seen or viewed as regularities in social behaviour that are agreed to by members of the society.<sup>465</sup> More so, institutions may also be seen to be specifying certain behaviour in a sort of recurrent situations that are enforced by external authorities or by some self-regulatory entities.<sup>466</sup>

At international level, comity of nations and other sub-state participants or actors as the case may be, do create this, viewing it as orientation points to exchange information and at the same time try to sort out difficulties. International institutions may be viewed also as a set of rules that govern the manner in which states should cooperate and at the same time compete with each other. They do this by prescribing acceptable and unacceptable state behaviour and practices.<sup>467</sup>

Most commercial observers, may agree with the fact that various opportunities have been created for the economy to grow as a result of financial liberalization and deregulation. As a result, and as interactions go on, there has also been evidence of different economic global crisis along the way. And in order to contain this, both private-sector oriented bodies and international public institutions would want to set standards to contain the situation. Part of the solution to contain this has been through the activities of some International Financial Institutions that concluded international agreements. But note that some of these agreements took various forms. Some were informally negotiated while others were in form of treaties with binding obligations accompanied with built-in mechanisms for dispute resolution in some of the treaties.

Due to the number of the international agreements in addition to the institutional arrangements, some observers have come to view this as a sign of fragility noticeable in the

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<sup>464</sup>North, D. 1990 *Institutions, Institutional Change and Economic Performance*. New York: Cambridge University Press. p.60

<sup>465</sup>R. Axelrod, 1984. *The Evolution of Corporation* New York: Basic Books

<sup>466</sup>J.P Allegret, and P. Dulbecco, 2002 “Global Governance versus Domestic Governance: *What Role for International Institutions?*” *European Journal of Development Research* 14, no. 2: 173-192

<sup>467</sup>M. Kahler, 1995. *International Institutions and Political Economy of Integration*. Washington D.C: Brookings Institute. pp.3-10

global financial system. There is the feeling that the presence of various international financial institutions that address matters or issues of financial stability have raised the concern that there may be need for the international standard setting to be governed by principles of global governance for proper direction.<sup>468</sup>

The fact remains that both the IMF and the World Bank are seen as very important economic organizations. They came into existence to help address short-term balance of payments issues and developmental loans to countries that needed them to get the world economy up and running again through the efforts of the USA, the UK and allied countries. They were formed in 1944 in Breton Woods (and can sometimes be referred as the Breton Institutions). They no doubt, play an important role by facilitating a sort of collective action among states and try as much as possible to assist in enhanced financial stability.

During their formation, the observation was that the two economic organizations were very necessary and still are, as they allow states to address very significant economic problems. These included currency stability and long term economic issues. If you assess at it this way, in today's economy which is now globalised to a massive extent, the presence of the two economic organizations help states to cut down on transaction costs to get the money they need. The nations save money (although some may disagree) by getting credit that may otherwise not be available to them if they want to do this on their own. The World Bank uses its own goodwill to get money from other developed economies when seeking to address the imperfections in the capital markets from western investors. The bank, then turns around and lends this money to the developing countries at rates that are considered to be competitive which these countries may not be able to get on their own. It is the hope that this facilitative role will allow capital to find their way into less developed economies and aid growth and development.<sup>469</sup>

The IMF on its own similarly since its formation contributed some inputs to addressing what may be seen as market failures. This could be as a result of less liquidity that may have come as a result of ‘not too enthusiastic’ attitude by private investors. These private investors may not be willing to provide short-term-loans to IMF member nations who may not be able to access money from them to address this. It is important to note that the members of the IMF

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<sup>468</sup>This observation was directed towards IMF. See J.P Allegret, and P. Dulbecco *op cit*.

<sup>469</sup>J. Stiglitz, 1999 “The World Bank at the Millennium” *Economic Journal* 109: pp.F576-F597 also available on <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-0297.00473> accessed on 26<sup>th</sup> Nov 2018

are also the same countries that are members of the Bank.<sup>470</sup> They are comprised of more than 185 members worldwide. The members of these two international economic organizations are entirely made up of states and the organizations have been established by treaties or agreements.<sup>471</sup> Flowing from this therefore, they also have international legal personalities. And of course, can assert claims under public international law.<sup>472</sup> The two differ from international financial supervisory bodies that have been previously pointed out to have a soft law status in this thesis. They were not established by bilateral or multilateral treaties or agreements and have no legal personality under international law.

### ***Direct impact on the convergence question***

The IMF and the World Bank have through their various actions been instrumental to attacking corruption and money laundering. This has been made possible through the two bodies' Articles of Agreement that established them. For instance, the Articles of Agreement of the IMF<sup>473</sup> empowered it to oversee the international monetary system to ensure its proper and efficient operation. It does this by exercising surveillance over the exchange rate policies of its members. On the other hand, the World Bank's Articles of Agreement permits it to promote economic development amongst its members by making loans available to them. These loans may be directed to the followings: economic adjustment programmes, rule of law, improving both the public and private sector accountability, including nice governance, and most importantly to the subject of this thesis, reducing corruption and financial crime.

In 2009, the IMF lunched a donor-support fund which was the first in what is called Topical Trust Fund (TTF). This was to finance technical assistance in AML/CTF. Countries like Canada, United Kingdom, France, Japan, Saudi Arabia, Korea, Kuwait, Luxemburg, the Netherlands and Switzerland were committed to raise \$29.2m over a period of five years.<sup>474</sup>

It is normal for the countries that are members of the IMF and the World Bank to come to them for loans. In summarized terms, the two organisations will let these countries know that

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<sup>470</sup> IMF uses its credibility to raise money from developed countries and advances this to sort out short-term balance of payment problems to countries that need it.

<sup>471</sup> D. Bowett indicated that international organizations are "created by a multilateral inter-governmental agreements that possess some measure of international personality." *The law of International Institutions*. 4<sup>th</sup> edn. 1982 chapter 11. London: Stevens

<sup>472</sup> See The American Restatement of Foreign Relations Law. Its sec. 223 describes international organizations as having "status as legal persons, with capacity to own, acquire, and transfer property, to make contracts."

<sup>473</sup> See Article 1V of IMF

<sup>474</sup> International Monetary Fund FACTSHEET March 2012, External Relations Department Washington D.C 20431 p.2

for them to get access to their request; they must be seen to conform to some international standards. In reality, countries are expected to toe the line of embracing the ‘rudiments’ that have been put out there by the soft law bodies as conditions to access the credit they need. Typical examples would be for the countries to embrace the FATF Recommendations and BCBS pronouncements that are seen to be stumbling blocks for the advancement of corruption and money laundering. In other words, they are seen to serve as international bench marks for accessibility of financial loans or aids to less developed countries. This is also applicable to developed nations. However, they are the orchestrators of the exercise. It may not affect them much.

There were few amendments to the IMF Articles. The one done in 1978 was crucial in helping to achieve surveillance and conditionality. That was the Second Amendment. It is probably right to point out that this actually made very important changes and gave the Fund powers and oversight over the members’ currency arrangements.<sup>475</sup> IMF conditionality was on the increase over the members.<sup>476</sup> In fact, IMF exercises its surveillance powers on the basis of its Article IV while its Conditionality powers are embedded in its Article V. The fund states that with regard to Surveillance, the organization is expected to put together a ‘machinery for consultation and collaboration on international monetary problems.’<sup>477</sup> The basis for the above is found in its Article.<sup>478</sup>

In recent years, the IMF surveillance status has consisted of its Financial Sector Assessment Programs (FSAPs). They lay emphasis in collecting information plus statistics on the financial health of member states on the areas that are provided and agreed by member states. The information they come up with is in theory, ‘on advisory basis.’ It has been noted that the countries are not actually bound by the information and statistics that IMF puts out, neither are they compelled to participate in the surveillance process. But I think it is in their best interest to listen to them. There are two types of surveillance, one is the multilateral Surveillance. The analysis is usually produced in its publication known as *World Economic Outlook*. In 1996, due to the Mexican currency crisis, IMF adopted a systematic standard data that enabled it to find out each country’s vulnerability to its banking and capital market. In

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<sup>475</sup> Ibid. It can be said that it succeeded in codifying the post-Breton Woods floating system, surveillance plus conditionality.

<sup>476</sup> See Article V of IMF

<sup>477</sup> Article 1 sec 1

<sup>478</sup> Article 1V (3) entitled ‘Surveillance over Exchange Arrangements’

this, IMF monitored various areas including financial crime.<sup>479</sup> There is the second one - the bilateral Article IV surveillance. But here, the IMF will do the publication of its findings with the consent of that member. This comes up as “Public information Notice.”

With regard to the analysis on why the countries are very eager to carry out IMF obligations, observers should also take notice of IMF’s enforcement tools. The author, points out, that the provisions of IMF’s articles are powerful tools in achieving this. Countries that get IMF money are very reluctant (at least on paper) not to comply in issues concerning financial aspects with corruption and money laundering in mind. The fund brings into play both an indirect and direct enforcement mechanisms. The fund can state that a member has failed in its obligation to meet up with the provision of the IMF Articles and therefore not qualified to use IMF’s general resources.<sup>480</sup> In a situation where a member has continuously engaged in persistent breach that is beyond a “reasonable period,” the Fund can by a stated majority of 70% of the members, in its Executive Board exercise the powers to suspend that member and can go for the withdrawal of that member from IMF.<sup>481</sup>

The above is there for the taking and is seen as very draconian but it has not yet been used by the Fund. It is a very powerful tool to use as deterrence against members. The greatest sort of fear about this comes from developing countries. Therefore, these countries will want to comply with the provisions. They have little or no alternatives when experiencing financial difficulties unlike some of the developed countries. Some of the developed economies are more likely not to seek financial succour from the fund (Japan is a good example of a country that refused to draw on the fund when it experienced financial difficulties).

With regard to the World Bank, the author notes that it has more expansive developmental work to do than the IMF. It was established with the Fund in 1944 and was part of the “World Bank Group.” This consisted of the International Developmental Association (IDA), the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for the Settlement of Investment Disputes (ICSID). The Bank’s powers are set out in its Articles of Agreement that has three general purposes: assistance in economic reconstruction and development, promotion of private foreign

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<sup>479</sup> M.D Bordo, and H. James. 1999. “The International Monetary Fund: Its Present Role in Historical Perspective.” This was a report that was prepared for the U.S Congressional International Financial Institution Advisory Commission, Washington D.C.

<sup>480</sup> See Article XXV1 (2)(a)

<sup>481</sup> Article XXVI (2)(b)-(d)



investment; plus increase in international trade, economic growth and the living standards of the general public. Of course, these are difficult to achieve in an environment where corruption and money laundering hold sway.

The World Bank Articles prohibit it from interfering with the internal political affairs of the member countries.<sup>482</sup> And there have been few suggestions that the Bank must be very careful in the way and manner that it operates in order not to be seen to be in breach of its Articles in dealing with the member states. The Bank is expected to be making its lending decisions based squarely on economic decisions and the expected viability of the projects.

The author notes that from the scheme of events, and activities of the bank, it was never mandated with the powers to oversee capital movements. But come to think of it, its role in advising countries on how best to put their acquired loans into productive use in enhancing proper economic development, may be a tacit suggestion that it may be in a position to offer an acceptable platform to regulate finance. This is only an observation by the writer.

In the 1980s and 1990s both the Fund and Bank's short-term loans began to forge together. They were similar in that they both encouraged institutional reforms including areas that are anti-corruption in out-look. A. Newburg noted that there were "few signs of cooperation and conditionality" that existed between the two organizations.<sup>483</sup> The bank was involved in what was to be known as the "new conditionality" which made people to believe that it may be stepping out of its original mandate. The author submits, that from whatever angle one may look at the issues concerning the IMF and the Bank, the emerging countries or the developing countries still try as much as they can to conform to the dictates of what the two institutions want as conditions for their "assistance" in attacking corruption and money laundering. Without this, they will not be able to access their facilities.

To add credence to the fact that the two economic organizations had separately and jointly on occasions put in efforts to combat corruption was evidenced as far back as 2001. In 2002, the IMF and the World Bank started a joint assessment program specifically that was about the international standard that both FATF and the Offshore Group of Banking Supervisors (OGBS) initiated. OGBS changed its name to Group of International Finance Centre

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<sup>482</sup>See Article 4(10)

<sup>483</sup>A. Newburg 2000, "The changing roles of the Bretton Woods Institutions: Evolving Concepts of Conditionality." In M. Giovanali (edn), *International Monetary Law Issues for the New Millennium*, Oxford University Press.

Supervisors (GIFCS) after thirty one years of its formation. And they have observer status with FATF and very close working relationship with Basel Committee.

Admirably and jointly, the requests from more than one hundred (100) countries to help them develop and at the same time build good institutional infrastructure that would stand the test of time in fighting money laundering and terrorism was met with positive response. These international standards were specifically geared towards fighting money laundering. Of course, the two organizations had in mind that this was as a result of corruption,<sup>484</sup> hence the relevance to the convergence problem. In truth, part of these requests included the recognition that Financial Intelligence Units (FIUs) should have very important role to play in the fight against specifically money laundering and counter terrorist financing. Both the Fund and the Bank as indicated above provided technical assistance to some developing countries. And the belief is that this will continue in future for a considerable length of time.

### **5.7 An assessment of Financial Intelligence Units (FIUs) and Wolfsberg Principles**

From the previous segment of this thesis, both the IMF and the World Bank have continued to play significant role in the global economy. Their efforts have continued to raise divergent views amongst financial and development observers around the globe in the role they have played and possibly will continue to play in the war directed to corruption and money laundering. However, as the wheel of economic development across nations continue to expand, there arose the need both domestically and trans-border for a coordinated financial information flow that should take the form of ‘‘guided financial intelligence’’ gathering.

Businesses are conducted around the globe with the intention to make profits. But most of the channels used in conducting legitimate transactions are also used for illegitimate commercial purposes. Criminals do use the financial systems around the world to conduct their financial transactions. It is difficult to deny this fact. The criminals involved in various facets of this are also ‘‘very wise’’ and can go to various lengths to try and hide the proceeds of their ‘‘so called profits.’’ Gathering financial intelligence, on account of the above therefore became a very good basis to help in the war against financial crimes in their various modes.

#### ***The Egmont Group as a crystallizing factor in financial intelligence gathering***

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<sup>484</sup> See APG/FATF ANTI-Corruption/AML/CFT Research prepared for the FATF/APG Project Group on Corruption and Money Laundering by D. Chaikin and J. Sharman. September 1977 p. 75

It is necessary, to point out, that there are various organisations that have been set up in such a manner, that they have as part of their overall goal, to fight money laundering. Typical examples of these organizations are the World Customs Organization (WCO)<sup>485</sup> and International Criminal Police Organization (ICPO/Interpol).<sup>486</sup> However, the above group (Egmont) has come into play specifically to provide intelligence that will be used to fight money laundering. The organization was formed in June 1995 and derived its name from the place that the first meeting occurred - Egmont-Arenberg Palace in Brussels. Interestingly, it was a joint initiative between the US and the Belgium government. After 1995, the group has continued to meet on a regular basis to formalise issues. The European Commission commented that this group has become a genuine international forum and also an essential element in the international fight against money laundering.<sup>487</sup>

The truth of the matter is that it was due to the need to gather intelligence in the financial circles against money laundering, that there were requests for the establishment of this type of organisation. But the form the intelligence unit should take was not specifically indicated.<sup>488</sup> The focus was and still is on reporting suspicious transactions to the relevant authorities. There were simply calls or requests from different bodies for this to be set up by various countries. The emphasis was on financial institutions and private organisations to make available suspicious transactions to a relevant body that would scrutinise these and hand over to other authorities to help in fighting money laundering.

In essence and in relation to the subject of this thesis, the idea was and is still that when intelligence is gathered through this manner, it will help in checking corruption and money laundering. However, it was noticed or observed during the initial process that there were issues with cooperation amongst countries. V. Mitsilegas remarked:

*‘it is extremely difficult for an independent or administrative unit to share information with a unit that constitutes part of the police of another state. Such an exchange, without sufficient guarantees, would undermine one of the fundamental missions of independent units, that is, to avoid to the greatest possible degree the communication of sensitive everyday information to law enforcement authorities. On the other hand, independent units face problems in*

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<sup>485</sup>This was formally called the Customs Cooperation Council (CCC).

<sup>486</sup>This is also known as Interpol that was founded in 1923, and a successor to International Criminal Police Commission

<sup>487</sup>See the Second Commission Report to the European Parliament and the Council on the Implementation of the Money Laundering Directive,” Brussels, 1 July 1988, COM (1998) 401, final, at p. 14

<sup>488</sup>FATF 1996 Recommendations called for establishment of this financial intelligence Unit. The 1991 EC Directive (Directive 91/308/EEC) on the Prevention of the use of the financial system for the purpose of money laundering did the same. But note that this directive has subsequently been replaced by other directives.

*consulting foreign police data, as they ‘do not fit’ in the international police communication system; at the same time, it is impossible sometimes even unconstitutional for many police units, as state units, to exchange information with independent, ‘non-state’ bodies in other countries.’*<sup>489</sup>

It was possibly due to clear recognition of some of the difficulties or teething issues encapsulated in the above author’s observations that FATF may have reacted at some point. A look at the then FATF Recommendation 32 of 1996 called on its members to react to this.<sup>490</sup> Indeed, it has now come to be accepted that the Egmont Group no doubt is now or has emerged as the main international platform that has a total focus on enhancing cooperation between financial intelligence units. Interestingly, it was in its meeting that was held in Rome in 1996 that it eventually came up with what has come to be accepted as the definition of what FIU should be - a central, national agency responsible for receiving (and, as permitted, requesting) analysing and disseminating to the competent authorities, disclosures of financial information concerning suspected proceeds of crime, or required by national legislation or regulation in order to counter money laundering.<sup>491</sup>

The author submits that it is the coming into play of the fruition of the efforts of the Egmont group by way of forging ahead the FIUs that has helped or contributed tremendously in checking the volume of corruption and money laundering. It is the information gathered from intelligence that is usually forwarded to the appropriate authorities, who would make some efforts to confront the criminals by way of prosecution from the information on the STRs. Although, we have to also note that distilling these STRs requires a very concentrated effort on the part of the FIUs.

Egmont as a group has had an observer status with the FATF since 2002,<sup>492</sup> and we are possibly aware by now of the implications of FATF granting it this status. The group has its permanent headquarters in Toronto. The group kept on expanding its horizon. A typical example of this was after the horrific terrorist attack on the US in September 2001, the group

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<sup>489</sup>V. Mitsilegas, *Money Laundering counter-measures in the European Union: a paradigm of security governance versus fundamental legal principles*, New York, Aspern Publishers, 2003, p. 170

<sup>490</sup>Countries were told to “make efforts to improve a spontaneous or “upon request” international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between such national units.”

<sup>491</sup>The group adopted this definition when it had its meeting in Rome in November 1996

<sup>492</sup>Refer to “Financial Action Task Force on Money Laundering: Annual Report 2001-2002” Paris, FATF, p. 12

just like the FATF expanded its mandate on financial reporting to encompass matters on terrorist financing.<sup>493</sup>

Aside above, the group in its bid in addressing the issues relevant in checking corruption and money laundering was able to focus on its objectives and by extension, the convergence question in this thesis. The objectives included the followings: to expand and systematise international co-operation in the reciprocal exchange of information, to increase the effectiveness of FIUs through the offering of training and promotion of personnel exchanges that would improve expertise of those personnel; fostering better/secure communication amongst its members via Egmont Secure Web (ESW); increased mode of coordination plus support among the operational sections of the group; to promote the operational autonomy of its members; encouraging and promoting FIUs with countries that have AML/CTF in place or those that are still at an earlier stage of developing.<sup>494</sup>

The formation of this group (Egmont) has enhanced the setting up of national FIUs which were specifically done using the definition given by the group. It is fair to say without possible contradiction, that this is now universally accepted. Very important organizations like the United Nations (UN) has encouraged the process of setting up FIUs.<sup>495</sup> Admirably, IMF/Bank have not been found wanting in this aspect.<sup>496</sup> Additionally, there are other Conventions (this includes also some soft law bodies) that have recognised the importance of FIUs and actually requested from countries that are signatories to them to set this up in their jurisdictions taking into account their country's local content.<sup>497</sup>

There are various types of FIUs. The common denominator amongst them is simply the fact that they are all geared towards fighting corruption and money laundering. It may be acceptable to indicate that the various brands of FIUs may be categorised into four

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<sup>493</sup> "Suppressing the financing of terrorism: a handbook for legislative drafting," Washington DC, Legal Department, International Monetary Fund, 2003, p. 62

<sup>494</sup> "Egmont Group: Annual Report June 2009-July 2010," Toronto, Egmont Group, p. 21.

<sup>495</sup> Article 58 of UNCAC 2003

<sup>496</sup> *Financial Intelligence Units: An Overview*, Washington DC, International Monetary Fund, 2004.

<sup>497</sup> Article 7(1)(b) of the 2000 United Nations Convention against Transnational Organised Crime. See also Articles 14(1)(b) and 58 of the 2003 United Nations Convention against Corruption. FATF Recommendation 26 of 2003 called for the establishment of FIUs for countries. In fact the interpretative note to recommendation 26 encouraged countries to seek Egmont Group membership. Currently, Recommendation 29 of the 2012 FATF that was updated in October 2018 has also sent the same signal to countries to establish FIUs.

types.<sup>498</sup> These include the administrative, Law enforcement, judicial or prosecutorial and the “hybrid” types.

The administrative-type is usually seen to be part of the structure that is placed under the supervision of an administration that is not part of either the judicial or the law enforcement agency. This type of FIU is seen to be a separate agency but may be placed under a substantive supervision of a ministry. The reason is simply to create what is called a “gap” between the financial sector and also the country’s financial agency that are seen to be in charge of financial crimes and investigations in that country. The USA is a good example of FIU that is administrative in character - Financial Crime Enforcement Network (FinCen).<sup>499</sup> It has its headquarters in Vienna, Virginia, United States. Another administrative style example is Belgium where the FIU was set up devoid of any connection to a ministry.

The real administrative location may be different. It may be placed under that country’s ministry of finance, a regulatory agency or as the case may be under the Central Bank. In administrative type, they do not have powers to do investigation and prosecution. They just collect the information, analyse and then disseminate. The thinking or the idea of creating a “gap” is possibly to encourage more reporting of STRs to FIUs. The financial institutions with particular focus on the banks prefer this type. They usually shy away from having a direct nexus with law enforcement units.

In the law enforcement type FIU, the unit will be involved as part of a law enforcement agency in that country. In view of its mandate or operation, it is usually expected to be close to other law enforcement apparatus in that polity (this includes financial crime unit). It is the expectation that it will benefit from the expertise displayed by them including other sources of information. It is reciprocated by the fact that the information that the FIU have are then accessed with less difficulty by the law enforcement agency. Of course, they can use this in any investigation to contain corruption and money laundering. They also have powers of the law enforcement agency which includes the power to freeze financial transactions and seize assets. Interestingly, the United Kingdom is a classic example of this type. Presently, this is done by National Crime Agency (NCA). The UK Financial Intelligence Unit (UKFIU) is

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<sup>498</sup> See on a general basis, J.F Thorny, 1996, “Processing Financial Information on Money Laundering Matters, The Financial Intelligent Units,” *European Journal of Crime, Criminal Law and Criminal Justice*, Brussels, pp. 257-82, and P.A. Schott, 2003, Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism (Washington: World Bank and International Monetary Fund), Ch V11.

<sup>499</sup> In the US this was founded in April 1990.

within NCA and its method of operation is mapped out. NCA took over or subsumed the old Serious Organised Crime Agency (SOCA) in October 2013. It was only National Criminal Intelligence Service that was a FIU.<sup>500</sup>

The UKFIU gets or receives more than 460,000 SARs (Suspicious activity Reports) a year. These (SARs) are simply the pieces of information that alert the law enforcement agency of a potential money laundering or terrorist financing activity. Although the task is very daunting, some positives have come out of it in the United Kingdom.<sup>501</sup> The idea has always been fundamentally to reduce the cancerous spread of financial crimes with money laundering at the forefront.

The judicial or the prosecutorial FIU can be classified as the type that is seen to “reside” within the judicial branch of the state. This is mostly under the prosecutor’s jurisdiction. This is highly noticeable in countries that have a civil law legal tradition. Typical example is Luxembourg. In this set-up, public prosecutors are usually part of the judicial system. They also have authority to control the investigatory bodies and can allow the prosecutors to direct and supervise the criminal investigations.<sup>502</sup> It is usually noticed here that such judicial powers like seizure of funds, freezing of accounts, detention of suspects, interrogations and searches can be quickly conducted. This is as a result of the fact that suspicious reports would be confirmed by initial enquiries. Additionally, this type of FIU usually works very well where there is a high tendency for bank secrecy laws. This is as a result of the fact that the judicial and prosecutorial authorities would be needed to ensure a positive compliance or cooperation from the financial institutions. The writer notes, that it is a fact that the “practical independence” of the judiciary inspires a solid confidence within the financial circles.

The last type of FIU is the one known as the “hybrid” style.<sup>503</sup> As the name suggests, it is classified as something that is made to exhibit or demonstrate a combination of different elements. It is a complete amalgam of the characteristics of the previous types put together. In other words, it is a positive attempt to obtain all the advantages associated with the other

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<sup>500</sup> Available on [https://en.m.wikipedia.org/wiki/Serious\\_Organised\\_Crime\\_Agency](https://en.m.wikipedia.org/wiki/Serious_Organised_Crime_Agency) accessed on 3<sup>rd</sup> December 2018

<sup>501</sup> See Part 7 of Proceeds of Crime Act (POCA) 2002 which still applies throughout the United Kingdom. This is not affected by the amendment in Schedule 24, Crime and Courts Act 2013. Note that POCA still applies as it did before the coming into existence of NCA in October 2013.

<sup>502</sup> See Financial Intelligence Units: An Overview by International Monetary Fund and World Bank 2004 p.16

<sup>503</sup> Ibid at p. 17

types. Some FIUs do combine the features of both administrative and law-enforcement types. However, others do combine the powers of the police with that of the customs. Irrespective of the form that a FIU takes, the fundamental motive is simply to assist in the fight against corruption and money laundering hence its significant importance to the subject of this thesis.<sup>504</sup>

Granted that the uniting informal organization is the Egmont group, we should bear in mind that Egmont is very much attached to FATF. Therefore, from the previous observations on the potency of FATF, by extension, FIUs are very vital components in the crusade against money laundering as previously indicated.

### *Compressed importance of the Wolfberg Principles*

The author reinstates that there are different approaches that were produced to control the scourge of money laundering. These approaches can range from regulatory dimensions to financial legal persons coming together in the financial circles with the purpose of issuing out some ‘effective principles’ (at least on paper) to tackle the scourge. In the late 1990s, there was this feeling in the financial circles around the globe that the private banks were very passively involved in matters concerning money laundering. This feeling therefore invigorated the formation of the group in order to possibly counter this assertion.

The Wolfsberg Group at present (as at 2018) is an association of thirteen global banks. Their aim is to develop frameworks plus guidance directed towards managing financial crime risks. These risks are focussed on anti-money laundering and terrorist financing plus knowing your customers. The Group is made up of the following banks - Banco Santander, Bank of America, Barclays Bank, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, J.P Morgan Chase, MUFG Bank, Societe Generale, Standard Chartered and UBS. They agreed and came together in 2000 in Chateau Wolfsberg in north-eastern Switzerland with some representatives of TI. They worked on the initial drafting of anti-money laundering guidelines for private banking. As a result, the Wolfsberg Anti-Money Laundering Principles for Private Banking came into play first in October 2000, but were revised in May 2002 and interestingly and most recently in June 2012.<sup>505</sup>

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<sup>504</sup>Corruption is one of the predicate offences of money laundering and the two are linked and complement each other. Therefore, STRs initiated for either should be viewed as same as the two activities are done in “obscurity” to evade the regulatory radar.

<sup>505</sup>This is available on <https://www.wolfsberg-principles.com> accessed on 5<sup>th</sup> December 2018



The Principles simply have a “soft law undertone.” But interestingly, banks are expected to follow them due to fear of reputational matters. In fact, issues that were published by the group are designed to provide financial institutions (FIs) with a sort of industry perspective on effective financial risk management. There are ways that the financial institutions do usually seek to adapt to their various publications including the Principles. But they must bear in mind that there is ‘no one size that fits all.’ Each must adjust to the peculiarity of each individual organization that must be tailored to meet its risk appetite. It is recognised that the risks inherent may be different in different places or regions.<sup>506</sup>

It is a fact that Wolfsberg issued some remarkable Principles which were periodically updated. For example, the Wolfsberg Anti-Money Laundering Principles for Correspondent Banking 2014 updated those that were originally issued in November 2002. These included matters on due diligence and dealing with PEPs by triggering an enhanced due diligence.<sup>507</sup> It is to their credit that they worked on some papers that they intended for the regulators to use as guidance when formulating theirs with regard to some areas in banking that are yet to be effectively guided.<sup>508</sup>

The author surmises, that at least on paper, the intentions and the various efforts made by Wolsberg Principles, can effectively be said to be relevant to fight the convergence question in this thesis. This is in theory and is my opinion. But practically and from what has been going on in the banking industry, the author submits that what the members do is simply paying “lip service” to the contents of the principles. The various money laundering incidents that happened in HSBC adds credence to this. Is this bank not a member of the Wolfsberg Group? Mr David Bagley, the then head of compliance in this global bank resigned his appointment and admitted that HSBC cleaned “dirty money.” This money emanated from drugs money and corruption matters from Mexico and Russia into USA.<sup>509</sup> Of course, HSBC was fined £26m for money laundering.<sup>510</sup> Additionally, the issue with Iran then, included the breach of sanctions.

The then CEO Stuart Gulliver on July 30 2012 apologised for “mistakes of the past.” He stated that what happened in the US and Mexico was shameful. The bank was fined \$27.5

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<sup>506</sup> Ibid

<sup>507</sup> See Dennis Cox, Handbook of Anti Money Laundering, 2014, John Wiley and Sons Ltd. p.112

<sup>508</sup> Supra

<sup>509</sup> *Metro Newspaper* Wednesday, July 18 2012

<sup>510</sup> *Evening Standard* Tuesday 7 August 2012 p. 2

million in Mexico for lax controls in its anti money laundering systems. This was a week after the US Senate Committee slammed the bank for letting its clients shift money from dangerous and secretive countries. The US indicated that between 2007 and 2008, HSBC Mexico operations moved \$7billion into the bank's US operations.<sup>511</sup> It ended up paying \$1.9b (£1.2b) in money laundering penalties to US authorities.<sup>512</sup> The author notes that HSBC is no stranger to fines. It is submitted that the banks are just paying lip service to these anti-money laundering principles or checks put in place. They are engaged on what the writer calls "cost benefit syndrome." At the time this fine was imposed, it made a pre-tax profit of \$12.7b for the first six months in 2012. This looks very interesting as most of these fines are like a "tap on the wrist," considering the colossal profits the banks make. What some do when investigation comes up, is simply to set aside a sum of money in anticipation for the breach.

There are other numerous fines that have been imposed by the authorities against various banks that are members of this Wolfsberg Group irrespective of their Principles. At about the same time, Standard Chartered Bank was also fined more than £187m (\$300m) to settle charges that it violated US sanctions in Iran, Burma, Libya and Sudan. In fact the NY Department of Financial Services (DFS) accused the bank of hiding 60,000 transactions with Iran worth \$250b over a decade. New York District Attorney Cyrus Vance had this to say:

*"Banks occupy positions of trust. It is a bedrock principle that they must deal honestly with their regulators. These cases give teeth to sanctions enforcement, send a strong message about the need for transparency in international banking, and ultimately contribute to the fight against money laundering."*<sup>513</sup>

Suffice to say, that irrespective of the anti-risk mechanisms on money laundering introduced by the private bankers, money laundering matters keep rearing their ugly heads. And until the authorities or regulators review their containment antidote, there may be no end in sight.

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<sup>511</sup> Available on <https://news.abs-cbn.com/business/07/26/12/hsbc-fined-275m-mexican-money-laundering-probe> accessed on 5<sup>th</sup> December 2018

<sup>512</sup> Available on <https://www.bbc.co.uk/news/business-20673466> accessed on 5<sup>th</sup> December 2018

<sup>513</sup> Available on <https://www.bbc.co.uk/news/business-20669650> accessed on 5<sup>th</sup> December 2018.

## **5.8 Vienna Convention 1988, Palermo Convention 2000 and European Union Directives as anti-convergence weapons.**

The author is not particularly convinced as to the intentions of the principles put forward by the Wolfsburg Group. Their emergence has been marred by the suspicious air of ‘‘we pay lip service to our rules and principles and when caught, can pay off the fines.’’ However, the authorities (with particular reference to the UN) on account of the negative implications of allowing drugs and criminal funds to flourish within the financial system came up with the above Conventions and Directives.

The background leading to the eventual emergence of the Vienna Convention and Palermo Convention in the context of this thesis was addressed in chapter 1. But suffice to say, that there was an upsurge in the potential problems encountered by the global economy or international community that came up as a result of the drug trade carried out by the culprits. There was a time that the drug trade was viewed as being synonymous with laundering issues. This was eventually tackled by the Vienna Convention. This Convention as a result of the contents therein; it may possibly be correct to be tagged with the title: ‘‘mother of all subsequent conventions’’ that contained anti-money laundering elements.

In point of fact, the Convention objectives were directed towards drug-orchestrated money laundering issues and the encouragement of members to extend the scope.<sup>514</sup> It was ratified by more than 100 countries and came into effect in 1990. And in all honesty, issues like confiscation, mutual legal assistance (MLA), criminalization of money laundering, treatment of bank confidential matters etc, one can humbly submit are contributory factors to the anti-convergence focus of this thesis.

The Palermo Convention of 2000 is perhaps the most significant non-bilateral treaty which has addressed organised crimes and financial crimes. Admirably, the countries (not less than 189) that are signatories are expected to implement measures that would be anti-money laundering.<sup>515</sup> This Convention, the author submits recognised the central issue in this thesis. How is this so? The answer resides in the fact that comingling of corruption and money-laundering was recognised. Corruption proceeds were criminalised.<sup>516</sup> The close interface that

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<sup>514</sup>See Article 3 of this Convention that defined money laundering silently. Members were encouraged to criminalise drug related money laundering and instigate other processes to tackle the issue.

<sup>515</sup> Article 7 Palermo Convention.

<sup>516</sup> Article 6 Palermo Convention

also existed between corrupt activities and organised criminal activities was given due recognition.<sup>517</sup>

### ***European Union Directives (anti-money laundering)***

Going by historical perspectives in the political arena within the EU, this global space since the 1970s, has always prior to the Directives promoted closeness against crimes by forging closer cooperation. Before the Treaty on European Union<sup>518</sup> such matters were addressed in form of European political cooperation. Enhanced version of this cooperation was also extended in such areas as justice and home affairs.<sup>519</sup> It was later on that such matters as customs cooperation, fraud and drug addiction etc that were to be dealt with outside the confines of Maastricht were later brought under the same umbrella by the Lisbon Treaty.<sup>520</sup>

The Lisbon Treaty abolished the “pillar” law structure. This was seen to be slowing progress in the EU. V. Mitsilegas captured this succinctly:

*“This change has major implications for third pillar law: with the third pillar abolished, rules on police and judicial cooperation in criminal matters are - in principle at least - aligned with the “ordinary” first pillar framework - with EU criminal law thus becoming “communitarised.” A closer look at the treaty reveals however that the undoubtedly significant “communautarisation” of third pillar is far from unqualified, with a number of “intergovernmental” elements remaining.”<sup>521</sup>*

In fact, the Maastricht Treaty and later Lisbon Treaty contributed in providing the legal basis for some of the different Directives. However, whatever the situation may be, we should all bear in mind that the EU Directives on money laundering are reactions in tandem with the FATF recommendations whenever the soft law body reacts to the prevailing money laundering matters around the globe. Importantly, some of the European Commission members along the line monitored the formation of the recommendations of the FATF. Actually, they do not want the Commission to lose ground on the progress already made by FATF. In reality as indicated above, all the subsequent anti-money laundering Directives that are to be implemented by 2020 were simply reactions to the suggestions of the FATF. The scenario goes like this: FATF on different occasions reacts to changes in the global scene

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<sup>517</sup> Articles 8 and 9 are fully illustrative of this.

<sup>518</sup> This is universally referred to as the Maastricht Treaty of 7 February 1992. It was signed in Netherlands.

<sup>519</sup> See Title VI of Maastricht Treaty

<sup>520</sup> Treaty of Lisbon was signed by the EU member States on 13 December 2007. It amended two treaties that formed the constitutional basis of European Union. It became effective on 1<sup>st</sup> December 2009.

<sup>521</sup> V. Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing, 2009, p. 37

(inclusive of terrorist threats), the European Union follows suit by responding in issuing the money laundering Directives. It is now left to the member states to transpose this into their national legislations with a time frame. Member states at the time of writing are expected to transpose the 5th Directive by 20<sup>th</sup> January 2020. We may now take a look in a compressed manner at the Directives.

The first European Union money laundering Directive was in 1991<sup>522</sup> and came into force on April 1994. The idea was to prevent the use of the financial system by money launderers. At that period, the issue of drugs was high on the agenda. The Directive was designed to achieve a level playing field across the EU. The authorities recognised this fact - not only that the financial institution be made to adversely suffer; money laundering can damage the financial system as a whole across EU. It was a way to prevent the use of “dirty money” from being circulated in the EU. At this period, this Directive was focused on credit and financial institutions. The reason then was that they were considered to be the most vulnerable to be used by the culprits. However, member states were encouraged to extend this to other organisations or legal persons that were considered to be at risk of being used.

It was because the drug trade was high on the agenda that this Directive focussed on it as elucidated in the Vienna Convention. However, member states were informed or encouraged to extend it to other serious criminal matters. In summary, member states were required to do the followings: prohibit money laundering, verify customer identification and keep the record, report suspicious activities, avoidance of informing the customers under investigation (known as “tipping off”), protection of breach of confidentiality, and maintenance of adequate internal compliance control by financial institutions. The writer agrees that the above would or did contribute in checking “dirty money” to some extent. We simply have to keep in perspective that the criminals are always ahead of the legislation. But the authorities will keep on reacting to the dictates of the situation.

It was as a result of the inadequacies inherent in the above Directive, that the second one (2MLD) came up to at least curb some of the loopholes.<sup>523</sup> Of particular focus was the inclusion of serious crimes in addition to drug trafficking. Secondly, it also included professional gate keepers like lawyers and accountants to be subjects of close scrutiny. This

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<sup>522</sup>Council Directive 91/308/EEC

<sup>523</sup>Directive 2001/97/EC amended and updated the first one on the prevention of use of the financial system for the purpose of money laundering.

of course generated a lot of controversy. Non-financial-sector-businesses were included. They included: estate agents, auditors/external accountants/tax advisers, notaries, dealers in high value goods/auctioneers, anytime payment was made in excess of 15,000 Euros and casinos. It must be noted that states seeking entry into the EU must comply with all EU regulations. The UK transposed the above via POCA 2002 and repealed Money laundering Regulation 2003.<sup>524</sup>

We have to note that most times that there is a major occurrence or incident around the globe the authorities do react to plug the loophole. R. Alexander indicated that it has become a truism that September 11 changed the approach to money laundering control worldwide, yet the changes brought in its aftermath continue. First in United States, then in the United Kingdom and shortly thereafter, at the Community level in the European Union, now the Financial Action Task Force of OECD has acted: the Forty Recommendations it sets out to prevent money laundering have been amended.<sup>525</sup>

The third Directive (3MLD) was issued to replace the second Directive.<sup>526</sup> As already indicated in this thesis, FATF made a lot of significant changes to its 40 recommendations in tune with global dynamics. The European Commission subsequently agreed that a new Directive was needed to replace the first two. It is good to note that the major issues concerned the CDD.<sup>527</sup> FATF Recommendations were first issued in 1990. It was subsequently revised in 1996, 2001, 2003 and lastly in February 2012 (no further review yet as at the time of writing). The essential thing to note is that the EU will always react to the FATF ‘changes’ by issuing ‘a Directive’ to keep in touch with the global anti-money laundering soft law body.

In fact, as a minimum, enhanced due diligence to check money laundering must be done by financial institutions in three instances in 3MLD. These include: non-face to face situations, cross-frontier correspondence banking relationships and lastly with PEPs.<sup>528</sup> Remarkably, it added a new perspective or definition of who a PEP should be. Also the provision of Trust and Company Service Providers were introduced under this Directive. Additionally, ‘high

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<sup>524</sup>This has since been replaced by Money Laundering Regulation 2007, which was also repealed.

<sup>525</sup>R. Alexander, “FATF new recommendations as the scope widens, companies come under the spotlight.” *Comp. Law* 2003, 24(9), 257

<sup>526</sup>Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

<sup>527</sup>See Article 7 of the 3MLD. This contained a more detailed requirements for customer due diligence.

<sup>528</sup>*Ibid* Article 11

value dealers” were no longer restricted to particular industries.<sup>529</sup> As is admirably customary with the UK, this was transposed as the 2007 Money Laundering Regulation which was replaced by the 2017 MLR. And it is fair to state here that the UK has always been “on top of the game” in its transposition of the EU laws. In some instances, the UK would have a domestic law that is already in tune with what the EU wants the member states to do.

It is pertinent to note that at the time of writing, United Kingdom has triggered Article 50 of the Treaty on European Union<sup>530</sup> and negotiations on its exit from the EU are still ongoing. But for the time being, the UK is still a member of the EU and will continue to implement and apply the EU legislation. It has demonstrated robustness behind any policy aims of the EU as steered by FATF. Not to do this will compromise the UK’s reputation in corruption and money laundering issues. In fact, the UK has already enacted the legislation - Sanctions and Anti-Money Laundering Act 2018.<sup>531</sup> The sanctions part came into effect in November 2018 but the money laundering part is not yet in force at the time of writing.

It was as a result of some of the inadequacies inherent in 3MLD that the 4MLD<sup>532</sup> was issued. It involved a lot of various levels of CDD and other matters. The idea is for the implementation to be a stumbling block to money laundering and terrorist financing in the EU. And it is very relevant to the issues of the convergence question in this thesis - corruption and money laundering. It came into effect or force on 26<sup>th</sup> June 2015 and member states were required to transpose it by 26<sup>th</sup> June 2017. The UK transposed this into UK law through the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The writer will comment on this in the next segment. The recommendations contained in the 2012 FATF took into account changes in technologies and

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<sup>529</sup>This included goods sold at more than 15,000 Euros. But this has been reduced to 10,000 Euros due to 4MLD.

<sup>530</sup>This was authorised by the contents of European Union (Notification of Withdrawal) Act 2017

<sup>531</sup>This received Royal Assent on May 23 2018. It is a significant legislation that is required to plug a gap that has been previously filled by EU Law. It represents key aspects of “Brexit Legislation.” Available on <https://www.mishcon.com/news/briefings/sanctions-anti-money-laundering-act-2018> accessed on 10<sup>th</sup> December 2018

<sup>532</sup>Directive (EU) 2015/849 of European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

vulnerabilities that have been essentially mirrored in 4MLD. This eventually was reflected in MLR 2017 in the UK.<sup>533</sup>

One of the key aims in 4MLD is to enhance transparency and also prevent the use of anonymity of offshore companies and accounts for the purpose of money laundering. Importantly, there is a further shift on the matter of risk-based approach. Some obliged entities like credit institutions, financial institutions and trust company service providers (TCSPs) are now required to undertake the required or appropriate steps necessary to assess the risk of money laundering in dealing with customers.<sup>534</sup> There is an obligation to maintain a central register for not only corporate and legal entities' beneficial<sup>535</sup> ownership information but also for trusts and similar arrangements to trusts.<sup>536</sup> This is to minimise the use of trusts in some negative instances where people use it for laundering and terrorist financing. 4MLD one can point out, completely overhauled or tampered extensively with the 3MLD. There was also focus on CDD that is focussed on a risk-based-approach.

In any case, the Directive is essential in containing money laundering and corrupt activities. But like we have already stated, the aim is to put a massive break on the quantum of the above activities. Above gainsaid, the 4MLD is still presently (at the time of writing) relevant in different aspects. What the 5MLD has done to contain the issues in the convergence matter is to further add additional bites to the 4MLD. It was meant to come into play with the 4MLD but the authorities decided that it was not realistic. The Directive was a direct response to the terrorist attacks in both Paris and Belgium in 2015 and the issues in the ‘‘Panama Papers.’’<sup>537</sup>

In tandem with what the European Commission had in mind, the objectives of the 5MLD are to: enhance the present powers of FIUs and at the same time facilitate their increasing transparency on trust matters plus company ownerships and prevention of the risks that are inherent in the use of prepayment cards and dangers posed by use of virtual currencies. The safeguards are to be improved in transactions involving high risk third countries (HRTCs). Access to information by FIUs is to be enhanced, evidenced by new centralised bank account

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<sup>533</sup>L. Campbell, ‘‘Dirty cash (money talks):4AML and the Money Laundering Regulations 2017,’’ *Criminal Law Review* 2018 vol.2 p.2

<sup>534</sup>S. Wong, ‘‘The New EU Anti-Money Laundering Directive: farewell to transparency of UK trusts Trust Law International [2017], 31(3), 137-151

<sup>535</sup>See Article 30 4MLD

<sup>536</sup>Article 31 4MLD

<sup>537</sup>This lends credence to an earlier observation by R. Alexander that if there is a major incident, the authorities react.



registers. Additionally, 5MLD will ensure a centralised national bank account and payment account registers or a central retrieval system.<sup>538</sup>

5MLD welcomes a more sophisticated manner of CDD. It has been established that the terrorist attacks in Paris and Belgium evidenced the use of pre-paid payment cards. CDD will now be done on such cards and the value was reduced to 150 Euros.<sup>539</sup> This is a welcome development as the culprits (terrorists) hide under this guise to commit crimes. Also, the crypto currencies<sup>540</sup> are now under the scope of AML regulation. Virtual currency exchanges that allow virtual currencies to be converted into fiat currencies (exemplified by Pounds and Euros) will be obliged entities under 5MLD. As a result, they are subject to AML compliance obligations.<sup>541</sup> There is now a shift in emphasis and crypto currencies are not only seen as a medium of exchange but also primarily as asset class.<sup>542</sup>

5MLD has increased further the role of FIUs from that previously accorded them in 4MLD. FIUs can now access the information they need and be able to exchange this information via the appropriate cooperation with other law enforcement units or agencies inclusive of the ones elsewhere in the EU. Presently, FIUs can do the above without the need of a prior SAR from AML-regulated firms. It can be said (possibly rightly) that the powers that the FIUs are presently accorded are richly enhanced. This will in no small measure assist in fighting money laundering and corruption from the intelligence gathered from the FIUs.

We should not forget that on matters concerning “high risk third countries” (HRTCs), 5MLD is in line with the 4MLD<sup>543</sup> and prescribed the requirements that firms must apply EDD (Enhanced Due Diligence) to firms in HRTCs when entering into business relationships or transactions with natural persons and legal entities there. Pakistan was added to the Annex of Delegated Regulation (EU)<sup>544</sup> that has detailed the third countries with strategic deficiencies in money laundering and terrorist financing. The danger here is that the cost will

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<sup>538</sup> A. Srivastava et al, “Financial crime update” *Compliance Officer Bulletin* 2018 p. 5

<sup>539</sup> See amendments to Article 12 of 4MLD

<sup>540</sup> This is defined as “a digital representation of value that is not issued or guaranteed by a central bank or public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money but is accepted by natural or legal persons as a means of exchange and which can be transferred stored and traded electronically.”

<sup>541</sup> Op. cit Arun et al p.6

<sup>542</sup> M. Starks, Director of Competition, FCA, Speech on Blockchain: considering the risks to consumers and competition. Available on <https://www.fca.org.uk/news/speeches/blockchain-considering-risks-consumers-and-competition> accessed on 16<sup>th</sup> December 2018

<sup>543</sup> See new Article 18a of 4MLD. This amends Delegated Regulation (EU) 2016/1675 supplementing 4MLD

<sup>544</sup> This is Delegated Regulation (EU) 2016/1675

eventually be passed to the customers. The authorities have powers under 5MLD to stop the firms based in HRTCs from opening branches or representative offices in their jurisdictions. And conversely, their firms cannot open in HRTCs. The recitals of 5MLD points to the importance of letting credit and financial institutions between group members and others to have access that are subject to the data protection laws. It is good to note that as usual, the United Kingdom via Criminal Finances Act of 2017, initiated such sharing of information, provided it is done through NCA.

5MLD has also widened access to the beneficial registers for corporate entities and trusts - this will involve areas where there are tax consequences. Tax evasion is a serious matter and involves money laundering. The UK transposition of the above was not very difficult considering the fact that it had something on the ground prior to this.<sup>545</sup> With that of trusts, the changes have a more significant undertone in doing the CDD. Those that have access are obliged entities and legitimate interest must be displayed to gain this. It has been noted that this can cause a lot of friction on issues concerning fundamental human rights - right to respect someone's private life. Interestingly, this has been successfully challenged in France.<sup>546</sup> However, it does not mean that transparency regarding trusts is not possible. The authorities need to take seriously into account the matter of privacy when transposition is in place in member countries.

It is a fact that very little stands long in financial services and same is possibly very true in financial crimes. Presently, (at the time of writing) the main piece of legislation will be the 4MLD as amended by the 5MLD. It will be no surprise that preparations are on for a further Directive considering the fact that nothing stands still in financial crimes. The interesting aspect is that in whatever guise that they come, they are directed towards curbing corruption and money laundering which is the central focus in this thesis.

## **5.9 Conclusion**

The author submits that soft laws are here to stay in addressing the issue of money laundering and corruption. It will never go away irrespective of the shortcomings that have been attributed to it. There have been rumblings within the academia that they lack the required

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<sup>545</sup>The UK introduced a People with Significant Control Regime in 2016 that encompassed a public register at Companies House.

<sup>546</sup>Available on <https://www.taxjustice.net/2016/12/07/beneficial-ownership-disclosure-trusts-challenging-privacy-arguments/> accessed on 18<sup>th</sup> December 2018

legitimacy to be uplifted to the “hard law status” that would have made them to generate the required legal obligation expected of the parties. But the truth of the matter, the author submits, is that these soft laws have been cleverly formulated by the “rich countries” to be imposed on the weaker countries that have not had a “contributory voice” in the formation and deliberation of the final outcome “forcefully transposed” within their respective jurisdictions.

You may want to question how the BCBS goes about issuing out its “pronouncements” that are expected to be eventually “adapted” by the financial institutions. The deliberations are not open to “outsiders.” And irrespective of the fact that they may require some inputs from other countries (developing ones), they are not actually obligated to take these into account and ingrain these inputs. In reality, these are ignored. Even with this, when they eventually issue the pronouncements, the other “non inner circle countries” are expected to take these on board. The matter of legitimacy therefore readily comes up as earlier indicated. This is also applicable to the FATF but admittedly, there have been suggestions that they are slightly more open than the BCBS. However, the fact is still that the core decision making apparatus still evades the majority of the members.

In the above segment, notice was taken of the ongoing role played by the IMF and the World Bank. It is the submission of the author that they cleverly formulated some criteria to perpetually keep the developing countries in bondage. These loans are tailored in such a manner that they are seen to be “helpful” to these nations. The countries will keep coming back for more loans. Articles IV, V and VIII of the IMF were designed to promote fear and as a result, when the loan is taken out, the countries are perpetually bound to the IMF. The Bank has similar Articles. Although, the Bank is seen not to interfere with the internal affairs of the countries as seen in its Article 4(10), in very indirect manners, they indeed do sometimes interfere subtly (this has generated a lot of divergent opinions).

The impression amongst financial observers is that the financial institutions with special reference to the banks are also part of key economic drivers in the economy. A lot of people agree with this due to their intermediating status in the economy. Have we actually tried to view their activities in a different manner? It is the submission of the writer, that the banks are behaving in such a manner that may be suggestive that they may be seen or viewed also as “rogue institutions.” My submission may not align properly with some people. Why have the banks continuously been fined for violations of the compliance rules? They are always

prepared to pay up against infractions of money laundering and other financial crimes. Many banks have been caught out in this web and are too numerous to mention (HSBC, UBS etc). The fines are getting bigger due to policy change, and I doubt, if they will be able to stand the ‘heat.’

The banks make a lot of profit and most times this is not commensurate (the fines they are levied) with their profit outlay. Is this trend not criminal in its outlook? It looks very sinister on the part of the banks and it is high time that the authorities sit up and carry out a ‘concentrated attention’ on them. It is my submission that they are just paying lip service to the anti-money laundering legislations and other soft law mechanisms available. The time has come for the authorities to sharpen their investigative apparatus and see them as ‘rogue set ups’ out to continue to defraud the society. The sooner a different view of their activities is focused on, the better for the larger society. They know what they are doing is very highly deceptive and someone must stand up and speak out. Of course, some people are of the view that they are also involved in very ‘strong legislative lobbying’ to make sure that regulatory authorities do not see them in this mould. The pattern of their profit making mechanism is alarming and deceptive to say the least.

Despite several interesting anti-money laundering and corruption mechanisms discussed in this chapter, money laundering and other predicate indices to the offence are still with us. My submission is simply that the present solutions are still not enough to stem the tide of money laundering and corruption. More needs to be done as the society is being burdened or dragged into reverse momentum as a result of the negativities associated with the situation.

## **CHAPTER 6**

### **Anglo-American responses to the convergence problems**

#### **6.1 Introduction**

Convergence issues like corruption, bribery and money laundering are not ‘a recent day occurrence’: they have been there from the beginning of time. The assessment of most economic observers is that the society as a whole has been left on their knees as a result of this. However, the above assertion has not been left unchallenged from various angles. Notably, signals or reactions aside from emanating from some global bodies (exemplified by the various UN Conventions and soft law mechanisms) as earlier indicated in this thesis, has also emanated from the Anglo-American directions.

This segment will bring into play the impact of the UK Bribery Act on the convergence question. The author will point out some of the salient coercive ingredients contained in the Act that is seen to add teeth to the fight against corruption and money laundering in the business environment typified by the Act’s frontal confrontation of bribery matters. The Act is seen in many quarters as very venomous in tackling the bribery issues with its extraterritoriality characteristics. The writer will highlight some of the most important effects albeit in a compact manner and some of the conviction/s under the Act will be mentioned. The Act’s reactions from external criticisms prior to it notably from OECD and moves taken to correct these will be brought to the fore.

Complimenting the above is the introduction of the Money Laundering Regulations 2017 in the UK. Admittedly, this is a reflection of the continuous transposing capability of the UK authorities. It is just a ‘local reflection’ of the EU law. This again has demonstrated the UK’s rapid response and willingness to bring into play within the UK, EU’s 4MLD. The contents are tangible reflections of the efforts used to fight the convergence question in this thesis - corruption and money laundering. Issues of due diligence in a sliding scale will be highlighted and issues of transparency brought to the fore.

Perhaps, recognising that a lot of damage will continue to be done to the global commercial template in form of unacceptable access to business (most companies were bribing their way through to gain business deals) arrangements around the globe, the United States decided to add their legislation that is seen to have extra-territorial vigour. This came in form of enactment of Foreign Corrupt Practices Act 1977 (hereinafter FCPA). This segment will

shade more light on the background and its eventual enactment. FCPA use of both prosecutorial and settlement avenues of checkmating corruption and bribery via Department of Justice (DoJ) and Securities and Exchange Commission (SEC) will be highlighted. The writer will provide some case law examples of FCPA scenarios to buttress the point. More importantly, the writer wishes to point out, that the ingredients of the above enactments are primarily directed to curb the issues that are embedded in the convergence matter in this thesis. And not unsurprising and in line with academic writings, the author will provide a summary and possible observations to bring this segment to an end. This is with a view to linking it to the general summation of the writing as will be exemplified in the last chapter of this thesis.

## **6.2 The genesis of the United Kingdom Bribery Act 2010 as a reactive tiger**

### ***Background and coming into play***

Historically, it is a fact of life that in every day commercial and non-commercial activities, there have been tendencies for some of the participants to distort or influence the established order of doing things. This is done by importing or introducing the issue of bribery to gain an advantage and expect to influence the established natural pattern of doing the right things. It can be seen as a crime of giving another person especially somebody that is in a position of authority, money, a gift, etc, so that they will do something that is illegal or dishonest for you.<sup>547</sup> Additionally, s.1 of the Act is definitely unambiguous on the definition of bribery and is very straightforward - offering, promising or giving an advantage, financial or otherwise, to a person where that advantage is intended to induce them to perform their duties in a manner that is improper or to reward them for doing so. This is present in every society. However the UK in its bid or effort to sanitize the system has been in the forefront (evidentially, the UK has been issuing anti-bribery legislation for a long time) of fighting the malaise. It was as a result of the above that 2010 Act was promulgated.

Prior to the above Act, the UK based their anti-bribery laws on the repealed Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and Anti-terrorism Crime and Security Act 2001. The present Act repealed all the previous statutory and common law provisions relating to bribery. It replaced them with the crimes of bribery,<sup>548</sup> being bribed, bribery of foreign public officials<sup>549</sup> and the

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<sup>547</sup> Available on <https://dictionary.cambridge.org/dictionary/english/bribery> accessed on 28<sup>th</sup> December 2018

<sup>548</sup> Section 1 Bribery Act 2010

failure of a commercial organisation to prevent bribery on its behalf.<sup>550</sup>In fact, all the previous anti-bribery legislative enactments were seen to be inadequate and were once described as being “inconsistent, anachronistic, and inadequate.”<sup>551</sup>The present 2010 Act has been described as “the toughest anti-corruption legislation in the world” and as “FCPA on steroids”<sup>552</sup>In fact, the Bribery Act 2010 is a notable statute that brought about a wholesale reform of bribery related offences in the UK.<sup>553</sup>The Explanatory Notes of the Act indicated:

*“These explanatory notes relates to the Bribery Act 2010 which received Royal Assent on 8 April 2010. They have been prepared by the Ministry of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament. The notes need to be read in conjunction with the Act. They are not and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require explanation or comment, none is given. The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in United Kingdom and abroad...”*<sup>554</sup>

The then Justice Secretary Jack Straw, the UK’s former anti-corruption champion was of the view that it was difficult for investigators and prosecutors to apply the law sensibly.<sup>555</sup>He indicated that from a purely legal perspective, the case for reform was a compelling one. He stated that in his role as anti-corruption champion, he also coordinated the UK’s strategy against foreign bribery and that law reform was (and still is) one of the key elements of the programme, in addition to international action.<sup>556</sup>Additionally, the Law Commission noted prior to the Act that the old law was riddled with uncertainty and in need of rationalisation.<sup>557</sup>The Commission’s Report suggested that while few would dispute the need to reform, consensus on best approach to do so was difficult and that a decade had passed since the publication of the initial consultation paper and report on corruption.<sup>558</sup>

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<sup>549</sup>Ibid Section 6

<sup>550</sup>See Section 7 UK Bribery Act 2010

<sup>551</sup>See D. Aaronberg, N. Higgins (2010) All bark and no bite...? Archbold Law Review (Sweet and Maxwell) 2010 (5)

<sup>552</sup>B. Breslin, D.F. Ezickson, J.C. Kocoras (2010). “The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practises Act” *Company Lawyer* 31 (11).

<sup>553</sup>See C. Rose, “The UK Bribery Act 2010 and accompanying guidance: belated implementation of OECD Anti-Bribery Convention” (2012) 61(2) I.C.L.Q. 484. See also G. Sullivan, “Bribery Act 2010: Part 1- An overview” (2010) *Crim. L.R.* 87

<sup>554</sup>Bribery Act 2010 explanatory notes. Available on <https://www.legislation.gov.uk/ukpga/2010/23/notes/contents> accessed on 28<sup>th</sup> December 2018

<sup>555</sup>See *Hansard* HC Vol. 506, col. 947 (March 3, 2010)

<sup>556</sup>This was contained in his Forward to the draft bill.

<sup>557</sup>See Reforming Bribery, Law Com. No. 313, para. 1.1 (November 19 2008)

<sup>558</sup>Ibid para 1.2

Bribery itself can be seen as part of the general corruption nomenclature that is evident in many societies including the United Kingdom, hence the various anti-bribery legislations. What we have to always bear in mind in a compressed manner is that the contents of the 2010 Act are there to fight or checkmate the issues inherent in the convergence question in this thesis. It involves corruption and money laundering. The various segments of the Bribery Act are simply poised as deterrents to the difficult issues of corruption, presenting with it, the extraterritorial dimension or reach. This is arguably, what it represents irrespective of whatever angle most observers analyse the scenarios in the Act.

It is fair to state that the Act was possibly partly born out of the pressure the ‘‘OECD community’’ put on the UK. In fact, in 2007, Angel Guerria the then Secretary-General of OECD stated:

*‘‘Some countries are sliding back on their determination. Some are still holding back on implementing the Convention. They have almost no investigations. They have brought no cases to court. They are not being pro-active.’’<sup>559</sup>*

Of course, the above was directed to countries that have not implemented OECD Convention but it was ‘‘tactically aimed’’ at the UK. OECD as an organisation was not particularly happy with the UK in certain bribery related issues. The way the UK handled the British Aerospace Plc (BAE) arms firm investigation issue and based the discontinuance of investigation on national economic interest in possible clear violation (in the mind of some people) of OECD Bribery Convention<sup>560</sup> was a worry. This investigation eventually ended in a plea bargain deal with both the US and the UK authorities.<sup>561</sup>

The signal emitted, was that (and is still) the UK wanted to correct or clarify some perceived anomalies or mindset by some countries that they are after all very serious with bribery or corruption matters. And they have since been sending positive vibes across the globe in their anti-bribery or anti-corruption efforts. Perhaps, in a bid to continue to buttress the above assertion, the UK played a crucial role in the Anti-corruption Summit in London in 2016 hosted by then Prime Minister David Cameron. The conference dealt with such issues like:

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<sup>559</sup> The Tenth Anniversary of OECD Anti-Bribery Convention: Its impact and its Achievements, Opening remarks by Angel Guerria, OECD Secretary-General, November 21, 2007.

<sup>560</sup> See Article 5 OECD Convention 1997. View also <https://uk.reuters.com/article/uk-oecd-bae/oecd-worried-by-probe-idUKROB46643020070314> accessed on 5<sup>th</sup> July 2019

<sup>561</sup> The stoppage of the investigation by the Director of Serious Fraud Office was eventually upheld by the House of Lords in *R. (on the application of Corner House Research) v Director of Serious Fraud Office* (2008) UKHL 60. See also A. J. Roberts, ‘‘Prosecution: Director of SFO - Lawfulness of Decision to Discontinue Prosecution’’(2009) Crim. L.R. 46.



corporate secrecy, government transparency, enforcement of international corruption laws, and the strengthening of international institutions. All these are pointers to reducing bribery and fall comfortably into the convergence issues, the writer submits.

### *Distillation of some positive effects of the Act*

It is generally agreed that the Act has added some vigour in its approach to tackle the problem of bribery and corruption. Interestingly and noticeable are its extraterritoriality characteristics - bribery of foreign public officials<sup>562</sup> (this is in line with OECD Anti-Bribery Convention) and its stance on failure to prevent bribery by commercial organisations.<sup>563</sup>

One is inclined to notice the changes in the substantive law of the UK on account of the coming into play of the Act. The Act is a replacement of the available bribery-related crimes with new offences. It repealed all the previous laws at common law and under statute. In fact, the repealed statutory offences are found in both Public Bodies Corrupt Practices Act of 1889 and the Prevention of Corruption Act 1906. The 2010 Act introduced the failure of a corporate body to prevent bribery.<sup>564</sup> There must be evidence of improper performance of a relevant function.<sup>565</sup> Of particular importance is the issue of handling corporate hospitality which may be an offence.<sup>566</sup>

We have to note that the intention of the Act is to identify hospitality that is designed as a cover for bribing someone. You can still continue to provide bona fide hospitality, promotion and other business expenditure. Of course, it must be proportionate to the existing business scenario. The Bribery Act guidance issued in December 2012 reaffirms the important point that bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business. The SFO will prosecute offenders that disguise bribes as business expenditure (hospitality and the like).<sup>567</sup> It must be noted that every case scenario must be looked into to see if the "hospitality issue is breached." It all hinges on the "proportionality" of what has been provided. For instance, there will not be a problem if it is found out that a visiting Nigeria minister was provided a football ticket worth just £50 to watch a football match in London by a UK company that has

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<sup>562</sup> s.6 Bribery Act 2010 especially s6(4) that set out who are public foreign officials.

<sup>563</sup> See s.7 Bribery Act 2010

<sup>564</sup> See s1 and s2 of the Bribery Act 2010. This is linked to s.7

<sup>565</sup> Ibid s.3(2)

<sup>566</sup> Ibid s.6

<sup>567</sup> Available on <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/> accessed on 13<sup>th</sup> June 2019

been doing business in his ministry in Nigeria. Here, it is envisaged that ‘‘common sense’’ will prevail on the part of SFO unless it is suggested otherwise. Of course, it will be a completely different thing if the value of the hospitality is discovered to be in the region of say £100000 or more. Here, you may quickly come to the conclusion that the ‘‘hospitality is excessive.’’ Note that there is no stated sum of money that is used as a marker to access the ‘‘hospitality issue.’’ This is just an illustration. Even before the Act was promulgated, the former Director of SFO Richard Alderman was very sensible in his assessment when he indicated that sensible and proportionate hospitality will remain perfectly lawful under the Act when it comes into force.<sup>568</sup>

Of course, a Christmas hamper or an invitation to the corporate hospitality box at a sporting event that is sent to an established client will not constitute bribery -- unless it is suggested that the client’s representative(s), in entering into a contract with the company concerned, performed their duties improperly or that it is hoped that the gift will encourage them to do so in future.<sup>569</sup> This could have possibly been the reason during the 2012 Olympic Games in London, it was noticed that some companies declined invitation to the games. The writer believes that this possibly could have been as a result of the fear of the Act and interpretation of the ‘‘proportionality’’ issue. *The Telegraph* stated that it was as a result of the over-cautious compliance departments of some companies that struggled to interpret the Act that there were these restrictions irrespective of assurances from SFO. They dwelled on the side of caution.<sup>570</sup>

Of great importance in the Act is Section 7. It is a strict liability offence and does not require the accused to act in a particular state of mind. It criminalises failure to prevent bribery that is committed by relevant commercial organisation. Failure to prevent the conduct will be tantamount to committing an offence under ss. 1 and 6 of the Act. This has made companies to sit up. But we need to note clearly here that firstly, the prosecution must prove beyond reasonable doubt that an act of bribery has taken place or occurred. Secondly, this act of bribery was evidently committed with the intention of furthering the business interest of that corporate entity or company. It is after this that the burden of proof will now shift to that company to show that it actually, had reasonable measures in place to prevent the bribery

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<sup>568</sup> R. Alexander, ‘‘Bribery of public official’’ may cover a wider range than you think. *Comp. Law*. 2011, 32(4), 97-98

<sup>569</sup> *Ibid*

<sup>570</sup> Available on <https://www.telegraph.co.uk/finance/yourbusiness/bribery-act/9306807/London-2012-Olympics-companies-refuse-tickets-amid-Bribery-Act-fears.html> accessed 5<sup>th</sup> July 2019

happening. This is important and it is what we have to look out for because if the intent is for personal interest of the culprit, it will be difficult for the prosecution against the company as a legal person to have a successful outcome.

As pointed out above, this has led to the increase in enhanced compliance programmes and amendments to commercial contracts to take care of this. It is a strict liability offence, so it is no surprise that the commercial organisations responded. We have to note that the changes have not been limited to criminal law and crimes of bribery. It has extended to the amendments of public regulatory law.<sup>571</sup> An entity can put up a defence if it can be demonstrated that the entity has put in place ‘anti-bribery mechanisms’ in the organisation.<sup>572</sup> It does not really matter where the act or offence took place. It can be outside the UK shores.<sup>573</sup>

The second important effect of the Act on issues concerning the convergence difficulty in this thesis is section 9 Guidance and revision of the corporate compliance programmes. The guidance now contains a detailed provision on what is meant by ‘adequate procedures’ that would be used to prevent bribery. It contains six principles that may appear to be vague. This is on account of the broad spectrum of businesses they do and the circumstances that they find themselves. Very close to the s.9 Guidance are the revised corporate compliance programmes concerning bribery. Organisations are encouraged to publish their compliance programmes for all to see.<sup>574</sup>

Evidentially, there is no doubt (in the mind of many people) that the Act has made an impact in the corporate policies of many legal persons. M. Taddia noted that the Act has been a catalyst for corporations to revisit or introduce anti-bribery systems and controls that they never had before, putting bribery firmly on the corporate agenda of the UK businesses.<sup>575</sup> Tellingly, and in reference to the above, the oil company ExxonMobil made a reference to the Act in its website - it indicated that in 2012, approximately 31,000 employees took part in anti-corruption training. The training covered the basics of FCPA and the UK

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<sup>571</sup>Regulation 21(1)(c) of the Public Contracts (Scotland) Regulation 2012 adds conviction under ss.1 and 6 of the Act.

<sup>572</sup>See s. 7(2) Bribery Act 2010.

<sup>573</sup>Ibid s. 12(5)

<sup>574</sup>P. Arnel, Ms N. Evans, “The effect of the Bribery Act 2010,” *Judicial Review* 2015, 2. 167-183

<sup>575</sup>M. Taddia, “Economic Crime Corruption Conundrum” (2014) 111(37) L.S.G. 13 available on <https://www.lawgazette.co.uk/law/economic-crime-corruption-conundrum/5044646.article> accessed on 30<sup>th</sup> December 2018

Bribery Act.<sup>576</sup> It does not welcome bribery matters in the company - a reflection of the effect of the Act.

The Act, prompted amendments by way of revision or addition of bribery clauses to commercial contracts. Simply, contracts have been revised to include anti-bribery clause/s. The writer humbly submits that this is good as it fights the convergence issues in this thesis. We should bear in mind that specific display of evidence of amendments in commercial contracts is less in non-model contracts. However, a good example from the public sector exemplified by the University of Bristol UK is a standard anti-bribery clause that it used. It indicated that any party contracting with the University is expected to:

*‘comply with all applicable laws, statutes, regulations relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 and not engage in any activity, practice or conduct which would constitute an offence under the Bribery Act 2010 if such activity or conduct has been carried out in the UK and that a breach of the clause shall be deemed a material breach and entitle the university to terminate it immediately.’<sup>577</sup>*

Interestingly and additionally, educational institutions with particular reference to universities in the UK do issue anti-bribery and corruption Policy Statements. This can also be attributed to the vigour of the Act. For example, the latest statement on this by Queen Mary University of London (QMUL) which was approved by its Council on 13<sup>th</sup> April 2018 at the time of writing (another review is due in April 2021) in paragraph 1.4 indicated:

*‘QMUL has a zero tolerance policy towards bribery and corruption and is committed to the highest level of openness, integrity and accountability, both in letter and spirit. The penalties for these offences are severe and can mean up to 10 years imprisonment for individuals responsible. In addition, if QMUL is found to have connived in or consented to acts of corruption undertaken in its name, the penalties include personal liability for senior managers and an unlimited fine, together with significant reputational damage for QMUL and could result in other Government-related consequences, such as debarment from public (government) tendering.’<sup>578</sup>*

To add vigour to the above, the group sales director of Deltex Medical Ltd whilst giving evidence to the House of Lords Select Committee on Small and Medium Enterprises was of

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<sup>576</sup> Exxonmobile, “Ethics,” available on <https://corporate.exxonmobil.com/en/investors/corporate-governance/ethics/ethics> accessed on 30<sup>th</sup> December 2018

<sup>577</sup> Anti-corruption and bribery/University Secretary, University of Bristol, “Anti-corruption and bribery-standard contract clause” (University of Bristol). Available on <http://www.bristol.ac.uk/secretary/legal/bribery/> accessed 30<sup>th</sup> December 2018

<sup>578</sup> Available on [www.arcs.qmul.ac.uk/media/arcs/policyzone/ARC2017-34iv-Anti-Bribery-and-Corruption-Policy-updated-21.2.18-v1-\(tracked\).pdf](http://www.arcs.qmul.ac.uk/media/arcs/policyzone/ARC2017-34iv-Anti-Bribery-and-Corruption-Policy-updated-21.2.18-v1-(tracked).pdf) accessed on 6<sup>th</sup> July 2019

the view that BRIC countries (Brazil, Russia, India and China), especially raise challenging questions about the Bribery Act, and that his fellow directors have concerns on how they operate under the Bribery Act within those countries. They therefore took legal advice plus the fact that they have made changes to their contracts.<sup>579</sup> This clearly points to the glaring impact of the Act. Whatever the situation may be, readers are implored to note that evidence of the impact of the Act as far as anti-bribery clauses are concerned; can actually be discerned from the plethora of advice and guidance emanating from law firms on anti-bribery clauses. It is there for all to see and is easily accessible in the net.

Contrastingly to the above, another effect of the Act is the issue of prosecutions and low convictions under the Act. The convictions have not been many as anticipated.<sup>580</sup> The first conviction under the Act was the case of *R v Munir Patel*.<sup>581</sup> The accused was convicted for accepting the sum of £500 to avoid putting the details of a traffic summons in the court data base. He was sentenced to six years imprisonment. He eventually admitted one count of bribery and misconduct when he appeared at Southwark Crown Court. His sentence was reduced to four years on appeal because the Appeal Court stated that the initial sentence was excessive.<sup>582</sup> He worked at Redbridge Magistrates' Court, and was of previous good character and had pleaded guilty. The appeal court headed by Lord Chief Justice Lord Judge, sitting with two other judges in their judgment stated that the appropriate sentence for the crime remains a substantial sentence but the sentence should be reduced from six to four years.<sup>583</sup>

It has been suggested, that the paucity of conviction under the Act has been attributed to the fact that the detection of bribery is extremely difficult due to the secretive manner this is done. Additionally, most bribery related matters do not produce immediately obvious victims. Mostly, the unholy agreement to gain an undue advantage is often retained amongst a close number of individuals.

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<sup>579</sup> House of Lords Select Committee on Small and Medium Enterprises, *Roads to Success: SME Exports* (the Stationary Office 2013) Ch. 10, para. 10.3

<sup>580</sup> As at 2013, Damian Green the then Minister of Policing, Criminal Justice and Victims indicated in 2013: "There have been three successful and no unsuccessful prosecutions under the Act since the Act came into force in July 2011." (*Hansard, H.C Written Answers, col. 711W* (June 19, 2013)

<sup>581</sup> Unreported, 18<sup>th</sup> November 2011, available at: <https://www.bbc.co.uk/news/uk-england-london-15310150> accessed on 30<sup>th</sup> December 2018

<sup>582</sup> (2012) EWCA Crim 1234. View <https://www.bbc.co.uk/news/uk-england-london-18191289> accessed on 12<sup>th</sup> April 2019

<sup>583</sup> *Ibid*

Possibly, a more reasonable factor for the low level conviction in the UK (in the mind of some people) is the unwillingness of the authorities to allocate more resources to the investigation and enforcement. This sounds more reasonable and convincing. Indeed, this resources issue was once pointed out by the OECD in the past. That is not to say that there have not been some convictions with the hallmarks mirrored towards s.7 of the Act. A possible good example of this is the first ever corporate conviction under the Act prosecuted by SFO under s7 - Sweett Group PLC case.<sup>584</sup> In this case, a UK-based construction company and professional services company, was convicted for the offence of failing to prevent its subsidiary Cyril Sweett International (CSI) from paying bribes on its behalf. The unlawful conduct took place over a three-year period from 2012 to 2015 in the United Arab Emirates. The company pleaded guilty and was ordered to pay £2.25m as a result of the conviction from SFO investigations for failure to prevent an act of bribery intended to secure and retain a contract with AI Ain Ahlia Insurance Company (AAAI) contrary to s7(1)(b) of the Act. The then Director of SFO David Green stated:

*‘Acts of bribery by UK companies significantly damage this country’s commercial reputation. This conviction and punishment, the SFO’s first under section 7 of the Bribery Act, sends a strong message that UK companies must take full responsibility for the actions of their employees and in their commercial activities act in accordance with the law.’*<sup>585</sup>

The Sweett Group decision should be understood as a wake-up call for all European businesses with ties to the UK. In order to fulfil their due diligence obligations, they cannot simply or just focus on actions that might happen within the UK or the EU but rather also concentrate their attention on their entire business practices worldwide.<sup>586</sup>

Another effect of the Act is the issue of notable expansion in scope of novel prosecution policies with regard to bribery and corruption. Here, attention should be focussed on corporate self-reporting and deferred prosecution agreements (DPAs). Without fear of possible contradiction, the writer points out that these two have to be quickly recognized as after effects of the Act. They apply to offences under the Act. The writer is glad to point out that this does not mean that they were initiated due to the coming of the Act. In fact, both

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<sup>584</sup> R v Sweett Group PLC (unreported)

<sup>585</sup> See SFO Press Release of 19<sup>th</sup> February, 2016 - Sweet Group PLC sentenced and ordered to pay £2.55m after Bribery Act conviction. Available also on <https://www.walkermorris.co.uk/publications/brief-walker-morris-legal-update-may-2016/first-ever-corporate-conviction-uk-bribery-act/> accessed 3<sup>rd</sup> July 2019.

<sup>586</sup> Available on <http://cjel.law.columbia.edu/preliminary-reference/2016/home-sweett-home-sweett-group-and-the-uk-bribery-act/?cn-reload=1> accessed 3<sup>rd</sup> July 2019.

predate the Act in some UK jurisdictions and also apply to a wider criminal spectrum than the Act.<sup>587</sup> For example, crimes like conspiracy to defraud and cheating the public revenue amongst others can be dealt with under DPA. With regard to deferred prosecution agreements, there is Ministry of Justice's (MoJ) Consultation and comment on a new enforcement tool to deal with economic crimes committed by commercial organisations. This indicated; that although the creation under the Bribery Act 2010 of criminal liability for commercial organisation that fails to prevent bribery is a notable improvement and although the prosecuting agencies are taking more proactive approaches in identifying and investigating serious economic crimes, more needs to be done.<sup>588</sup>

In Scottish context, the self reporting was brought into force the same day with the Act. The intention possibly was to increase its effect. However, the two, do not apply on an equal basis throughout the UK. Self reporting policy issued in England, Wales and Northern Ireland has now been withdrawn in the UK. It was evidenced in the 2009 Serious Fraud Office guidance. But the current SFO guidance is simply - there is no presumption in favour of civil settlement in any circumstance.<sup>589</sup> In England and Wales, the general parameter for prosecutors is whether there is sufficient evidence to go ahead and if it is in public interest. Self-reporting is somehow still being used in Scotland. In one case, Abbot Group PLC successfully self-reported itself in Scotland and avoided possible prosecution.<sup>590</sup> It detailed all the corrupt payments made by an overseas subsidiary in 2007. In another case in Scotland in December 2014, an Aberdeen based firm, International Tubular Services admitted benefitting from corrupt payments and voluntarily remitted the sum of £172,000 to the Civil Recovery Unit.

It must be noted that self-reporting and deferred prosecution agreements differ in nature and application. It must be voluntarily entered and would have the blessing of the court. In other words, the charges lay dormant.<sup>591</sup> In the UK, DPA with a company does not rule out the prosecution of individual officers in that company unlike the USA. Interestingly, the DPA that SFO entered with Rolls-Royce PLC in 2017 to the tune of £497.25m stood out as a

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<sup>587</sup> Note that the crimes that can possibly be dealt with under the Act via deferred prosecution agreements are in paragraphs 15-27 of Sch. 17 to Crime and Courts Act 2013, with the four bribery offences indicated in paragraph 26.

<sup>588</sup> Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisation: Deferred prosecution agreements (Stationary Office, 2012), CP9/2012, paragraph 11.

<sup>589</sup> See Serious Fraud Office and Director of Public Prosecutions, Joint Prosecution Guidance of the Director of SFO and the Director of Public Prosecutions on the Bribery Act 2010, p.5.

<sup>590</sup> The corrupt payments were made prior to the Act and may not have been criminal under a previous legislation.

<sup>591</sup> See Section 45 Schedule 17 of the Crime and Courts Act 2013.



significant pointer in this direction. The agreement with the company followed four years of investigation into bribery and corruption. This also continued the investigation into the conduct of individuals.<sup>592</sup> This covered a period of over three decades of bribery and corruption which was evidenced across the globe notably in the UK, the US and Brazil.

It is interesting to note that the first DPA agreement since its introduction in the UK in 2014 ended successfully on 30th November 2018. This was the DPA that SFO entered with Standard Bank PLC (now known as ICBC Standard Bank PLC) on 30<sup>th</sup> November 2015. The bank was guilty under s7 offence and did not waste the court's time. It was approved by the President of the Queen's Bench Division, RT Hon. Sir Brian Leveson at Southwark Crown Court. SFO announced that the bank complied with the terms successfully. The DPA required the bank to pay nearly \$26m in fines and disgorgements of profits, and to pay \$6m in compensation to the Government of Tanzania. Under the DPA terms, the bank was required to commission an external consultant to report on its anti-bribery and corruption controls, policies and procedures and to recommend improvements to strengthen its controls, with regular reports issued to SFO. Lisa Osofsky SFO Director at the time of writing indicated thus:

*‘I welcome this successful conclusion of UK’s first Deferred Prosecution Agreement. DPAs are a way of holding companies to account without punishing innocent employees, and are an important tool in changing corporate culture for the better. Under the terms of the DPA, the SFO alleged that Standard had failed to prevent its associated person(s) from committing to secure a contract to secure a sovereign debt for Tanzania.’*<sup>593</sup>

The six terms that the SFO agreed with Standard Bank PLC were based on, to wit: Cooperation - Standard Bank was required to fully and honestly cooperate with the SFO and other authorities investigating the bribes, including disclosing information and materials relating to activities by individuals involved. This has occurred throughout the term of the DPA. Compensation - \$6m of compensation, plus interest of \$1,046,196.58 to be paid to the Government of Tanzania, this was paid in full in May 2016. Disgorgement of profits - All \$8.4m fees paid to Stanbic Tanzania and Standard Bank through the secured contract to be confiscated by SFO and passed to the UK Treasury, this occurred in May 2016. Financial penalty - \$16.8m in fines were imposed on Standard Bank by SFO and passed to the UK

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<sup>592</sup> Available at <https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/> accessed on 31<sup>st</sup> December 2018.

<sup>593</sup> Available at <https://www.sfo.gov.uk/2018/11/30/uks-first-deferred-prosecution-agreement-between-the-sfo-and-standard-bank-successfully-ends/> accessed on 4<sup>th</sup> July 2019.



Treasury, this occurred in May 2016. Corporate compliance programme - Standard Bank agreed to commission a review by Price Waterhouse Coopers (PWC) on the bank's internal anti-bribery and corruption compliance procedures, in agreement with SFO, who advised on the scope and extent of that review. On completion, Standard Bank was required to implement any recommendation and act on advice received within 12 months of the review completing, with PWC verifying their implementation with regular reports provided to the SFO for certification. This was completed in August 2017. Costs - SFO costs of £330,000 to be paid by the Bank - completed in May 2016.<sup>594</sup>

Another significant effect of the Act is partial closing of the gaps identified in the UK's international bribery legal deficiencies. In 2008, OECD accused the UK, although it was a party to the OECD Bribery Convention, of lacking in its legislation the provision to provide an effective criminal corporate liability. Bribery of foreign public official may be committed by a legal person and senior corporate officials or managers can now be recognised as the 'directing minds' of the company, meeting the requirement for the mental state of an accused in criminal law prosecution.<sup>595</sup> C.K Wells once remarked that the UK came under pressure from OECD Working group on Bribery, which believed that the identification route to corporate criminality which could otherwise apply to bribery offences was wholly inadequate in meeting the UK's obligation under the Bribery Convention.<sup>596</sup>

The OECD also raised the issue of the UK not having a specialised bribery authority agency to specifically address bribery, the introduction of some extraneous factors used by prosecutors and the requirement that the Attorney General must agree to prosecutions. To be fair, the first arm of the criticism will remain. The fact is that the Act has not created a single specialised authority specifically mandated to only tackle bribery in the UK. But in Scotland, it is the responsibility of the Crown Office and the Procurator Fiscal Service that are responsible for this. This was provided in a Memorandum of Understanding (MoU) of April 2014.<sup>597</sup> And in the rest of the UK, the SFO has the mandate to carry out this role.<sup>598</sup> We

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<sup>594</sup> Ibid

<sup>595</sup> C.K Wells, "Who is afraid of the Bribery Act 2010?" (2012) J.B.L Vol. 2012 No. 5 See also C.K Wells, "Corporate Criminal Liability in England and Wales: Past, Present and Future" in Pieth, M. and Ivory, R. *Corporate Criminal Liability-Emergence, Convergence, and Risk* (Dordrecht: Springer, 2011), Ch. 3

<sup>596</sup> C.K. Wells, "Corporate Criminal Liability - a Ten Year Review," 2014 Crim. L.R. 849, 864.

<sup>597</sup> *City of London Police, Crown Office and Procurator Fiscal Service, Crown Prosecution Service, Financial Conduct Authority, MoD Police, National Crime Agency and Serious Fraud Office, "Tackling Foreign Bribery" (The Stationary Office, 2014), para. 4.5.* Available at

should be aware that the MoU has gone a long way to ameliorate the OECD criticism and the author surmises, that in a way, this is laudable. The City of London Police, FCA, CPS, MoD Police and NCA are all part of it.

Above gainsaid, the prosecutorial-related-criticism that the UK received from OECD about the bribery investigation of BAE created a lot of dust. OECD indicated that the UK went against article 5 of the OECD Bribery Convention that specifically stated that ‘national interest’ should not be a factor in deciding about whether to prosecute. But the UK replied in style and stated that while it abides by OECD’s Article 5 Bribery Convention, additional CPS requirements are twofold in deciding prosecution as required by the UK Guidance in the Code for Prosecutors in England and Wales. They are the established evidential and public interest tests.<sup>599</sup>To this, the author submits that this is an admirable reason to discontinue with the BAE investigation. Additionally, a lot of collateral damage could have resulted from the outcome. Firstly, the Saudi Government threatened to cancel all contracts with the UK companies and secondly, cancel all intelligence cooperation with the UK on combating terrorism.

The consent of the Attorney General is no longer required before starting to prosecute. Section 10 of the Bribery Act contains this. Whatever the effects evidenced by the Act came about as a result of the reactions to the criticisms that UK had earlier on received. This is good as the improvements together with the contents of the Bribery Act are all necessary weapons used in addressing the convergence issues present in this thesis, hence their relevance.

### ***Compressed post legislative scrutiny***

Indeed with most legislation that is usually in existence in robust legislative environments, (The UK is considered as a very proactive legislative and robust environment) it is not out of expectation that the authorities do after a while embark on reassessment of the situation. This is usually geared towards identifying gaps with the aim of rectifying them and to positively move forward with the legislation. It could sometimes lead to abandoning some parts, or the

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<https://www.fca.org.uk/static/documents/mou/mou-tackling-foreign-bribery.pdf> accessed on 1<sup>st</sup> January 2019

<sup>598</sup>In the website of SFO, there is the inclusion of the issue of bribery. Available at <https://www.sfo.gov.uk/about-us> accessed on 1<sup>st</sup> January 2019

<sup>599</sup>Crown Prosecution Service, “The Code for Crown Prosecutors.” Available at [https://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](https://www.cps.gov.uk/publications/code_for_crown_prosecutors/) accessed on 1<sup>st</sup> January 2019

whole of that particular legislation or to give positive accolades to the legislation. It is therefore no surprise that the Act which has generated a lot of comments from different quarters albeit both positive and negative was subjected to the above.

In March 2019 the observations in tandem with the above was made by the House of Lords Select Committee on the Act - Post Legislative Scrutiny. Some of the significant areas included the followings: On corporate offence of failure to prevent bribery, it recommended that the guidance must have a more expansive approach. In other words, it must be expanded to provide clarity on which procedures to be followed by the SMEs to help them in creating a good defence. It sought more clarity on the issue of ‘adequate procedure.’ This should be interpreted in their opinion as ‘procedures that are reasonable in all circumstances.’ It acknowledged the inconsistency that existed between the wordings in the Act and the recent Criminal Financing Act 2017 (CFA) that created the offences of failure to prevent facilitation of tax evasion.<sup>600</sup>

On the interesting topic of corporate hospitality, the Committee acknowledged that the boundary between it and bribery can be very challenging. It indicated that further guidance is needed on what might constitute acceptable corporate hospitality. It acknowledged that the present guidance is as clear as possible in the absence of any judicial interpretation. It also recommends that SFO and Director of Public Prosecution (DPP) should make available plans as to how to speed up prosecutions. Of further interest, is on DPAs. They welcomed it as a positive. But they did not go as far as recommending the US style non-prosecution-agreements. On bribery of foreign officials, the Committee reiterated the need to provide support for SMEs particularly those abroad that may be facing prosecution. It recommended that even the smallest embassies abroad should have at least one person with an expertise in the local language, customs and culture. The essence would be to contact the official representative of the foreign government department on behalf of the UK firm. The committee is of the view that a lack of police training and awareness could possibly be a contributory factor on why we have low number of prosecutions.<sup>601</sup>

### **6.3 The Money Laundering Regulation 2017: A weapon not to be overlooked**

Obviously, the crux of this thesis with regard to the convergence issues is that tackling money laundering is a key policing and policy priority. And issues about the ‘washing of dirty

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<sup>600</sup> <https://publications.parliament.uk/pa/ld2011719/ldbribact/303/303.pdf>

<sup>601</sup> Ibid

money” has in actual fact led to changes in both substantive criminal laws of nations and the creation of some detailed extensive or massive regulatory frameworks. It is actually due to the enormity of the problems, that the authorities in order to meet up with containing the malaise, that it is no surprise that anti-money laundering mechanisms keep springing up.

It is on account of the above as earlier on indicated in this thesis, that the regional block – the EU issued some of its Directives to contain the problems. It is no secret that the EU reflects or watches the “body language” of the FATF. This is usually demonstrated by the EU issuing a Directive to reflect the “signs of the time” as far as anti-money laundering matters are concerned. Of course, the UK is always a willing and diligent player in its monitoring of the EU Directives. It may not be possibly considered an over statement to state that the UK is always ahead of other EU nations in its eagerness to make sure that the EU laws are implemented in the UK. The current (as at the time of writing) 4MLD has now been transposed into the UK law as the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulation 2017. It is a reflection of 4MLD.<sup>602</sup>It is also known as Money Laundering Regulation 2017 (hereinafter MLR 2017).

The essence of the contents of the MLR 2017 is to help fight “dirty money” that the criminals use various tactics to launder. In this legislation, there are some salient points that the regulation is intended to achieve. Issues like the customer due diligence has now taken the risk based style to be dealt with by the relevant persons. They can use mechanisms like customer due diligence (CDD), simplified due diligence (SDD) or enhanced due diligence (EDD) as the situation demands. It is expected that there must be beneficial registers to track down the beneficial owners of corporate entities. However, it is good to note that the UK addressed this partially.<sup>603</sup>They are known as Persons with Significant Control registers (PSC).

Aside above, there is the requirement that there must be also a central register of trust. But this has also raised questions about the privacy of the beneficial owners with regard to the European Convention on Human Rights. In fact, in France, the judiciary has frowned at this and this was suspended in that country. The truth is that this element of MLR 2017 has very serious implications on the human rights of citizens. The writer is confident to indicate that

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<sup>602</sup>This is Directive (EU) 2015/849 of the European Parliament and of the Council of May 2015, amending Regulation (EU) No 648/2012 of the European Parliament and of Council, repealing Directive 2005/60/EC of the European Parliament and Council and Commission Directive 2006/70/EC.

<sup>603</sup>See Section 81 of UK’s Small Business, Enterprise and Employment Act 2015.

MLR 2017 focussed on the serious issues of transparency and beneficial ownership which are serious clogs in fighting money laundering. It is expected that the implementation of the facets of the regulations would go a long way in curbing the problem. However, readers should not be surprised to embrace further regulations to combat this. The reason is that the authorities have the habit of being reactive to these matters. And it is not far from the truth to state that the MLR 2017 was enacted as a result of the “contagion of the Paris, Brussels terrorist attacks and the Panama Papers incidents.”

#### **6.4 The US approach to the convergence problems: A look at Foreign Corrupt Practices Act 1977 (FCPA)**

##### *Compressed background, effects and prosecutions*

Indeed, the issues embedded in bribery and corruption have been with our society from the cradle of civilization or “from cradle of time.” And bribery is always geared to achieve an unfair advantage and thereby distorting the level playing ground for issues to take the natural cause of events. For some of the readers that are conversant with the Holy Bible, it was even stated that bribery is not right when God spoke to the Israelites. It was indicated that justice shall not be perverted, that no one should show partiality, bribes should be rejected on account of the fact that it blinds the eyes of the wise and subverts the cause of the righteous.<sup>604</sup>In fact, Samuel’s children took bribes and perverted the cause of justice.<sup>605</sup> And there were instances where the priests teach for a price, people in authority gave their judgement for a bribe and prophets practiced divination for money.<sup>606</sup>The guilty has also been acquitted for paying bribe and the innocent deprived of their rights.<sup>607</sup>

Other instances where bribery was employed to gain an undue advantage abound. A certain woman known as Delilah was offered eleven thousand pieces (11,000) of silver by the Philistines to disclose the source of the power of Samson who was very powerful for the Philistine to handle. It was in their bid to get hold of Samson through this lady that they bribed her.<sup>608</sup>

The writer surmises, that bribery has always been used by people to achieve a particular aim. It is as old as history. Interestingly, when we fast forward to modern era and focus on

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<sup>604</sup>Deuteronomy 16 verse 19 English Standard Version.

<sup>605</sup>1<sup>st</sup> Samuel 8 verse 3

<sup>606</sup>See Micah 3 verse 11

<sup>607</sup>Isaiah 5 verse 23.

<sup>608</sup>See Judges Chapter 16 verses 4-5 of the Holy Bible.

commercial or business transactions, there is a similar trend in the global economic template. On account of this, the USA reacted. And part of the reason was as a result of the significant discovery that payments were made to representatives of some foreign companies in the USA which did not reflect in the accounting books, that the US authorities ‘‘woke up’’ to stem the tide.

There were two issues that actually helped to galvanise the coming into play of the USA’s FCPA of 1977. One of these was that during the Watergate Scandal affair (this was during the tenure of President Richard Nixon), it was discovered that many US corporations made illegal contributions to the domestic political campaigns. After investigation by the Securities and Exchange Commission (SEC)<sup>609</sup> it was established that this practice was wide spread. It also involved officials of foreign companies. It was discovered that these payments were not even transparently reflected in the books of these companies. The payments, one can say, were misrepresented in the books of the companies with the intention to evade the auditors.

The second galvanizing episode that gingered the legislation of FCPA was the Lockheed Aircraft Corporation bribery incident.<sup>610</sup> This Corporation was in serious financial distress. It actually received a loan guarantee from the US Congress to the tune of \$250m. This was made possible to forestall a potential bankruptcy. The essence of the loan was to fundamentally improve the ailing financial situation of the company. However, investigation by SEC uncovered the fact that this corporation used over £22m of this money to bribe foreign officials to booster its capabilities to gain contracts internationally. When confronted, the company defended itself and said that this was what other companies did and gained access extra-territorially to contracts and increased their profits.<sup>611</sup> In a bid to get this through Congress, the rationale for this legislation to combat bribery was echoed in the words of the then US President Gerald Ford. He stated that the spate of scandals resulted in an erosion of confidence in the responsibility of many of US important business enterprises. And that if

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<sup>609</sup>This investigation was led by SEC’s Director of the Division of Enforcement Stanley Sporkin. Companies that made voluntary disclosure were not punished and over 500 did take part. Over \$300m dollars exchanged hands as bribes to gain undue advantage.

<sup>610</sup>This corporation was regarded at that period as the second largest US defence contractor. It was assessed by the US authorities that it must maintain a healthy financial status in order to support the war efforts in Vietnam.

<sup>611</sup>See ‘‘Scandals: Lockheed Defiance: A Right to Bribe?’’ Time, August 18, 1975

you look at the matter in a more general way, the disclosures tend to destroy confidence in the US free enterprise.<sup>612</sup>

Prior to the above, the then US Secretary of Commerce Elliot Richardson stated:

*“Bribery corrodes the confidence that must exist between buyer and seller if domestic and international commerce is to flourish. It threatens to poison relationships between the United States and nations with which we have long had mutually beneficial political and commercial ties.”*<sup>613</sup>

The truth is that FCPA came into play in 1977. It contained two significant segments - the anti-bribery provisions and a book and records provisions. Simply elucidated, the anti bribery provisions made it illegal for US corporations to offer payments to a foreign official for the purpose of “obtaining or retaining business” or “securing any undue advantage.” The “books and records provision” made it an offence for companies who fail to record proper transactions in their accounting books. These must reflect the exact nature of the transactions. This should prevent companies from hiding illegal payments in such headings like “travel and entertainment,” “consulting fees” and “commissions.” These are all ways to camouflage for bribery, hence, the relevance to the subject of this thesis. The enforcement on behalf of the US Government is the responsibility of Department of Justice (DoJ) and Securities and Exchange Commission (SEC). It must be noted that the two do usually coordinate their investigations. But interestingly, they do act independently and dish their own penalties.

DoJ initiates criminal charges against firms, negotiates settlements and recommends penalties which in turn will be approved by the courts. The fines of DoJ usually do reflect the federal guidelines. The fines can be reduced depending on the circumstances, to wit: whether the culprit is a first-time offender or repeat offender, steps undertaken to curb the issue to prevent future criminality and level of cooperation during investigation. SEC has its own enforcement authority and penalties that are inclusive of fines and profit disgorgements. To calculate the disgorgement, SEC usually looks at the total estimated profit that is earned as a result of the bribe. Indeed, if it involves a major capital project, the amount could be huge. In point of fact, this can include what is termed “cease and desist order”- this usually will prohibit the firm

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<sup>612</sup>This was the message from the US President Urging the Enactment of Proposed Legislation to Require the Disclosure of Payments to Foreign Officials (August 3, 1976).

<sup>613</sup>Hearings before the Senate Committee on Banking, Housing, and Urban Affairs (April 7-8, 1979) Statement of Elliot L. Richardson, Commerce Secretary.

from repeating the infraction.<sup>614</sup> Further violations, usually attract very high penalty in tandem with the peculiar circumstances.

This Act has extra-territorial reach to catch the culprits and initially the US companies were not happy about it. The reason then was that they believed that it put them in a competitive disadvantage with other foreign firms that paid bribes to gain access to lucrative deals abroad. For instance, in 1979, the National Construction Association in the US actually estimated that the US firms had fallen to number five in ranking behind such countries like Japan, Korea, West Germany (before unification) and Italy. It noted that three years earlier, the US was number one in that sector or industry. It was observed by a member of a construction trade group - Chicago Bridge & Iron that the company in fact lost over \$100 million of sales over a three year period where they thought that there were serious elements of bribery.<sup>615</sup> It was like a football match where the goalpost of one team was massively expanded to enable the other team's chances of winning the game to be brighter. Analogously, it looked like a situation where you were supposed to box with your two hands, but one of them was actually tied to your back. This was the situation that the US corporations were in.

In truth, the above observation was actually a true reflection of the global business scenario shortly after the FCPA was promulgated. It was only USA globally that had that sort of law for a while before others did largely on account of "USA pressure." Indeed, corroborating the loss of the US firms' profits as a result of the Act was a 1981 report by the General Accounting Office (GAO). This is an independent nonpartisan agency that works for congress. Often called "congressional watchdog." It examines how taxpayer dollars are spent and provides Congress and Federal agencies with objective, reliable information to help the government save money and work more efficiently.<sup>616</sup> It indicated that over 30 percent of US companies had lost their bids in recent years to companies that actually paid bribes and edged them out. The report was based on the survey of over 1,000 largest corporations in the USA. It concluded that it was the aircraft manufacturers plus the constructions firms that were most likely to report very significant impact on the volume of their business.<sup>617</sup>

To be fair in the analysis, this was what was very prevalent then (and still is presently but with "more cautious approach" on the part of the companies). It must be noted, that the USA

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<sup>614</sup> See Section 21C of SEC Act of 1934

<sup>615</sup> "Anti-Bribery Law Said to Cut U.S. Firms out of Markets," *The Wall Street Journal*, August 2, 1979

<sup>616</sup> Available at <https://www.gao.gov/about/> accessed on 6<sup>th</sup> July 2019.

<sup>617</sup> R. Pear, "G.A.O. Urges Easing of Corrupt Practices Act," *The New York Times*, March 5, 1981.



is also a member of OECD. So in order to make sure that at least other nations do not have the competitive advantage over the US firms, it was the US pressure that contributed to the emergence of the OECD Bribery Convention of 1997 to at least smoothen the terrain. Interestingly, the Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have registered a lot of success in their prosecutions and settlements in this area. The cases are so numerous to mention. But the writer will just mention a few. It must be noted, the writer submits, that the increase in the enforcement of FCPA could possibly be attributed to two issues - firstly, the USA Patriot Act 2001<sup>618</sup> and secondly, Sarbanes-Oxley Act 2002.<sup>619</sup>

The Halliburton bribery case readily comes to mind. This particular case has cost the company a lot of money in fines in the USA.<sup>620</sup> But surprisingly, no one has yet been indicted in Nigeria. This could be as a result of the fact that allegedly very powerful personalities may be involved. In fact, the Nigeria administration (at the time of writing) has reopened the case file again through the corruption agency EFCC. Some people may think that this may have a political undertone as it may be seen as an attempt to hunt down political opponents.<sup>621</sup> I do not buy into this ‘rash’ idea that it is or may be an attempt to hunt down political opponents or a political vendetta by the present Nigeria government. We need to view this as a good move by the current government to see that justice is done however long it takes and that the ‘rule of law’ must always prevail.

In Nigeria, as in some other jurisdictions (although not all), there is no statute of limitations for a criminal prosecution. It does not elapse in criminal cases and can be started anytime once the prosecution has the evidence and facts in Nigeria - indeed it should be so. Again, the writer sees this as a good and solid ‘political will’ on the part of the government to make sure that justice is done. Nobody should be seen to be above the law and this possibly could be the message that the government wants to send out by progressing with this case. Some individuals accused in Nigeria sometimes resort to ‘media trials’ to garner support. This should not be the case. Due process must be allowed to take its course. The suspicion is that

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<sup>618</sup>This Act expanded the powers of the federal law to enforcement agencies to search communications plus records to aid combating terrorism. This helped investigation into money laundering that also drew links to bribery of foreign public officials.

<sup>619</sup>This raised the accountability standards of senior corporate executives which led to enhanced oversight by regulators. Firms increased their compliance attitudes in order to protect themselves from financial plus reputational risks.

<sup>620</sup>Available at <https://www.reuters.com/article/us-halliburton-t0-pay-559-million-to-settle-bribery-probe-idUSTRE50P5ZE20090126> accessed on 5th July 2019

<sup>621</sup>Available at <https://www.google.com/amp/s/www.vanguardngr.com/2015/12/my-frustration-with-halliburton-other> accessed on 4<sup>th</sup> January 2019

some of the previous administrations may have “deliberately” decided not to “effectively” go for this prosecution. The writer hopes and is very optimistic that at this time, that this case may see the light of the day in Nigeria irrespective of the allegations that powerful personalities are involved. We need to exercise patience and observe how this case will eventually turn out.

DoJ and SEC do reach agreements with the accused on how to go about the issues. In September 2018, Stryker Corp a Michigan-based medical device company paid the SEC a \$7.8 million penalty to resolve FCPA books and records and internal accounting controls offences in India, China, and Kuwait. It was found that the firm’s internal accounting control were not sufficient to detect risks of improper payments that happened in the above countries. The Director of SEC’s New York Regional Office Mark P. Berger considered the penalty ordered along with the imposition of a compliance consultant as appropriate and necessary. In fact, without admitting or denying the SEC’s findings, Stryker consented to the entry of an order requiring the company to cease and desist from committing violations of the books and records and internal accounting provisions. This same firm settled its infractions with SEC in October 2013 and was required to pay a \$3.5 million penalty plus more than \$7.5 million in disgorgement of ill-gotten gains and more than \$2.2 million in interest. The penalty for its second violation in 2018 was understandably higher from SEC.<sup>622</sup>

In September 2018, Petroleo Brasileiro S.A - Petrobras, the DoJ and SEC assessed penalties and disgorgement of \$1.78 billion against Brazil’s state energy company to resolve FCPA violations involving bribes to politicians and political parties in Brazil. Petrobras entered a non-prosecution agreement with DoJ that assessed a criminal penalty of \$853.2 million and an administrative order with SEC that required disgorgement of \$933.5 million.<sup>623</sup>The SEC order found that senior executives of the company worked with the company’s largest contractors and suppliers to inflate the cost of Petrobras’ infrastructure project by billions of dollars. The companies that executed these projects paid billions of dollars in kickbacks to the Petrobras executives, who in turn shared these payments with top Brazilian politicians that helped them to get the top level positions in the state owned Petrobras. The firm recorded these payments as money spent to acquire and improve assets, resulting in an estimated \$2.5 billion overstatement of assets. Aside this, SEC found that Petrobras false and misleading

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<sup>622</sup> Available on <https://www.sec.gov/news/press-release/2018-222> accessed on 5<sup>th</sup> July 2019.

<sup>623</sup> See 2018 FCPA Enforcement Index – FCPA Blog – The FCPA Blog. Available at <https://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html> accessed on 4<sup>th</sup> January 2019

fillings included materially false and misleading statements to the US investors in a \$10 billion stock offering completed in 2010. This misrepresented their assets, infrastructure projects, integrity of its management, and the nature of the relationship with majority shareholder - Brazil government. Steven Peikin, Co-Director of the SEC Enforcement stated that if an international company sells securities in the US, it must provide truthful information about its business operation.<sup>624</sup>

United Technologies Corporation in September 2018 paid the SEC \$13.9 million to resolve charges that it violated the FCPA by making illicit payments in its elevator business in Azerbaijan and aircraft engine businesses in China and elsewhere. The company provided trips and gifts to various officials in China, Kuwait, South Korea, Pakistan, Thailand and Indonesia through its Pratt & Whitney (aviation) division and Otis (elevator) subsidiary. The company settled without admitting or denying the SEC's findings. It simply disgorged \$9 million plus pre-judgement interest of about \$919,000, and paid a penalty of \$4 million.<sup>625</sup>

Additionally, Vantage Drilling Company in November 2018 paid the SEC \$5 million in disgorgement for FCPA violations in Brazil, in connection with bribes a director paid to Brazil officials connected to a contract for drilling services. The director paid about \$31 million in bribes through an intermediary. The SEC later found after investigations, in an internal administrative proceeding that the company violated the FCPA internal accounting control provisions.<sup>626</sup> In truth, in 2018, a total of 16 companies paid \$2.9 billion to resolve FCPA cases.

There is no shortage of conviction for natural persons under FCPA. For example, the Hong Kong former Home Secretary Mr Patrick Ho was convicted in December 2018 by a Manhattan federal jury after a ten-day trial for bribing African officials on behalf of a Chinese energy company. The jury convicted him on seven counts that he faced which also included money laundering.<sup>627</sup>

The cases are many and part of the outcome has demonstrated FCPA's extra-territoriality status in tackling bribery and corruption that involves both natural and legal persons. From whatever angle this is analysed, the important thing to note is that FCPA is a very crucial

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<sup>624</sup> Available on <https://www.sec.gov/news/press-release/2018-215> accessed on 5<sup>th</sup> July 2019

<sup>625</sup> Op.cit FCPA blog

<sup>626</sup> Op.cit

<sup>627</sup> Op.cit

legislation that has exhibited its tenacity to fight the convergence question which is the substance of this thesis – “dirty money” got via bribery and corruption transmuted through money laundering.

## **6.5 Conclusion**

The writer concludes that the issue of bribery which is subset of corruption in every day interaction is a massive problem for the society as a whole. This is irrespective of the jurisdiction that one finds himself or herself on account of the fact that the world is now a ‘global village.’ What effects one country can easily contagiously transmute into other jurisdictions. Flowing from this is the conspicuous evidence that some of the major economic global players (perhaps epitomised by the USA and the UK) also recognised this issue. And it is on account of the above dilemma, that both jurisdictions reacted at different times with legislations geared towards controlling these cancerous situations evidenced by the admission of the presence of corruption, bribery and money laundering.

Indeed, part of the UK’s response was seen in the promulgation of the Bribery Act 2010. This one can possibly rightly indicate was as a result of the “cumulative anti-bribery missiles” directed towards the UK, notably, emanating from the direction of OECD that pin pointed certain inadequacies inherent in the UK’s anti-bribery or anti-corruption legislation prior to the Act. True to type, and as evidenced in the contents of the Act, it is generally agreed (by most commentators) that there has been a significant improvement on the cautious approach taken by both legal and natural persons to avoid falling into the bribery trap. The writer is glad to submit, that it is as a result of the Act, that there is an upsurge amongst commercial players both nationally and extra-territorially to improve their compliance status in order to present more anti-bribery stance in their economic or commercial interactions. This will enable them to avoid the bribery web. To this extent, it is a welcome development.

There is also more awareness amongst commercial players about the importance of playing “in accordance to the rules.” Although, the bribery investigations may take a long time to come through on account of its secretiveness, it is not “a nice cup of tea” for the individuals and companies that may be culpable. The awareness to avoid this was exhibited by some corporate entities during the London Olympic Games when the companies refused corporate tickets to attend the games.

The MLR 2017, reflecting the 4MLD, has impact in checking the convergence issues and demonstrates the UK's readiness to continue to transpose the EU anti-money laundering legislation whenever the situation arises.

The coming into play of the US FCPA in 1977 presented a very impactful scenario to the convergence questions. It completely changed the “dynamics of extension of the territorial hook” to make sure that those that offer bribes and distort their books are brought to justice. Numerous individuals and companies that fell short of the above legislation were made to face the music when caught in the FCPA anti-bribery net. This was evidenced by the actions of DoJ and SEC.

However, the writer submits or notes that irrespective of the various legislative interventions exhibited by the UK and the USA in the above, the issue of the convergence matter is still with us. More needs to be done. Some of the penalties handed to the companies and individuals one can say are mind-boggling. But still the issues of bribery and corruption keep on reoccurring as if these legislations are not there. The tempo of checking this must be intensified. Perhaps the anecdotes one would suggest may have to be tailored in a way to suit that particular region.

## CHAPTER 7

### Conclusion

#### Summary of key findings

The issues involved in investigating bribery and corruption are opaque. Perhaps, part of the reasoning here is that the issues anchor on the fact that the culprits or the participants as the case may be, usually conduct their business or trade ‘in the dark.’ In truth, issues on bribery and corruption are very secretive in their outlook. In fact, the currency of the trade is ‘opaqueness.’ And this is why the information in this area of research in most instances is populated with estimations. It is on account of this that figures presented as the outcome of some findings may be excused for lack of exactness. We need to appreciate that irrespective of the fact that these figures are estimates do not actually mean that they are misleading, far from it and this should be understood.

The reader may agree with the writer that bribery and corruption presents multifaceted problems to the society. Part of the problem being that because of the ‘changing nature’ of corruption, there is the difficulty of (up until now) fashioning out a universal agreed definition of what it is. It is difficult. R.J Williams captured this vividly. He indicated that the study of corruption is like a jungle and if we are unable to bring it to a state of orderly cultivation, we at least require a guide to the flora and fauna. This need has impelled many writers to find a precise definition which will accurately characterise the phenomenon. Yet it is important to note that there are nearly as many definitions as there are species of tropical plants and they vary as much in their appearance, character and resilience. The point is that the search for true definition of corruption is like the pursuit of the Holy Grail, endless, exhausting and ultimately futile.<sup>628</sup>

R. Alexander aptly captured the corruption template or scenario. He is of the view that people should always be on their toes any time the issue of corruption comes up as a crime more particularly when it is categorised as a financial crime. He suggested strongly that people should make efforts to understand what it actually means. He went on to indicate, that corruption can encapsulate various manners of behaving. The style associated with the behaviours can sometimes be seen as lacking morals. In certain cases, it could even lead to

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<sup>628</sup>R.J Williams, “The Problem of corruption: A Conceptual and Comparative Analysis”(1976) Political Action Committee Bulletin 41

people being forced to relinquish the job they are holding by way of resignation/s. He noted further that even under English law, the said manner of doing things do not actually constitute infractions under the law. According to him, it is a very difficult task to categorically put a stamp or marker on what we should consider to be this societal problem. The society as a whole is characterised by various legal setups and various customs. We need to note, that it is hugely as a result of the above, that an agreed definition of what the phenomenon should be, is lacking. Irrespective of this, he said this societal issue should be viewed as a situation where a person abuses his/her office to engage in an act that is in breach of his/her duty. This can also include the demand of some type of favour. In the first place, what the individual is supposed to do for you usually is within the remit of his/her official position or job. In any event, this needs to be analysed as to how it is connected to the extant law.<sup>629</sup> His observations simply go on to show the multi-faceted aspect that the corruption picture presents to the diverse society in a chameleonic dimension.

We need to take cognizance of the fact that the above writer's appreciation or analysis of what corruption should be is in the real sense of the word in consonance with what the Council of Europe (CoE) observed in 1995. The CoE it must be noted alluded to the fact that it was (and still is) as a result of the various difficulties that usually come up trans-border amongst countries that there is this problem of agreeing universally on what definition to accord corruption. Of course, this can also be attributed as to why there is the serious difficulty in trying to shake off the corruption issues. In reality, there are many multifaceted explanations of what corruptions stands for.

We need to recognise the fact that there are also other definitions. These actually do not exclude the ones that were given by various types of legal persons. Of particular interest, it has been noted that one of the most recognisable non-governmental-organisations (NGOs), Transparency International (TI) was not left behind in coming up with a definition of what corruption stands for. It simply stated that corruption is the misuse of entrusted power for private gain.<sup>630</sup> In truth, this definition can be classified as being succinct and it is likely that a few may argue against this. This definition, one can allude, has included possibly bribery that is also classified as being a part of corruption that also has the characteristics of happening in that sector of the economy that is seen to be private. This can be classified as being advantageous. Tellingly, it is also possibly right to say that the other subsets of corruption

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<sup>629</sup> R. Alexander, "Corruption as a financial crime," *Company Lawyer*, 2009, 30(4), 98-104

<sup>630</sup> <https://www.transparency.org/what-is-corruption> accessed 18<sup>th</sup> June 2019.

and close offences like misconduct in public office, fraud, embezzlement and theft are also included. Of course, these offences in their own right can be seen as separate offences that are also committed when corruption happens. We need to recognize the fact that TI has a soft law status. However, a lot of respect is usually accorded to the observations that this NGO usually pronounces. This as a result has necessitated the fact that both natural and legal persons do take note of their observations. This is the present situation and may not change in future.

The World Bank was not left out on this and has indicated that corruption should be seen as the abuse of public office for private gain. It must be noted that the fact that the World Bank comes up with an opinion, does not in actual fact make that opinion to be critique-free. The World Bank recognised the fact that the term “corruption” prior to settling with the above definition covers a broad range of human actions. The then (now late) World Bank General Counsel, Ibrahim Shihata indicated that corruption occurs when a function, whether official or private, requires the allocation of benefits or provision of a good or service. In all cases, a position of trust is being exploited to realise private gains beyond what the position holder is entitled to. Attempts to influence the position holder, through the payment of bribes or an exchange of benefits or favours, in order to receive a special gain or treatment not available to others is also a form of corruption, even if the gain involved is not illicit under applicable law. The absence of rules facilitates the process as much as the presence of cumbersome or excessive rules. Corruption in this sense is not confined to public sector and in that sector or to administrative bureaucracies. It is not limited to the payment and receipt of bribes. It takes various forms and is practiced under all forms of government, including well-established democracies. It can be found in the legislative, judicial and executive branch of government, as well as all forms of private sector activities. It is not exclusively associated with any ethnic, racial, or religious group. However, its level, scope, and impact vary greatly from country to country and may also vary, at least for a while, within the same country from one place to another. While corruption of some form or another may inhere in every human community, the system of governance has a great impact on its level and scope of practice. Systems can corrupt people as much as if not more than people are capable of corrupting the systems.<sup>631</sup>

However, the writer submits, that the positive thing is that irrespective of the various views or incongruous tones, exhibited within the academia and beyond, there is the consensus from

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<sup>631</sup> Helping Countries Combat Corruption: The Role of the World Bank September 1997 Available at <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/coridx.htm> accessed 4th July 2018



various quarters, that it is not good for the society and that it is an antithesis to growth and development. This was corroborated by the statement of the former United Nations (UN) Secretary General, Ban Ki-moon. He stated that corruption destroys opportunities and creates rampant inequalities and undermines human rights and good governance, stifles economic growth and distorts the markets.<sup>632</sup> It must be taken into cognisance that both corruption and money laundering are very closely related and can be likened to ‘‘Siamese twins.’’ Therefore the effect of one can also be classified as being synonymous or congruous as the effect of the other. This has already been identified in this thesis. It is recognised that most corruption loots do undergo the money laundering process to enable the ‘‘acquired loots’’ to be reused in the legitimate economy.

There is presently the consensus that corruption has been identified as a predicate offence of money laundering. This is a fact. In truth, it is the consensus that anti-money laundering tools can also be employed to reduce the cankerworm that is identified as corruption. This has reinforced the close affinity that exists between corruption and money laundering. To help in buttressing this, clear evidence has emanated from credible observations from respectable sources all in good harmony with regard to the connectivity. Indeed, of particular interest are the observations credited to the World Bank and the statements that emanated from United Nations Office for Drugs and Crimes (UNODC) to mention but a few. These can possibly be said to be very credible observations.

The writer strongly submits that it is appropriate to categorically indicate on account of close perusal of the contents of this thesis, to state that after all, there is the convergence of ‘‘dirty money’’ and private to private corruption. We have a real problem on our hands because evidentially, facts on the ground have consistently demonstrated a factual or existential reality. This is true on account of the fact that the problems may not have been adequately addressed. It is not fictitious and I strongly believe that no one has viewed this as being a fictitious scenario. It may be right to say (actually it is right to say) that the earlier conception of not realising that the issue of corruption and money laundering will eventually find a convergence point, may have been hampered by the fact that the two were not initially seen to be correlated. There was the tendency to study them as a sort of stand-alone-concepts with little or no nexus. They were probably seen as lacking a cogent link between them. However, this has proved not to be the case.

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<sup>632</sup>United Nations, ‘‘U.N. Secretary-General, In Message for International Anti-Corruption Day, Says Prevention Critical To Securing Rule of Law’’ UN Press Release SG/SM/14703 (December 2012)

Indeed, it was as a result of the negative issues associated with the drug trade, other criminalities and the corrosive effects they brought into the global arena, one would say, engineered the impetus or galvanized the efforts to further delve closely into the issues to find a solution. This eventually led to a more critical and forensic observation or examination of the problems, with regard to the connectivity of the two concepts. Interestingly, there was this remarkable impression in the minds of people that fundamentally, drug dealing was synonymous with money laundering. This was the feeling in the 1980s and 1990s as a result of the fact that drug dealing or business was at its peak during that time.

It is submitted that the above scenario is factual, it is a reality. We need to recognise the fact that the illicit profits that have been generated through the various “under the radar efforts,” had been and is still being craftily reintroduced into the legitimate system and into the society with the intension of according them legitimate status. There are numerous proofs about this and instances of culpability abound. Various judicial pronouncements on this exist. Evidentially and conspicuously it has been taken cognizance that AML regimes or laws can also be used to check the serious issue that is known as corruption. The effect is that it has accorded more credibility to the writer’s view as demonstrated earlier.

More so, it may not be right for anyone to continue to dwell or have the assumption that there are differences between private and public corruption. A close perusal of the impact or their respective input to the general wellbeing of the society in general, does not actually support the misplaced notion that they should be treated differently. Each in its own stead evidently generates or causes a lot of havoc to the society as a whole. We need to note that the issues of globalization and liberalization that brought close affinity into how services and trade are utilized, must to say the least, helped matters as this has led to a closer connectivity with regard to how services are delivered.

It is submitted, that this idea should not hold sway or be encouraged to see the light of the day. The two are noted to cause very significant difficulties to the society. This is irrespective of the direction that it emanates from. Indeed, the advent of globalization and liberalization of commercial interactions, one can say, have made for a stronger inclination against separation. The observation inherent from International Chamber of Commerce (ICC), has helped to a significant extent to justify why the idea should be dropped. It is possibly right to say that ICC is a noted advocate of criminalization of private corruption. But it did not distinguish between this and public corruption in 2005. It simply indicated that there is no meaningful

difference between the two, on account of the fact, that they both distort commercial dealings. Therefore, they must be accorded the same treatment in law. Of course, commercial ventures adhere to their ‘‘pronouncements.’’ The reason is that this enables them to avoid serious reputational damage that is potentially inherent in non-compliance by companies. Perusal of its Article 1 in 2005 edition indicates that ‘‘Enterprises’’ are urged to prohibit bribery and extortion in whatever form in order to obtain business at all times directly or indirectly. Of course, this also applies to agents in both public and private capacity devoid of any distinction. They simply have to be taken serious because it is the world’s largest business organization that represents more than 45 million companies in over 100 countries. Their core mission is to make business to work for everyone, every day, and everywhere.<sup>633</sup>

In the UK, when arguably the ‘‘best’’ anti-corruption legislation in the world was prepared, which has very robust extra-territorial capabilities, the framers of the Bribery Act 2010, did not attempt to distinguish between private and public corruption. The opinion formed was that private sector corruption also harms the markets as much as public corruption. This issue was glaringly brought into attention by the Law Commission in 2007 in its Consultation Paper - *Reforming Bribery*. In truth, they pointed out that there was no need to establish or have two separate offences for private and public corruption. In their assessment, it was (and still is) very difficult to establish with clarity the differences that could exist or exists between private and public sector functions - they definitely from available facts, comingle. This is one of the reasons, when you go through the UK Bribery Act 2010, you will not find this distinction. This is understandable, as the close connectivity of both public and private commercial relationships in most cases are very difficult to sort out. This gives credence to the thinking that the division that may be present between them should be discarded.

In fact, to induce somebody to act illegally through bribery will always be present. This is irrespective of the direction that this comes from. Of course, bribery can still happen, even without the process of money laundering taking root. We have to recognise the fact that it does not follow, that it is all the illegal money that must undergo money laundering. In certain instances, some part of the illegal money may undergo the process. For example, the money in question could be paid as what is known as ‘‘grease payments’’ or ‘‘gold’’ and ‘‘art works’’ or may even be spent. Additionally, you cannot rule out the fact that it could actually be spent using an indirect style. Take for an example, a Russian company could instead of

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<sup>633</sup> Available on <https://iccwbo.org/about-us/> accessed on 19<sup>th</sup> June 2019

inducing a Nigerian top government official (PEP) with substantial amount of money in cash to help in achieving a purpose in a business venture, can equally indirectly, take care of that official's daughter's school fees and maintenance in a UK university. More so, a company could bribe a client by making available a huge lavish hospitality that is not in tandem with the 2012 (December) Government Bribery Guidance on hospitality in the UK that the entity pays for directly. In fact, bribery and corruption are always done in 'secret' and this is its hallmark as they occur in various forms. Arguably, the above is indicative of the fact that the same state of affairs is present in illegal acquirement of wealth either via public or private bribery. It is on account of the above that the writer submits that bribery and corruption are trans-border and there should be no need to continue to show the unnecessary division between private and public corruption.

Perhaps more potentially controversial in this thesis, is the writer's submission that we are gradually witnessing the possible gradual metamorphosis of the banking institutions to the status of 'rogue institutions' albeit possibly in a very subtle and carefully orchestrated manner by the players. This may sound "Greek" to the ears of some people. My observation is that irrespective of the laws put in place to contain the occurrence of money laundering, the banks still tactically circumvent this. I am afraid that the frequency of the infractions is something to be concerned about. This is an area, we need to examine microscopically. In truth, there has been a sort of policy change in the approach by the authorities to issue very hefty fines for the banks' infractions.

The recurring issue in the past was that most of them were willing and able to come up with the funds to meet up with the sanctions presented against them by the authorities. Previously, the fines were not really, to say the least, very hefty. It must be pointed out here that questions were raised on whether the German Bank, Deutsche Bank would be able to afford the huge fine that the US authorities could impose on it at some point for mis-selling mortgage securities in the US. The bank's shares have taken a dive on account of the prospect of a \$14b (£10.5b) potential fine from US DoJ. This could be the largest fine ever emanating from the US against a bank. This is aimed to settle allegations dating back since 2005. The bank is also facing potential huge fines from "mirror trading" in Russia.<sup>634</sup> There are signs that the bank will find it difficult to survive after these fines as they have struggled to bounce back after 2008 financial crisis.

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<sup>634</sup> <https://www.theguardian.com/business/2016/sep/16/deutsche-bank-14bn-dollar-fine-doj-q-and-a>  
accessed 19<sup>th</sup> June 2019

Based on the above, the writer submits that it will now be very difficult for the banks to continue to put themselves in “deep anticipatory mode” and be ready for the fines to be paid for these infractions. This is because there has been a policy change by the authorities and more hefty fines are now being dished out for infractions. We still need to keep an eye on them and close scrutiny should not be hastily discarded. In fact, there may still be the suspicion that there could still be this air of “unwritten code” amongst the financial institutions with special reference to the banks. In point of fact, with the heavy fines on Deutsche, and the threat to its viability, it is probably not true that they are still comfortable to continue to find the money to pay off the fines. The fines, of course are getting higher. As pointed out initially, they may be comfortable to do this in the past. But the issue still warrants a close attention.

The cases are too numerous to mention. The money laundering issues that engulfed some major banks across the globe - HSBC, Barclays and StanBank is a big worry (Stanbank was fined £102m on 9<sup>th</sup> April 2019 by Financial Conduct Authority (FCA) for allowing their branch in Dubai to be used for money laundering). The British bank agreed to pay \$947m to American agencies, including the US DoJ. This is over the allegation that it violated sanctions against a string of countries that included Iran. Separately as indicated above, it was fined £102m by FCA for anti-money-laundering breaches that included “shortcomings” in its counter-terrorism finance control in Middle East. Interestingly, this is the second largest fine ever imposed by the UK regulator for anti-money laundering failures. The US treasury department said the latest fines settled “apparent violations” sanctions imposed against Burma, Zimbabwe, Cuba, Sudan, Syria, and Iran. In fact, the fines were expected after Standard Chartered said in February 2019 that it had set aside \$900m (£691m) to cover the US and the UK penalties. A further settlement will eventually force the bank to take a further hit in its first-quarter-results. The bank thereafter, indicated that it accepted all the “responsibilities for the violations,” “control deficiencies” and added that the vast majority of the alleged incidents took place before 2012. None of the breaches happened after 2014.<sup>635</sup>

The writer therefore submits that there is the high tendency that some banks are being subtly very deceitful plus the fact that they make astronomical profits. The issue or attitude in the past of setting up “contingency funds” lying in wait or as insurance for possible fines against infractions in money laundering and corruption matters, will not work as hefty fines are now

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<sup>635</sup> <https://www.theguardian.com/business/2019/apr/09/standard-chartered-fined-money-laundering-sanctions-breaches> accessed on 20th June 2019

being dished out by the authorities. I hope they should quickly change their attitude, and embrace the fact that the tactics will not work, because the fines are presently going up. This may sound like a childish or pedestrian reasoning to some people but attention needs to be focused on this, the sooner the better. Even with the presence of compliance setups, they will still go on and infringe on the rules ‘silently’ possibly convinced in the knowledge that they have sufficient monetary reservoir to accommodate the anticipated fines.

There are some robust mechanisms which one can say are encapsulated in the contents of this thesis - with the aim of tackling the problems identified at the convergence point. The initial approach or perhaps perception is that these mechanisms should be good enough to tackle the unfortunate problems of bribery and corruption. The anti-corruption/money laundering mechanisms one can confidently admit have come in various forms. However, the facts on the ground are nowhere favourably suggestive that these can contain what is going on. In other words, the author is left with very limited options, than to submit that these mechanisms are not robustly good enough to engage the problems presented by bribery and corruption in the society. More efforts need to be aggressively introduced in the system to counter these issues. Of course, the picture presented, is that they look very robust on paper. Hardly, does a short period pass (possibly a week) without a case of infraction of bribery and corruption/money laundering surfacing. If one takes a look at the data base of FCPA for example, (this is extremely informative in dissecting corruption and bribery issues about legal and natural persons) you will begin to see the enormity of the situation. The culprits are aware that the punishments are there but still they are more than happy to continue with their infractions. It is either the punishments are too soft or that “tick skins” have been comfortably “grown” by the culprits over the years and that they have craftily developed a “solution” to the problems. Perhaps, it is time other countries consider the “Chinese option”<sup>636</sup> and change their legislation.

In China serious harm that involves corruption and large amount (over 1m RMB) will attract a death penalty. The “baby milk case” is a good example. Here, the Chinese food safety officials seized 64 tonnes of raw dairy materials contaminated with the toxic industrial chemical melamine. It was the quality watchdog in the Qinghai province that seized this. Test samples revealed that the milk powder carried up to 500 times the maximum allowed level of the chemical. It was the use of the chemical in 2008 that killed six babies and made 300,000

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<sup>636</sup>In China, death penalty awaits people that are found guilty of corruption of over 1 million RMB (Renminbi) or CNY (yuan) and negligent harm results eg “The Baby Milk powder case.”

ill. It was suspected that the traders might have bought tainted milk that should have been destroyed in 2008 with the intention of processing and reselling to make huge profits. This chemical, when added to food products, indicated a higher apparent protein content that caused kidney stones and kidney failure. Needless to say, the scandal caused outrage amongst consumers and led to international condemnation. Twenty people were convicted for their role in this and two others were executed.<sup>637</sup>

The writer recommends that we should seriously consider this option but should lower the monetary threshold to £50,000 in Africa and the UK. In the USA as at 2019, 29 states still have death penalty, for example - Texas and California etc.<sup>638</sup> Interestingly, this would be a major issue with jurisdictions that do not have the death penalty: for example, 21 US states, Canada, most European countries, Australia, New Zealand and South Africa. It would also mean that extradition of suspects from these jurisdictions would be difficult to implement. The case of Lai Changxing readily comes to mind. He was only extradited from Canada after the Chinese Government gave assurances that he would not be executed. They kept to these assurances and when extradited, he was given a substantial prison sentence.<sup>639</sup> His lawyers had argued that at least seven of his associates had died or disappeared in China's justice system. They said that he would face torture and execution in China as a scapegoat for high-level officials that were involved in corruption. China is believed to carry out more executions a year than any other country, but in this case, they kept their promise.<sup>640</sup> Feelers from the diplomatic circle, had it that had China negated from the assurances that they gave to Canada, that could have effectively put a stop on further extradition requests from China. The Chinese foreign ministry stated that the trial exhibited China's firm resolve in fighting crime and corruption and that this case showed that China and Canada had and still have important law enforcement cooperation.<sup>641</sup>

This suggestion is controversial. But my view is that anything that can be done to reduce the menace of corruption and money laundering must be taken very seriously. Corruption and money laundering are cancerous and kill people irrespective of the fact that there may be the erroneous impression that they are victimless. I understand that legislations have to be changed to accommodate this. Another option is to make it mandatory in this threshold and

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<sup>637</sup> Available at <https://www.bbc.co.uk/news/10565838> accessed on 20<sup>th</sup> June 2019.

<sup>638</sup> <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> accessed on 19<sup>th</sup> June 2019

<sup>639</sup> Available at <https://www.bbc.co.uk/news/world-us-canada-14262269> accessed on 3<sup>rd</sup> July 2019

<sup>640</sup> Ibid

<sup>641</sup> <https://www.bbc.co.uk/news/world-asia-china-18113026> accessed on 3<sup>rd</sup> July 2019.

for life sentence to be meted to the criminals. In truth, corruption, bribery and money laundering are totally unacceptable on account of the massive harm that they unleash on the society.

The reality therefore, is that the authorities should jettison the habit of being reactive to bribery and corruption issues. Rather, it is better for them to be presenting a refined and more proactive legislative posture. They should not allow the criminals to be ahead of them in the game. Sadly, this appears to be what is happening as the signals being emitted from the authorities suggest that there is no light at the end of the tunnel. We are watching!

Additionally, it has been recognised that in every society there is the problem encountered at the convergence point in this thesis - laundering taking place due to bribery and corruption. Evidentially, there are laws that have universal applicability like the UK Bribery Act 2010 and FCPA 1977. There are also local laws against bribery and corruption in various places. It is a fact, that in some places, with particular reference to Nigeria, when you insist that people should be made to take "local Oath" when they take office, they "sit up." Local oath taking simply means the oath that is embedded in the traditional religion associated with where the individual comes from. It has been noticed that when people use a "local oath taking mechanism" peculiar to where they come from, they abide by this for fear of repercussions. They believe in its efficacy more than the conventional Christian or Moslem Oath taking with either the Bible or the Koran. My view or submission is that this method will work better in Africa because some people accord more respect to their traditional African religion than the Western religion like Christianity. I will term this a sort of "sanctions of moral coercion."

This traditional method of gauging peoples' honesty works in many places in Nigeria. We have to take into cognizance that before the advent of the Europeans in Africa, the "local community" had – and still have - their traditional methods of checking criminal activities. For instance, in Nigeria, with particular reference to the eastern part, there are many fearful local deities that the various fragmented communities "obey" for fear of being attacked supernaturally if they break the local laws. These fearful deities are very peculiar to different local communities. For ease of reference, in a place like Awka in Anambra State of Nigeria, there is a deity known as "Agbala Awka," in another neighbouring town called Agulu, there is a deity known as "Habah Agulu" and in Okija, there is the "Okija Shrine." These are all related to traditional African religion which some people could term to be "pagan practises" possibly simply because the processes are not aligned with Western religion like Christianity.



This is worth looking into to confront the problem of bribery and corruption. My submission simply is that these “fetish processes” sends out a lot of coercive and conformist signals to the alleged culprits, who would readily admit to the infractions. This should not be confused with the impression that the crime committed would be easily admitted to because the person could be under duress. The “efficacy” of these local deities is what had been passed on from generation to generation. And there have been instances in the local communities where people readily admitted their guilt due to the fact that they do not want to swear before their local deities for fear of repercussion. The point is that if we apply “local solutions” reflective of the “local jurisdiction” this will drastically reduce corruption, bribery and money laundering. I am not expecting a solution for one region to be workable in other regions: there is no universal antidote to the scourge.

The writer suggests that further research should also focus on the allegation that the financial institutions are allegedly gradually metamorphosing into “rogue set-ups.” The sooner the authorities realise this, the better for the community. Just as the saying goes, “there is no smoke without fire.” To treat this with levity has very strong potential to put the society in reverse momentum, the writer submits. There is the suspicion that the banks resemble or mimic the ingredients noticeable in organised criminal networks whose characteristics can be identified as follows - transnational and multi-jurisdictional in outlook, sophisticated, operating in a restricted environment; economically motivated, technology based and stimulated, gaining of appropriate rewards, structured in organisation, elite criminals, criminal activities, complex structures, rooted in corruption, structured hiding of wealth, use of facilitators and networking.<sup>642</sup>

The degree of protection that the financial institutions with particular reference to the banks have received from the government is tactically startling. This is coupled with the absence of sometimes, effective precautions for even the most blatant and egregious acts of criminality which possibly have led young and easily suggestible employees into believing that committing crimes in relation to the markets they trade and the benchmarks that they have been habitually manipulating is not a crime. This was probably correct or true at one time - although the banks that were involved in the LIBOR case were heavily fined and some individuals jailed. But the UK government, including the EU, responded to the LIBOR scandal by amending their laws to cover manipulation of benchmarks. Of course, before the

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<sup>642</sup> R. Bosworth-Davies, “The emergence of the criminal financial institution: can effective measures be implemented to deal with them?” *Comp. Law.* 2015, 36(10), 307-309.

scandal, they were repeatedly rewarded by the managements, all of whom benefited from the criminal profits that were made, it is not very difficult to decipher why such offences repeatedly kept coming up then.<sup>643</sup>

It is therefore no surprise on account of the ‘mess’ noticeable in the banks that the Governor, Bank of England (BoE), Mark Carney had a swipe on the banks. He made his observations known when BoE published the Fair and Effective Markets Review in London in 2015. He stated on account of the infractions going on in the banks:

*‘This is a major opportunity for the industry to establish common standards of market practise. If firms and their staff fail to take this opportunity, more restrictive regulation is inevitable...unethical behaviour went unchecked, proliferated and eventually became the norm. Too many participants neither felt responsible for the system nor recognised the full impact of their actions.’<sup>644</sup>*

Mark Carney is no stranger to infractions in the sector and effective regulation: he knows what he is talking about. There have been such scandals in the UK that involved the big banks - HSBC, Barclays, Royal Bank of Scotland (RBS) - about Libor and foreign exchange benchmarks which cast aspersions on BoE. Massive personal profits were made by some bank officers and the legal persons (banks) in these issues and highly suggestive of criminal gang-up in the circle. The rate of the infractions in the circle, one can say, was noted to be happening with ‘unpalatable frequency’ and some of the employees have not covered the industry in glory. In fact, the former Chancellor George Osborne corroborated the observation of Mark Carney. He once indicated that the public was right to ask why it is that after so many scandals and the costs it brought to the UK, so few individuals faced punishment in the law courts. These people (responsible for the infractions) should be treated like the criminals that they are.

The author surmises, that some people conversant with the financial industry have a ‘deep rooted suspicion’ that something ‘sinister’ has been going on in the industry. And the suspicion may be, because this is a ‘powerful cartel,’ it is going to take a while to break it up and come to the root of this ‘nonsense.’ This is really a massive source of worry. The

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<sup>643</sup> Ibid

<sup>644</sup> M. Carney, “Building real markets for the good of the people,” Manson House speech June 10 2015

government, if it has the political will, should in all honesty beam a very penetrating searchlight towards the industry.

The issue of corporate governance was given attention. In actual fact, it has a crucial role to play in reducing corruption and money laundering. Admittedly, in the last two and half decades, corporate governance has become very important. However, we need to admit that if the issues of checks and balances are robustly focussed on, it is the submission of the writer, that corruption that is one of the predicate offences of money laundering will be reduced reasonably. The period the financial crises 2008 occurred, it was later evidenced that part of the problem was that corporate governance was not given due attention. This contributed to aggravate the situation. Of course, some people were very quick to point out that the US subprime mortgage issues were to blame. However, most people paid less attention to corporate governance side of events. Noticeably, the individuals that controlled the financial entities were less focused on corporate governance. Unrestrained risk appetite by the managers of the institutions blindfolded them. They wanted to make more profits. It is my submission that more attention needs to be on corporate governance. When this is embraced, there would be less doubt that corruption and money laundering will be reasonably reduced. The authorities, it is suggested should not treat this with levity.

Adherence to the ‘‘ethical codes’’ in firms as part of the corporate governance mechanism will contribute greatly. It is recommended that attention should be directed to this. In fact, the society should endeavour early to educate the masses about the importance or viability of adherence to ethical issues in whatever one does. This can be achieved through impacting this knowledge from very early stages of the individual’s development process. For instance, when people are made to understand tenaciously from their formative stage about ethical matters, the tendency is on maturity, at least, this will be displayed in their attitude - this is a good suggestion. Of course, the impact this will have in reducing corruption, bribery and money laundering should not be underestimated. This is important and possibly, will eventually metamorphose into business ethics. Ethics and nice corporate governance also germinated via foundations laid out in the global universal values.

A close scrutiny of the Universal Declaration of Human Rights (UDHR) has actually reinforced the global consensus directed towards the applicability of a shared moral behaviour internationally. The UN General Assembly on 10<sup>th</sup> December 1948 adopted this document. The after effect is that many of the principles therein, are conspicuously reflected

on significant anti-corruption and money laundering documents present in many countries. Good examples come readily in form of OECD Anti-Bribery Convention 1997, UNCAC 2003, World Economic Forum Partnering against Corruption, Transparency International's Initiative Business Principles for Countering Bribery, and ICC Rules 2005 to mention but a few. These benefited from UDHR, it is submitted. The positive thing is that the documents mentioned, ethically abhor corruption and money laundering.

Interestingly, the issue of soft law has generated quite a lot of standpoints from various perspectives. In truth, the writer submits, is simply that they are effective in curbing the incidents of corruption and money laundering. It is the writer's submission that they should be accorded the relevant accolade for the prudential role they have so far been playing. It is suggested that we should pay less attention to their coercive sources. This is a distraction and uncalled for. What should be paramount should be that any mechanism that can help to curb the incidents of corruption and money laundering should be seen as a very welcome relief. We do not need to remind ourselves of the devastating negative unquantifiable consequences that these two have unleashed on the society as a whole. Therefore, the acceptability of any soft law mechanism is a timely relief, the writer submits, as they have plugged the lacunae in the so called hard laws in addressing pressing matters. The author pointed out in the thesis that we are "forced" to accept FATF recommendations. My submission therefore is that this "forceful acceptance" must continue. It is from all indications, a massive help to use in fighting the scourge. Its periodic reviews are usually tailored to the changing global dynamics in relation to the reactions to money laundering and terrorist issues.

The author is also highly suggestive of the fact that the soft law pronouncements of BCBS which are always prudential in outlook directed to the financial institutions should continue to be embraced without hesitation. This is irrespective of the fact that there may be reservations about the "core decision making apparatus" of the Committee. The "balance of convenience" hinges on the possible fact from all indications that the benefits outweigh the perceived negativities. The society should be more interested in the "substance" of the "messages" often directed to the financial institutions with reference to the banks and not the "form." This is important, if we are serious in checking infractions in the industry. As already indicated, there are also other soft law mechanisms like the OECD Anti-Bribery Convention 1997 and ICC 2005 "pronouncements" to mention a few. The message is simple

- they help to reduce the incidence of bribery, corruption and money laundering. As a result, it is submitted that the best option is to continue to adopt them aggressively.

It is noted that the issues of whistle-blowing has now been associated with helping to combat corruption. Legislations in various countries are now in place. In the UK, for instance, this is covered by Public Interest Disclosure Act 1998 (PIDA) which came into force on 2<sup>nd</sup> July 1999. The interesting follow-up is that this has been emulated or copied in various jurisdictions to protect whistle blowers. In the USA, whistle-blowers are protected in the legislation - Whistleblower Protection Act of 1989. It is this legislation that protected the main whistleblower during the ‘‘Enron Incidents’’ in the USA. It was the bold report or concern brought forward by Sharon Watkins to the Chief Finance Officer (CFO) of now liquidated Enron that brought about or triggered the investigations that eventually unravelled the fraud that was associated with Enron. The company was the ‘‘undisputable’’ winner of the crown - ‘‘greatest bankruptcy’’ in US corporate history. The importance of the mechanism of whistle blowing need not be over emphasised. It is needed to check corruption and money laundering. The good thing about the mechanism is that it is very difficult sometimes to figure out the source of the complaints. But generally, it usually emanates from people that have close proximity to the source. Typical examples are your work colleagues on account of the fact that they are more likely to figure out the pattern of official procedures and behaviours of their fellow workers.

There is also a whistle blowing legislation in Nigeria - Nigeria Whistle Blower Act 2016. To motivate Nigerians, to participate, a policy statement was made that if a report is followed that leads to the fraud to be unravelled, the whistle blower ‘‘may’’ be entitled to an amount equivalent to between 2-5% of the principal amount recovered. Reports or complaints can be made to State Vigilance Commission (SVC) in Nigeria. It was on account of the above, that in 2018, a whistle blower was rewarded with the sum £880,000 (at the conversion rate of 450 naira to a pound £).

The writer has noted that only 10 European Union (EU) countries have a comprehensive law that protect whistleblowers at the time of writing. These are France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and the UK. Interestingly, the good news is that the European Parliament in April 2019 voted in favour of backing the whistle blowers law in the EU. It is now left for the Council of Ministers to approve this. After this, transposition will hopefully occur in the next two years. The measure covers a very wide

range of policy areas which includes money laundering, banking, product and transport safety, nuclear safety, public procurement, and tax avoidance matters. The thinking is that when this comes into effect, it is envisaged that it will save substantial amount of money. For instance, in procurement alone, it is estimated that up to £9b would be saved. With the EU legislation, people that want to report infractions would be allowed to go straight to law enforcement or regulatory bodies and make their reports. They will have the option to make either internal or external report.<sup>645</sup>This is a welcome development and there would be safeguards against reprisals from employers.

The EU rapporteur Virginia Roziere of Progressive Alliance of Socialists and Democrats (S&D) stated clearly that the recent scandals such as LuxLeaks, Panama Papers and Football leaks have helped to shine a light on the great precariousness that whistle-blowers suffer today. And that on the eve of European elections, Parliament has come together to send a strong signal that it has heard the concerns of its citizens, and pushed for robust rules guaranteeing their safety and that of those persons that choose to speak out.<sup>646</sup>The EU Whistleblowing Directive was formally adopted on 7<sup>th</sup> October 2019.

It is a fact that in the UK, PIDA is designed to protect whistleblowers. This is fair, but in contrast, it does not provide for whistle-blowing bounties or financial incentives.<sup>647</sup>This does not look good. It is therefore, suggested that the various legislations already in place should be amended to include the fact that a whistle blower must be entitled to at least 50% of the recovered amount if the report he/she makes eventually leads to successful recovery of the loot. The reasoning is simple - you need to give a massive incentive for the people to participate in this. If you take a look at the Nigeria one, the policy used the word “may.” This should not be the case. The government or the authorities should be seen to make an irrevocable commitment to the course. There may be the reasoning that this could look over ambitious. Far from it, and if you assess the other side of the coin, there is the reasoning that if no one comes up to report the envisaged infraction, nothing may be recovered. The EU law should be made to include the suggested “50% rule” by the author. The author is fully aware that this may trigger unnecessary reports that could cause a lot of dissatisfaction. But the good thing is that the legislations should or rather have inbuilt sanctions to check vexatious

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<sup>645</sup> [www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved](http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved)

<sup>646</sup> Ibid

<sup>647</sup> N. Schonert (2011), “A fistful of dollars: bounty hunting under Dodd-Frank Act’s whistle-blowing provisions,” Southern University Law Journal, vol. 36, pp. 159-181

and frivolous reports. This should not be interpreted as being over ambitious. We must all try and implement the needful because the society will gain more from this. In truth, whistle blowing is an excellent mechanism to check the scourge.

Additionally, the author is suggestive of the fact that more resources ‘‘must’’ be allocated to anti-corruption and money laundering institutions in various countries. Their respective governments should increase the budgetary allocations usually directed to these institutions. It follows without much possible contradiction, that when you allocate more resources to these institutions, the effect would naturally transmute into reducing the scourge. This is the expectation. In fact, more resources will make the anti-corruption agencies to be more robust and productive in the work they do. I recognise the fact that the government provides them with financial support. If the government can increase what they are presently getting in their various countries by 100%, it reasonably follows that their productivity will increase. When FATF visited the UK in 2018, for the peer review process, aside indicating that the UK has a robust anti-money laundering set-up, they pointed out that UKFIU needs more resources. Although, it has been noticed that resources may be scarce, but the negativities associated with the scourge are gigantic.

For the jurisdictions that may not be able to afford this, it is suggested that aid should be sort and when received, must be monitored closely to make sure that it goes to the right department - FIUs and corruption prosecuting agencies. In reality if FIUs and other agencies are under-staffed and under-resourced, it reasonably follows that they would not pose much of a deterrent to illegal activities. Most people engaged in corruption and money laundering are ‘‘smart guys’’ and will have little need to exert improper influence on them, because they feel that ‘‘proper attention’’ would not be directed to them.

The fact is that both the IMF and the World Bank are one of the most important bodies that pull the strings in issues concerning the scourge. This study recommends that in order to continue to raise the awareness level about the scourge, the subject or module of corruption and money laundering should be made compulsory in secondary schools in various jurisdictions - much earlier. At present, in appropriate professional and vocational training courses, it is offered in tandem with FATF recommendations for staff. It is also clear that in the UK, anti-corruption training is one of the key elements that is to be considered to be ‘‘reasonable adjustments under s7 of the Bribery Act for companies. The study recommends that this should commence early in secondary schools to increase awareness and early

adaptation for everybody. Therefore the two bodies should include this as part of their conditions to release their facilities to their members. This will possibly translate into reducing the volume.

Corporate tax avoidance, when analysed closely without bias is arguably a form of corruption. Studies have shown that eventually it is the poor that suffer as a result of depletion and deprivation of tax revenues. Interestingly, recently, the UK based "Tax Justice Network" in late May 2019 in their investigations, found out that the UK is the "greatest enabler" of corporate tax avoidance globally. Out of 64 jurisdictions, the UK ranked 13. But globally, 8 of overall top 10 that got "avoidance scores" are all UK "dependent territories." Topping the list is British Virgin Islands, followed by Bermuda and Cayman Islands. Jersey, that is a Crown dependency, was seventh. This in the author's opinion makes for a depressing and uncomfortable reading. I am not saying that the UK has not been in the forefront of fighting corruption, after all, it has the Bribery Act 2010 to show for this. It is therefore, suggested that the UK "must" not treat this lightly. The UK government "must" quickly provide a legislation to block this loophole.<sup>648</sup> The government must develop "quickly" the political will to deal with this. Alex Cobham, the chief executive of Tax Justice Network was not happy about this. He stated:

*'a handful of the richest countries have waged a world tax war so corrosive that they have broken down the global corporate tax system beyond repair...the UK, Netherlands, Switzerland and Luxembourg - the Axis of Avoidance - line their own pockets at the expense of a crucial funding stream for sustainable human progress ..the ability of governments across the world to tax multinationals corporations in order to pay teachers' wages, build hospitals and ensure level playing field for local businesses has been deliberately and ruthlessly undermined.'*<sup>649</sup>

The shadow chancellor, John McDonnell indicated that the findings were very embarrassing and shameful. The only way the UK stands out internationally on tax is leading a race to the bottom in creating tax loopholes and dismantling the tax systems of countries in the global south. He clearly emphasised that the rot must stop. He accused the Tory leadership hopefuls of promising tax giveaways for the rich. His party - Labour Party will implement the most

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<sup>648</sup> <https://www.independent.co.uk/news/business/news/uk-corporate-tax-avoidance-havens-justice-network-dodging-a8933661.html> accessed on 20<sup>th</sup> June 2019

<sup>649</sup> Ibid



comprehensive plan ever seen in the UK to tackle the scourge.<sup>650</sup> A government spokesman defensively stated that tackling tax avoidance was a priority and that the UK had been on the forefront of international action aimed at reforming global tax rules.<sup>651</sup> As previously indicated, the time for action is “now,” time for unnecessary “cross-accusations” and “defensive statements” on the part of the UK Government, I believe is fast running out.

The authorities, in addition to requiring natural persons to declare their assets when they take a new post, it is suggested that when their respective tenures finish, they should be made to declare their assets within two months of leaving office. This will make it smoother and quicker to compare the information with regard to finding out if there has been any unjustified enrichment on the part of the officer/s concerned. At the moment, office holders in LDC like Nigeria are required to declare their assets when they take office. But when their tenure comes to an end they do not complete a second asset declaration form. This in the opinion of the writer will help at least to find out the level of enrichment, if any, concerning the office holders. However, some natural persons do not even declare their assets when they take office. This is one area where the authorities should wake up to their responsibilities and offer the necessary attention.

The authorities should also make sure that when appointments are made, that this should be based on merit. Individuals should be well scrutinised to make sure that they are very capable of holding the said positions. A check on their criminal records is done in the UK - by referring to Disclosure and Barring Service (DBS) and before they assume office. I understand that in some instances, even after a check had been done, there could still be instances of illegal enrichments when the person assumes office. But this is not in all cases. In some LDCs like Nigeria, the authorities must muster the political will to make appointments on merit inclusive of the corporate appointments. It could lead to “corporate corruption.” The essence is that there is the tendency that if a proper due diligence is followed in the appointments and on merit, there is the likelihood the position holder “may” not steal. Its importance, is to minimise the chances of “unjust enrichments.” In truth, this will always be present. It is better to closely have a check on their past instead of just appointing people based on “who they know” as powerful “unseen hands” are usually at work in that country.

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<sup>650</sup> <https://www.theguardian.com/world/2019/may/28/uk-and-territories-are-greatest-enabler-of-tax-avoidance-study-says> accessed on 4<sup>th</sup> June 2019

<sup>651</sup> Ibid

Another suggestion would be the removal of immunity of serving officials. I have to quickly point out here that this has been a sort of thorny issue that has not yet been addressed. All I am suggesting is that this is the time for ‘a solid political will’ to be utilized to address this. In some jurisdictions like Nigeria and some Commonwealth countries, serving political office holders like the President and Governors are immune from prosecution whilst in office. Prosecution can be started after they leave office. Although, it has been suggested that prosecution will distract them from governance, I do not think that this is sufficient reason to continue with the immunity. The facts on the ground in most cases is that some of these PEPs would have made so much money during their tenure, and recovering of the illegal profits they made after their tenure are not usually very substantial, although, this depends on individual cases. It can also be argued that because they are in power, they have this power of incumbency to frustrate ‘due process.’ Far from it, if the immunity is removed, at least, they would realise that they can be prosecuted whilst in office and could be replaced. The tendency could be that they would be very cautious. I do not think that most office holders would want this. They all look forward to completing their tenures. The amount frittered away by some office holders is alarming and obvious significant dent on the resources of the nation/s.

Of course, it is no longer news that some public officials that are accused of corruption and money laundering usually whilst in office object to both civil and criminal cases on the basis of privileges and immunities. In fact, there are some legal international instruments that one can say provide a bit of guidance on this. Article 40(2)<sup>652</sup> indicated that an appropriate balance must be maintained by States on immunity when necessary on issues of investigation, prosecuting, and adjudicating on public officials in accordance with its legal system. The writer submits that this has not gone far enough. It has given States very wide discretion on how to handle public officials’ immunity. Indicatively, it does not require states to alter their domestic laws on this. In Gambia, the constitution grants immunity to National Assembly members while attending to the proceeding of the Assembly.<sup>653</sup> Nigeria constitution grants immunity to serving public officials.<sup>654</sup> This does not have extra-territorial application outside Nigeria. For example, a former Nigerian Governor Joshua Dariye in 2004 was arrested in London on allegation of money laundering whilst in office. He jumped bail in London and

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<sup>652</sup> UNCAC 2003

<sup>653</sup> Section 115 of the Constitution of The Republic of The Gambia, 1997

<sup>654</sup> See Section 308 of Constitution of Federal Republic of Nigeria 1999 as amended.

returned to Nigeria and was not extradited to the UK during his tenure.<sup>655</sup> However, he was sentenced to a total of 14 years in jail in Nigeria in June 2019, on charges that bothered on criminal breach of trust and criminal appropriation of state funds.<sup>656</sup>

The writer suggests that the authorities should look into the area of “judicial corruption.” I need to quickly point out here that the UK and the USA have a robust judiciary that one can say have tenaciously fought and will continue to fight the issues of corruption and money laundering. This may not be true in some jurisdictions to fight the scourge. All I am suggesting, is that in these jurisdictions, more money needs to be allocated to the judiciary to make them more “focussed” in fighting the scourge. Judicial corruption has the potential to produce a lot of negativities, to wit: poorly paid judges will become susceptible to corruption - corrupt judiciary has the hallmarks of undermining efforts to attack corruption and money laundering, and possibility of a successful deterrence of financial crime or even asset recovery from abroad.<sup>657</sup> The need to strengthen the judiciary should not be seen as unnecessary. In fact, Article 11 of UNCAC is specific on this:

*“each state Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.”*<sup>658</sup>

It must be noted that in some instances, some judges have been accused of corruption irrespective of the fact that they may be well remunerated. It is not my intention to enumerate the many cases in Nigeria. But the consensus is that possibly, there is judicial corruption in Nigeria. There were allegations of corruption against the former Nigeria Chief Judge Walter Onnoghen. He was suspended from office and later resigned. And the matter is still ongoing at the time of writing. The writer therefore decided not to go into the merits and demerits of this case as it is still *sub judice*. The writer’s suggestion is that more money should be directed to the judiciary and efficient monitoring mechanisms put in place to monitor how the money is spent. This will have strong potential to reduce judicial corruption in many countries. But we should always bear in mind that “bad eggs” are everywhere including both developed and developing countries. But the chances of “polluted judiciary” is arguably

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<sup>655</sup> <https://uk.reuters.com/article/uk-nigeria-britain-corruption/court-convicts-nigerian-over-stolen-public-funds-idUKL0571853220070405> accessed on 5<sup>th</sup> July 2019

<sup>656</sup> Available at <https://punchng.com/ex-plateau-gov-dariye-jailed-14-years-for-over-n2bn-fraud/> accessed on 4<sup>th</sup> July 2019

<sup>657</sup> See 2007 Global Corruption Report of T1: Corruption and Judicial Systems p.63

<sup>658</sup> Article 11 UNCAC 2003

more in some developing countries due to resource constraints and possibly “lax checks and balances.” In truth, if a country is perceived to have a corrupt judiciary, it possibly impacts on the willingness of other countries to be enthusiastic to permit individuals to be extradited to that country. And this could also hinder positive chances of “asset recovery” process of corrupt proceeds.

The author is optimistic that when these suggestions are taken on board, reduction of the problem would be brighter. It is not going to be easy but inaction on the part of the authorities should never be considered as a viable option because it could lead to “greater doom.” To be fair, the scourge will never go away. The reasonable ambition should realistically be focussed on massive reduction. This is the reality on the ground as crime will “never” be completely eliminated from the society.

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