

**THE ADEQUACY AND EFFICACY OF ANTI-MONEY
LAUNDERING LEGISLATIONS WITHIN THE CONTEXT
OF ELECTRONIC BANKING AND INFORMAL
REMITTANCE SYSTEMS IN DEVELOPING COUNTRIES
WITH PARTICULAR REFERENCE TO NIGERIA AND
SOUTH AFRICA**

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I declare that the work presented in this dissertation is mine alone.

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ABSTRACT

In recent times, international, regional and local legislation has been couched to strengthen anti-corruption institutions and deter corrupt public officials from syphoning public wealth for their benefits, but this has continued unabated in spite of some successes recorded from these anti-graft agencies. Electronic banking notable for timeliness in executing transfers have helped in facilitating ease of doing business and as well accelerated the transfer of illicit wealth to secrecy jurisdictions. So regardless of internal and prudential controls instituted by regulatory authorities to ensure transparency in handling transactions and the reporting requirements for suspicious transactions, money laundering persists. Tracing and recovering the loot becomes another financial, legal and inter-state hurdle on the part of law enforcement agencies while the perpetrators live in exquisite luxury believing that the loot is their fair share of the 'national cake.'

This dissertation sought to assess the adequacy and efficacy of anti-money laundering legislation given the complexities of the local environment: namely nepotism, weak institutions, and predominance of a cash-based economy, lack of independence and the politicisation of corruption. First, we consider the enormity of the problem of corruption and its effect on developing countries with due regard to security, judicial fairness and stability of the economy. After that is an examination of international and local money laundering initiatives with a considerable emphasis on the United Nations Convention against Corruption and the role of the Financial Intelligence Unit in providing intelligence for tracing of corrupt proceeds. The researcher asserts that anti-money laundering legislation will be efficacious where good governance prevails and the incentives for corruption including nepotism and prebendal attitudes are discouraged. A State, which provides social safety nets for its populace, would strengthen the anti-corruption fight thereby discouraging new entrants into public office positions from graft and abuse of those positions of authority.

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TABLE OF ABBREVIATIONS

ACB	Anti-Corruption Bureau
ACJA	Administration of Criminal Justice Act 2015
AFU	Asset Forfeiture Unit – South Africa
AML	Anti-Money Laundering
ATM	Automated Teller Machine
AU	African Union
AUCPCC	African Union Convention for the Prevention and Combating of Corruption
BCBS	Basel Committee for Banking Supervision
BIS	Bank for International Settlement
Bofia	Banks and other Financial Institutions Act 1990 as amended
BVN	Bank Verification Number
CARA	Criminal Asset Recovery Account
CBN	Central Bank of Nigeria
CCB	Code of Conduct Bureau
CCT	Code of Conduct Tribunal
CDD	Customer Due Diligence
CFT	Combating the Financing of Terrorism
CHIPS	Clearing House Interbank Payment Systems
CHS	Commission on Human Security
DAC	Development Assistance Committee
DIA	Defence Intelligence Agency

DNFBP	Designated Non-Financial Businesses and Professions
DPCI	Directorate for Priority Crime Investigations (“Hawks”)
DPP	Director of Public Prosecutor
EACC Act 2011	Kenyan Ethics and Anti-Corruption Commission Act, No 22 of 2011, revised
EBG	Electronic Banking Group
EC	European Community
ECLSSCPC	European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990.
EFCC	Economic and Financial Crimes Commission
EG	Egmont Group
EGGS	Eastern Gas Gathering System
EMJ	European Ministers of Justice
ESSAAMLG	Eastern and Southern Africa Anti Money Laundering Group
EU	European Union
FATF	Financial Action Task force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FICA	The Financial Intelligence Centre Act, No. 30 of 2001 and (No. 11 of 2008) – South Africa
FIU	Financial Intelligence Unit
FTZ	Free Trade Zone
G-7	Group of Seven
GCB	Global Corruption Barometer

GDP	Gross Domestic Product
GIABI	Inter-Governmental Action Group against Money Laundering in West Africa
GNI	Gross National Income
ICPC	Independent Corrupt Practices Commission
IDA	International Development Association
IMF	International Monetary Fund
IOSCO	International Organisation of Securities Commissioners
KYC	Know-Your-Customer
LDC	Least Developed Countries
MDG	Millennium Development Goals
MLA	Money Laundering (Prohibition) Act 2011 as amended
MTB	Money Transfer Businesses
MVTS	Money or Value Transfer Services
NAPIMS	National Petroleum Investment Management Services
NGO	Non-Governmental Organisation
NIA	National Intelligence Agency
NPPS	New Payment Products and Services
NNPC	Nigerian National Petroleum Corporation
NPA	National Prosecuting Authority ('the scorpions')
OCCRP	Organised Crime and Corruption Reporting Project
UNODC	United Nations Office on Drugs and Crime
ODA	Official Development Assistance

OEDC	Organization for Economic Cooperation and Development
PCCAA	Prevention and Combating of Corrupt Activities Act, 2004.
PDP	People's Democratic Party of Nigeria
PEP	Politically Exposed Persons
PIDA	Programme for Infrastructure Development in Africa
POCA	Provisions of Organised Crime Second Amendment Act (No. 38 of 1999)
POCB	Proceeds of Crime Bill
SAPS ACU	South African Police Services Anti-corruption Unit
SAPS CCU	South African Police Services Commercial Crime Unit
SAPS	South African Police Services (SAPS),
SEC	US Securities and Exchange Commission
SOA	Sarbanes-Oxley Act of 2002
SSA	Sub Saharan Africa
SSS	State Security Services
STAR	Stolen Asset Recovery
SWIFT	Society for Worldwide Interbank Financials Telecommunications
TBML	Trade Based Money Laundering
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption

UNCAITINDAPS	United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
UNCATOC	United Nations Convention against Transnational Organized Crime
UNDP	United Nations Development Programme
UNIRG	United Nations Implementation Review Group
USD	United States Dollars
VCPPS	Virtual Currencies Payment Products and Services
WB	World Bank

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INTRODUCTION

In recent years, the need to curb economic crimes has become a burning issue in domestic and international policy circles. Discussions about Sub Saharan Africa involving economic and infrastructural development, failure of governments, the judiciary, poverty, and aids to the continent, conflicts and other issues would in one way or the other trace its problems to endemic corruption and mismanagement of the wealth of the state. They use the machinery of government as a conduit to form their illegitimate empires. The focus of most international media coverage about Sub Saharan Africa has been about corruption, underdevelopment and poverty, political and social unrest.

Covering an area of just over 30 million km², around 20% of the earth's total land mass, and a current population of over one billion people, Africa is the second largest continent in both size and population. The continent, with 54 UN-recognised states is politically and culturally divided into two regions: North Africa more often affiliated with the Arab World and Sub-Saharan Africa, the Sahara desert providing a natural boundary. Sub Saharan Africa made up of 48 countries, home to about 85% of Africa's population with most governments democratically elected.¹ The region accounts for about \$1.591 trillion of Africa's GDP With an average per capita income of \$1615². Alarming, most of the countries in the

¹ The World Bank, 'Sub-Saharan Africa' <<https://data.worldbank.org/region/sub-saharan-africa>> accessed 28 October 2014

² The World Bank, 'Sub-Saharan Africa' <<http://data.worldbank.org/region/sub-saharan-africa>> accessed 28 October 2014

region fall below the Transparency International Perception Index on Corruption with very many states occupying the bottom half of the table (figure1).³

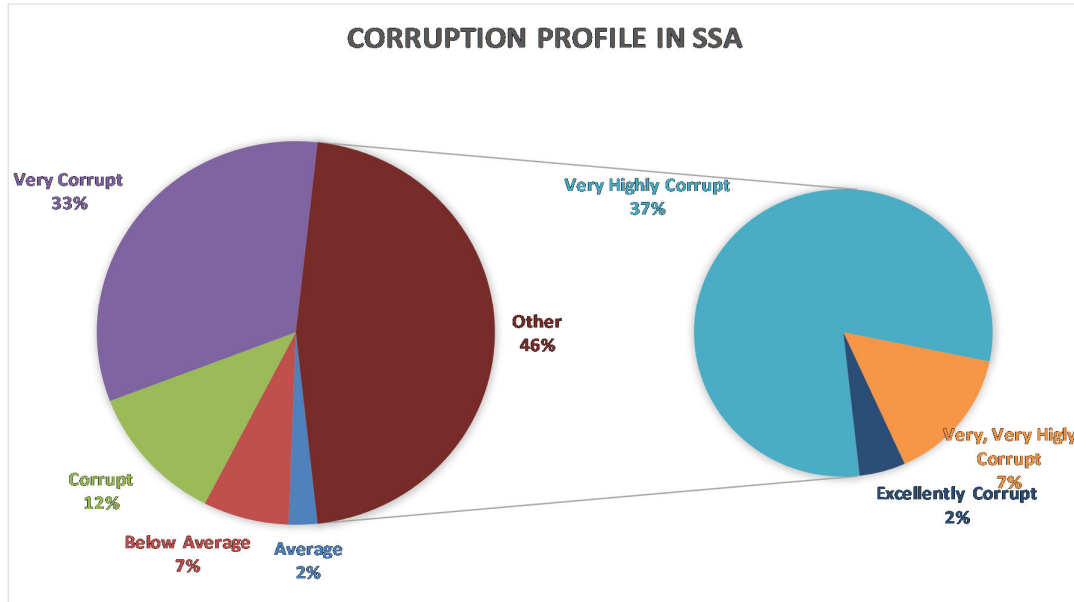


Figure 1 - Corruption Perception Profile in SSA

Adapted from TI's Corruption perception index 2013.

<<https://www.transparency.org/cpi2013/results>> assessed 28 October 2014

Additionally, the illicit capital flows survey indicates that for about ten years 1.36 trillion USD was lost from the region arising from illicit outflows.⁴ Nigeria ranked among the top 10 states having the highest measure of cumulative illicit financial flows accounting for about 129 billion US dollars.⁵ The same is true of other countries within SSA ranked in the table of illicit financial flows as high contributors to the outflows.

³ Transparency International, 'The 2013 Corruption Perceptions Index: Measures the Perceived Levels of Public Sector Corruption in 177 Countries and Territories' <<https://www.transparency.org/cpi2013>> accessed 28 October 2014

⁴ The outflow represents 28.3% of the total illegal discharges from developing countries.

⁵ Dev Kar and Joseph Spanjars, 'Illicit Financial Flows from Developing Countries: 2003 – 2012' <<http://www.gfintegrity.org/report/2014-global-report-illicit-financial-flows-from-developing-countries-2003-2012/>> accessed 3 October 2015

Culturally, there is a close family link within the region. The continent is one of the most ethnically diverse in the world with thousands of different ethnic groups, nearly all having their distinct language, traditions, social norms, and history. Colonialism, however, did not do any good to the varied ethnic groups because nations created had no recourse to their diversity within the system. A noticeable cultural characteristic across Sub-Saharan Africa is that most inhabitants look to traditional communities when social services and security provided by the state deteriorates.⁶ Regardless of the nation in which they live, Africans tend to have their strongest loyalties to family, clan, and tribe. These loyalties are likely to matter most to Africans, regardless of the task, and are depended upon when trouble brews or conflict erupts. Extended family ties are maintained and also affects bureaucracies.⁷ Where government employees help individuals and friends with special treatments, even if, occasionally this behaviour might require bending or even breaking some administrative rules and departing from 'universalistic principles.'⁸ Such cultural ties in some ways substantially affect the corruptive attitude of government officials and institutions of government holding the public trust.

⁶ Karl P. Magyar, 'Culture and Conflict in Africa's History: The Transition to the Modern Era' in Stephen J. Blank, Lawrence E. Grinter, Karl P. Magyar, Lewis B. Ware, and Bynum E. Weathers (eds), *Conflict, Culture, and History: Regional Dimensions* (Maxwell AFB, AL: Air University Press 1993) 264.

⁷ The concept of impersonal bureaucracies in economic theory is practically difficult in most Sub Saharan African countries where family ties override objective decision making. The relationships between people who work in a bureaucracy are defined strictly concerning their roles and responsibilities. Relationships are thus based on divisions of labour and expertise rather than on interpersonal considerations. People are expected to communicate to each other from the role they occupy and nature of functions they are required to perform. Thus a bureaucracy is characterised by impersonal social relationships. The reverse is the case where elected public officials appoint their close family relations (wives, brothers, and cousins as special advisers, commissioners, and ministers in their cabinet).

⁸ Vito Tanzi, *Policies, Institutions and the Dark Side of the Economics* (Edward Elgar 2000) 91

An essential geographic characteristic of Sub Saharan Africa is the immense wealth embedded in its natural resources. An unusually large number of countries within the region is landlocked, so they struggle to develop economically placing much reliance on their neighbours for access to the international markets⁹. Sadly, the resources of SSA are distributed¹⁰ in many countries, whereas a few have used the resources prudently for the benefit of the people.¹¹ Control over natural resources has brought several factors to bear including but not limited to colonial legacy, tribalism, and religious pressure. Cultural factors try to ensure that *quid-pro-quo* exists between the haves and have-nots in the determination of the utilisation of these resources. The result has been lack of economic, social and political improvements but wanton mismanagement of the state resources, where each successive administrator considers the wealth of the nation as '*national cake*' meant to enrich oneself.

The region also presents an array of security challenges. Most states struggle to provide essential services such as electricity, water, education and internal security. In the mid-2000s, organised crime became an international security concern in West Africa due to the detection of significant cocaine shipments transiting the region to Europe.¹² Other transnational crimes such as oil bunkering,

⁹ Some examples are Chad, Niger, Mali, Eritrea, Ethiopia, and DR Congo.

¹⁰ African Development Bank Group, 'Annual Development Effectiveness Review 2013: Towards sustainable growth for Africa' <<https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADER-%20Annual%20Development%20Effectiveness%20Review%202013.pdf>> accessed 3 October 2015. While many African countries have continued to grow at above the global average, not all states within Africa are benefiting from this growth. Six of the ten most unequal countries in the world as in Africa and there is yet any evidence of progress in reducing income inequality; poverty remains unacceptably high and over 60% of Africans – many in isolated and rural communities and fragile states as they earn less than \$2 a day.

¹¹ Botswana is a good model in Africa, utilising its resources for the good of the people.

¹² United Nations Office on Drugs and Crime 'Transnational Organized Crime in West Africa: A Threat Assessment' (2013) 3 <https://www.unodc.org/documents/data-and-analysis/tocta/West_Africa_TOCTA_2013_EN.pdf> accessed 3 October 2015

illegal diamond sale, arms trafficking,¹³ human trafficking, migrant smuggling, fake medicine, kidnapping are now commonplace in the West Africa sub-region and East Africa where sea piracy and abduction are significant security concerns.

In the midst of these teething problems, there are high growth potentials with the International Monetary Fund (IMF) projecting that some SSA countries will have fast economic growth similar to some Asian economies like China.¹⁴ Some published indices show Nigeria ranked as the most significant economy in Sub Saharan Africa with strong growth potentials, the same with other countries such as South Africa, Kenya, and a host others. One major factor, however, that have impeded the development of Sub Saharan Africa is bad governance marked by political instability and policy somersaults. Because political actors are most times elected to office on the wrong premise,¹⁵ insincerity marked by grand corruption and other irrational vices becomes the order of the day, subjecting the welfare of the common person to the secret dungeons of the heart, with tremendous implication on development, growth, regional stability.

A major problem of developing countries is corruption, which amongst others fuels the massive remittance of stolen money to safe havens and or the conversion of

¹³ Ibid 4. As the report noted, 'there is great concern about the security implications of weapon trafficking...many weapons continue to circulate from past conflicts and diversion of from official weapons stock. The recent flood of perhaps 10,000 to 20,000 firearms from Libya to the West African sub-region represents a serious threat, this appears to have been realised in northern Mali.'

¹⁴ International Monetary Fund, 'Regional Economic Outlook. Sub-Saharan Africa Staying the Course' <<http://www.imf.org/external/pubs/ft/reo/2014/afr/eng/sreo1014.pdf>> accessed 22 October 2014. The IMF maintains that the outlook for SSA remains favourable. Projected growth was 5% to 5.75% in 2015. The sustained demand stems from infrastructural projects, the expansion of productive capacities, buoyant service sector and rebound in agricultural production are some factors responsible for growth.

¹⁵ Politicians paying large sums to bribe their way through, seeing elected position as on the only means to get rich quickly, some have had to commit suicide for losing elections for their inability to pay back borrowed money. Others have had to hire political thugs armed with dangerous equipment to cajole their opponents into submission.

illicitly acquired wealth into legitimate use. In addition, criminal activities such as trafficking of drugs, illegal crude oil bunkering, kidnapping, and prostitution generate enormous proceeds, which flow to legitimate use through the laundering process. More so, the problem of capital flight subsists as funds repatriated to home countries follow processes aimed at payment of lower taxes and dues through trade mispricing, under-invoicing or a combination of complex techniques. In the absence of proper enforcement of laws and standards, SSA has become a breeding ground for offenders to perpetuate economic crimes. Furthermore, the lack of political will and a flawed judicial system helps to foster the actions of money launderers.

The new wave of terrorist activities in Sub Saharan Africa, the need for governmental action to craft and enforce adequate legislation to curb this growing tide and the urgent need to ensure illegitimate funds laundered under any guise is traced and recovered and adequately utilised underscores the importance of this research effort. Also, the cumbersome judicial processes including the inability of enforcement agencies to coherently coordinate and prosecute offenders in time further highlight the reason for law reforms.

This thesis is concerned with the adequacy and efficacy of anti-money laundering legislation within the context of electronic banking and informal economy and informal value transfer systems in developing countries with particular reference to Nigeria and South Africa. It attempts to explore the role of the informal economy and remittance system both formal and informal in the promotion of laundering activities. An attempt to unravel within the context of an academic discussion, the

impact of economic crimes either negative or positive particularly corruption and organised crime have and continues to exert on Sub Saharan African economies. The effect of financial offences evaluated from the following perspectives: sustainable development, real fairness, security, and stability.

Sub Saharan Africa constitutes one of the high profile areas in the world where corruption thrives¹⁶ with its attendant conflicts. There is a high agitation for self-determination due to the long-term neglect experienced by the populace in the hands of a few elites using the machinery of government as a conduit to amass wealth for themselves. Conflicts abound, and the scourge of underdevelopment have ranked most Sub Saharan African countries, as constituting the worlds' poorest with many living below the poverty line.¹⁷ In recent years, there is a growing wave of terrorism with very dire consequences to the weak/innocent. In Northern Africa, the Arab spring erupted resulting in several deaths; this is mainly due to the high level of unemployment and imbalance in the social structure. In West Africa, Nigeria and Mali and other countries in the sub-region have varied forms of insurgency, each demanding for self-determination.

This study expounds this thesis in nine chapters. The first discusses the vulnerability of developing countries in detecting and combating economic crimes. As Roger Bowler put it: *'crime, whether it involves theft, or apparently 'non-*

¹⁶ Transparency International ranking of corrupt countries in the world list most of the African countries in the bottom half of the table due to their unethical nature. The figure though is not always acceptable to national governments but at the least provides a reasonable expectation of the corruption perception of countries.

¹⁷Organization for Economic Co-operation and Development, 'The DAC List of ODA Recipients' <<http://www.oecd.org/dac/stats/49483614.pdf>> accessed 22 October 2014.

*economic' actions like violence, is assumed to benefit the offender in some way.'*¹⁸

No doubt, economic crimes creates many problems not readily discernible by the populace but noticeable in the long term with adverse consequences. The chapter discusses the issue of financial crime in the context of sustainability. It implies that the actions of an individual should neither be detrimental to the present populace nor fail to guarantee the sufficiency of the future generation. Would the continuous looting of public fund by corrupt public officials sustain infrastructural development and foster good governance?¹⁹ In addition, why do public office holders lack the political will to curb this hydra-headed monster called corruption? Funds allocated for welfare and provision of social services, are looted and stashed in foreign bank accounts for personal aggrandisement, would it foster stability in developing countries? Other issues examined in the chapter include economic crime and its implication on security, regional stability and the impact on the judiciary regarding fairness and confidence. The chapter concludes by determining the reasons for money laundering in Nigeria including but not limited to political factors, flight capital, looting and the activities of organised criminal organisations.

Distinctive characteristics of money laundering activities in developing countries are the focus of Chapter 2. Two countries selected for this study: Nigeria and South Africa. They are the two most significant economies in Sub Saharan

¹⁸ R. Bowlers, *The Economics of Crime* (Martin Robertson and Company Ltd 1982) 54

¹⁹ Brigitte Unger B and Dan van der Linde, *Research Handbook on Money Laundering* (Edward Elgar 2013). The authors show that good governance 'encompasses the duty to pay attention to everything that is necessary for the government to serve a community well.' Aspects of good governance include:
i. the rule of law which forms the basis of the current government models; ii. Second is democratic demands which become increasingly important in developing societies; iii. and, the functioning and quality of government as such, the set of instruments that the public institutions have at their disposal and the legal norms observed.' 372

Africa,²⁰ have more developed infrastructure; investment and market; are Anglophone countries with relative political stability. Nigeria forms the basis for the inference about corruption, and the proceeds of grand corruption, whereas the focus on South Africa is capital flight.

In Chapter 3, we focus on International Money Laundering Initiatives, their usefulness and adoption as a basis to curb the surge in money laundering activities. The fourth chapter analyses specific anti-money laundering legislation in developing countries, efforts in place to confiscate illegitimately acquired wealth, proceeds of crime and enforcement of offenders.

Chapter 5 gives attention to the vulnerabilities of internet banking in respect of laundering the proceeds of illicit wealth. It ascertains and examines the adequacy or otherwise of legislation as well as prudential guidelines aimed at regulating the payment system. The chapter also evaluates the controls placed on politically exposed persons, outline the justifications for strengthening the regulations relating to PEPs, justify the need for restrictions on beneficial owners. It also examined why penalties for breaching the rules by defaulting banks are inadequate to curb the problem of illicit fund transfers.

Developing countries in SSA are predominantly cash-based. Cash is the basis for all transactions irrespective of the value. Chapter 6 examines the informal economy and informal value transfer systems available and how it facilitates the

²⁰ International Monetary Fund, *World Economic and Financial Surveys (IMF) – Regional Outlook: Sub Saharan Africa – Maintaining Growth in an Uncertain World* (IMF Publishers 2012) 28,38

laundering of proceeds of unlawful activities. We consider local and international regulations on cash and cross-border cash management; its adequacy in controlling trans-border movement of money including disguised proceeds of corruption and available remittance corridors.

As money laundering is usually multi-jurisdictional, chapter 7 explores associated benefits of civil recoveries as a means to recover the proceeds of corruption and other unlawful activities. Notably criminal procedures for the seizure and forfeiture of the proceeds of crime is principally conviction based. Much progress has been attained using civil recovery legislation to deprive corrupt public officials of benefitting from their fruits of corrupt enrichment. In the chapter, we compared non-conviction based recoveries in South Africa and Nigeria with further insight from the UK civil recovery regime. South Africa having had an operational civil recovery regime whereas Nigeria still uses fragments of criminal law provisions and has proposed a bill (proceeds of crime bill) to address this challenge. Chapter 8 examines good governance, political will, and executive immunity and suggest applicable reforms. It underscores the need to strengthen the regulatory framework, ensure that the judicial processes are devoid of corrupt tendencies as a means to combat money laundering and the speedy administration and dispensation of justice. In Chapter 9, we discuss and conclude on the research work and highlight recommendations towards the effective enforcement of AML legislation, law reforms and measures to prevent the growing tide of money laundering activities and networks.

CHAPTER ONE

WHY IS ECONOMIC CRIME A PROBLEM FOR DEVELOPING COUNTRIES?

Globally, the fight against economic and financial crimes have gained close international attention with far-reaching effects. According to former Solicitor General of the UK, Oliver Heald, 'the profile of economic crime is now higher than ever before. Since the global financial crisis began in late 2007, it seems that financial institutions, markets and businesses have endured years of perpetual crises.'²¹ In addition, the concept of borders and jurisdictions are facing an incredible challenge in most situations and meaningless in others due to connectivity caused by the internet. Laws, policies and procedures that were once under the control of individual states have now become the focus of the international community. Criminal groups who operate in an organised manner can now easily commit economic crimes and avoid sanctions across jurisdictions, which have now necessitated increased cooperation among the global criminal justice agencies. Financial crime pose threats to world economies and individual states alike akin to the problems associated with the use of proceeds from economic crime to finance terrorist activities. Furthermore, the last two decades have witnessed a paradigm shift in criminal law in the area of crimes that generate profit. There is now increased effort to strengthen the effectiveness of legal

²¹ Attorney General's Office and The Rt Hon Sir Oliver Heald QC MP, 'Fighting Economic Crime in the Modern World' <<https://www.gov.uk/government/speeches/fighting-economic-crime-in-the-modern-world>> accessed 8 October 2014. The Solicitor General of the United Kingdom, speaking in the 31st Cambridge International Symposium on Economic Crime. He further noted that rarely has a week passed without the emergence of some new allegation of financial misfeasance, fraud and corruption. The most high profile current issue in the United Kingdom is the LIBOR scandal; the accusations that bankers have conspired to manipulate the London inter-bank lending interest rate.

instruments meant to detect, seize and confiscate illicitly acquired wealth causing a decline in the motivation of those who intend to engage in such criminal activity.

Economic crime has been defined as ‘any non-violent crime that results in financial loss’²² and would comprise ‘a broad range of illegal activities including fraud, tax evasion and money laundering’.²³ The term is used to describe some crimes associated with industry and commerce and other organised criminal activities that are financial either in the private or public sector. It can refer to illegal acts committed by individuals to obtain a financial or professional advantage with the principal motive of the offender being an economic gain. Such crimes include cyber-crimes, tax evasion, robbery, selling of controlled substances, and abuses of economic aid. Economic crimes can also be in the form of profit motivated, illegal activities conducted within or arising out of the economic activity that is itself legal or is seen to be legal. Economic crimes are acquisitive crimes. Such crimes generate huge profits aptly described as ‘profit-oriented’ crimes. They appear as not to cause any direct harm to any identifiable victim. Therefore, legal instruments designed to punish crimes that cause immediate damage to an identifiable victim is ineffectual in attempts to confiscate proceeds of economic crimes thus the increased need for non-conviction based recovery legislations. In the same vein, there are numerous means available to disguise the proceeds of the crime, thereby, making it completely difficult for enforcement agencies to trace any direct

²² United Nations Office on Drugs and Crime, ‘Economic and Financial Crimes: Challenges to Sustainable Development’ The Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 18-25 April 2005, Bangkok, Thailand <http://www.unis.unvienna.org/pdf/05-82108_E_5_pr_SFS.pdf> accessed 15 October 2014

²³ United Nations Office on Drugs and Crime, ‘Economic and Financial Crimes: Challenges to Sustainable Development’ The Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 18-25 April 2005, Bangkok, Thailand <http://www.unis.unvienna.org/pdf/05-82108_E_5_pr_SFS.pdf> accessed 15 October 2014

link or the perpetrator to the original crime committed. With the continued improvement in internet technology, globalisation and regional integration, economic crimes and corruption are getting more and more sophisticated and free-flowing. White-collar crime is another concept often associated with financial crime and refers to crimes committed in conjunction with professional life by persons highly placed in society²⁴ or a crime committed in connection with an organisation. Economic crimes are much becoming organised and transnational with globalisation and internet connectivity playing a pivotal role. They are transnational because they transcend national and international boundaries and transgress laws of several states. The Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems identified eighteen categories of transnational organised crime. These include:

- i. money laundering;
- ii. illicit drug trafficking;
- iii. corruption and bribery of public officials;
- iv. infiltration of legal businesses;
- v. bankruptcy fraud;
- vi. insurance fraud;
- vii. computer crime;
- viii. theft of intellectual property;
- ix. illicit trafficking in arms;
- x. terrorist activities;
- xi. aircraft hijacking;
- xii. sea piracy;

²⁴ Hans Sjogren and Goran Skogh, *New Perspective of Economic Crime* (Edward Elgar 2004) 128

- xiii. abduction on land;
- xiv. trafficking in persons;
- xv. trade in human body parts,
- xvi. theft of art and cultural objects, environmental crime and other offences.²⁵

Furthermore, 'insurgent, paramilitary and other extremist groups' have been identified to be increasingly involved in organised crime and drug trafficking syndicates.

While varied forms of economic crimes exist, the thesis focused mainly on corruption as a predicate crime leading to money laundering and its impact on developing countries. From a Sub-Saharan African perspective, we examined the effect of post-colonialism on the political situation as grounds for festering corrupt practices. Additionally, the thesis underscores why the issue of economic crime is relevant given the reasons for corruption, money laundering and capital flight in Nigeria and South Africa.

1.1 The Prevalence of Corruption in Sub Saharan Africa.

The historical basis for the emergence of corruption was traced to the industrial revolution of the nineteenth century which brought about substantial financial growth accompanied by an elaborate economy characterised by increasing dependence on finance and investment, large banking networks, stocks and credits, and a complicated legal system. This development required the need for

²⁵ Bruce Zagaris, *International White Collar Crime. Cases and Materials* (Cambridge University Press 2010) 145

lawyers, financiers and other professionals and in turn aided the expansion of the potential of white-collar crime now popularly called corruption.

Some scholars have argued that the menace of corruption is deeply rooted in the historical processes of colonialism²⁶. The practice is viewed as a by-product of traits of fraudulent anti-social behaviour derived from the colonial masters with particular reference to the scramble for the resources of Africa²⁷ that led to the partitioning of the continent into spheres of interest by the European. Munyae identified three ways colonialism is linked to corruption in Africa: First, drawing from Robb's argument²⁸ that the new economic order made possible by the industrial revolution led to the emergence of white-collar crime, posit that corruption required a well-developed monetary economy characterised by a clear differentiation of interests to thrive, and while the precolonial economies lacked one, the colonial governments instituted it, thereby 'laying the structural groundwork for the origins and sustenance of corrupt practices.'²⁹ Second: the introduction of 'compulsory cash taxation payable' to meet the objective of covering the 'cost of administration or acquiring the cheap African labour to meet the establishment of productive economic activities.'³⁰ The modus operandi of cash taxation was to give the privilege of tax collection to the local chiefs who were required to retain 10 percent of the amount collected, this inadvertently, led to

²⁶ Munyae M. Mulinge and Gwen N. Lesetedi, 'Corruption in Sub-Saharan Africa: Towards a More Holistic Approach' [2002] 7 African Journal of Political Science 1,54

²⁷ Tseliso Thipanyane, 'Current Claims, Regional Experiences, Pressing Problems: Identification of the Salient Issues and pressing Problems in an African Post-colonial perspective' in George Ulrich and Louise Krabbe (eds) *Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs* (Kluwer Law International 2003) 37

²⁸ George Robb, *White Collar Crime in Modern England: Financial Fraud and Business Morality 1845-1929* (Cambridge University Press 1992)

²⁹ Ibid 54

³⁰ Ibid 54

taking of kickbacks by the leaders. Besides, the practice of rewarding tax collectors became a method for the accumulation of private property and abuse of office.³¹ The rewards blinded the chiefs from the plight suffered by their people from the effects of the introduced taxation.³² Thirdly, the divide and rule.³³ A method employed to subdue and control the natives promoted corruption. This divide and rule method favoured one tribe above the other, with the dual objective of securing the loyalty of the group to the administration and encouraged rivalry between various tribes aimed at preventing unity who could become opposed to the colonial authority. The favoured Chiefs received perquisites in the form of access to western education and government-sponsored economic activities.

Furthermore, colonialism in sub-Saharan Africa was characterised by brutal rule where scores of groups of people massacred.³⁴ After the plundering of the resources and subjecting the people to the most gruesome treatment, and, when independence was granted, it has been argued that the colonial masters did not prepare the new rulers to manage their devastated economies.³⁵ The same pattern of brutalism, insatiate greed for the nation's resources and brigandage bequeathed by the colonial masters have been emulated by some of the African leaders and

³¹ Ibid 55

³² Ibid 55

³³ Ibid 55

³⁴ Tom Masland, *The Forgotten Genocide*, NEWSWEEK, August 21, 2000 (hereinafter, Masland, *The Forgotten Genocide*) (narrating the systematic and horrendous German extermination of the

³⁵ Rand Richards Cooper, 'History as Tragedy: 'Lumumba' [2001] 128,17 *Commonweal*;

See also Abdullahi A. An-Na'im, 'The Contingent Universality of Human Rights: The case of Freedom of Expression in Africa and Islamic Contexts', *Emory Int'l Law Review*, Vol. 11, page 55 (Spring 1997) ('After a long history of encouraging and institutionalizing European settlement of Kenya and the total subjugation of its native African population, Britain was finally forced to return the country to its people with little preparation for democratic self-governance.' 'For example, the so-called 'council of ministers appointed by the British government in 1954 to run the daily administration of Kenya consisted of three Europeans, two Asians and one African'.

have so far heaped misery, violence and poverty on their people. These leaders pitted ethnic groups against each other to preserve their political power and live in unabashed luxury while robbing their countries blind.³⁶ The colonial rule, therefore, culminated in the current spate of sheer recklessness and endemic corruption that is now typical of sub-Saharan Africa. More so, some newly formed governments in Africa imposed a dictatorial system of government resulting in political exploitation by the revolutionary forces.³⁷ Admittedly, some of the nationalists had the noble intention of letting go the colonial yoke and improved the lots of their fellow Africans. Other leaders adopted the greed and violence of the colonialist and their self-serving lifestyles.³⁸ The colonial masters left their colonies unprepared and a fertile ground for corruption. As Akinseye George observed, there was 'uneasy relationships between the post-colonial state and its public; between the received socio-political and legal systems on the one hand and the African pre-colonial systems of governance on the other hand.'³⁹ The basic law in an application in most African countries is a wholesale replica of the colonies' law not taking into cognisance their socio-cultural peculiarities.⁴⁰ As a result, the applicable laws are unable to adapt to the acceptable patterns of behaviour and conceptions of the organisations they are to regulate. African traditional norms became side-lined, thus creating conflicting value systems open to exploitation by

³⁶ The case of Mobutu Sese Seko and General Sani Abacha are notable.

³⁷ Hisashi Owada, 'Development in an Unstable World: A Japanese Experience to promote Human Security' in Francois Bourguignon, Boris Pleskovic and Jacques van der Gaag (eds.) *Annual World Bank Conference on Development Economics – Europe 2006: Securing Development in an Unstable World* (The World Bank, 2000).

³⁸ Emmanuel O. Ihuekwumere and Chukwuemeka A. Ihuekwumere, 'Colonial Rapacity and Political Corruption: Roots of African Underdevelopment and Misery' [2003] 3 CHI-KENT J. INT'L & COMP. Law 1, 19

³⁹ Yemi Akinseye-George, *Legal System, Corruption and Governance in Nigeria: Including the Corrupt Practices and Other Related Offences Act 2000* (New Century Law Publishers Ltd 2000) 9

⁴⁰ British colonies in Africa applied the common law of England in their respective jurisdictions, whereas French and Portuguese law applied in their colonies.

the political elites.⁴¹ The introduction of European legal system no doubt brought about the modernisation of procedures in Africa, but 'the European organisational pieces that were brought to Africa were disembodied of their moral content, and their substratum of implicating ethics'.⁴²

The term corruption as defined by Osoba refers to:

A form of antisocial behaviour by an individual or social group which confers unjust or fraudulent benefits on its perpetrators, is inconsistent with the established legal norms and prevailing moral ethos of the land and is likely to subvert or diminish the capacity of the legitimate authorities to provide fully for the material and spiritual well-being of all members of society in a just and equitable manner'.

Perhaps two definitions I prefer to use are those provided by Tanzi, that corruption is the '*intentional non-compliance with arm's length relationships, aimed at deriving some advantage from this behaviour for oneself or related individuals*'⁴³ And the World Bank's definition, as '*abuse of public office for private benefit*'⁴⁴. Public office is abused for private gains when an official accepts, solicits, or extorts a bribe; when individual agents actively offer bribes to circumvent public policies or processes for competitive advantage and profit; and, abuse can occur even if no bribery happens through patronage and nepotism.

⁴¹ Samuel P. Huntington, 'Modernization and Corruption' in Arnold J. Heidenheimer and Michael Johnson (3rd ed.) *Political Corruption: Concepts and Contexts* (Transaction Publishers, 2002).

⁴² Peter Palmer Ekeh, *Colonialism and Social Structure: An Inaugural lecture delivered at the University of Ibadan on Thursday, 5 June 1980* (University of Ibadan, 1983) 17 Cited by Akinseye-George, Y. *Legal System, Corruption and Governance in Nigeria: Including the Corrupt Practices and Other Related Offences Act 2000* (New Century Law Publishers Ltd 2000) 8

⁴³ Tanzi (n8) 134

⁴⁴ Poverty Reduction and Economic Management, The World Bank, 'Helping Countries Combat Corruption' <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>> accessed 31 October 2013

Corruption is most prevalent where governments are not accountable to the people; spends a considerable amount on large-scale capital projects abandoned half-way; official accounting practices are not well informed; government officials are not well remunerated; political elections are monetised and not well controlled; weak legal instrument and lack of political will to enforce laws and standards. A behaviour deemed to be corrupt would therefore incorporate acts such as the use of public authority, office or official position for the intent of extracting personal or private monetary benefits or other privileges at the expense of public good and in violation of rules and ethical considerations, theft, embezzlement or public funds or appropriation of state property by other means, as well as nepotism or granting favours to personal acquaintances. The issue that corruption has eaten deep into the very fabric of Sub Saharan African is not disputable.

Many agree that corruption is pandemic in Sub Saharan Africa and has reached cancerous proportions. It has permeated virtually all institutions, both public and private, government and non-governmental and has become a way of life. It is a principal method for the accumulation of private property. Illicit enrichment is one predicate offence of corruption which results from embezzlement of public funds by high ranking officials. Additionally, records show that corrupt rulers have stashed away billions of dollars of states money into private overseas bank account for their personal and family benefits.⁴⁵ In the same vein, some have converted the apparatus of government to family run business whereby family

⁴⁵ See R v Ibori (Theresa) [2011] EWCA Crim 3193; R v Ibori [2013] EWCA Crim 815, [2014] 1 Cr App Rep (s)73. Ibori was sentenced for conspiracy to commit money laundering, money laundering and obtaining a property transfer by deception.

members and or their cronies hold all sensitive departments and functions, to prevent any form of opposition when their nefarious acts are committed.⁴⁶ Aids money received from donor organisations fall into white elephant projects resulting in numerous abandoned projects.⁴⁷ Some despotic rulers have had to change the country's constitution to prolong their stay in office.

The judiciary is subject to executive and political influences and cases of judicial corruption are widespread.⁴⁸ Legal processes are abused continuously by influential and highly placed officials for their aggrandizement. There is a high level of impunity among officials with many walking tall when there is ample evidence to convict them of misuse of state funds. In some countries, rulers do not have the political will to implement far-reaching reforms aimed at sanitising the system or purging its arm of corrupt officials. Citizens face long delays and frequent requests for bribes from judicial officials to expedite cases or to obtain a favourable ruling. More so, due to prohibitive legal cost and the time-consuming process, many lack confidence in the judiciary for the speedy dispensation of justice. In some cases, judicial processes are abused to frustrate the administration of justice by corrupt wealthy people in business, politicians and highly placed government officials.

⁴⁶ According to Adams Smirzir, 'owing to personal rule, newly established African states have lacked the capabilities to create conditions for capital accumulation. The economic rationality of state actions is low. The government administration and the public enterprises are characterised by mismanagement, inefficiency and widespread corruption.' In this case, '*an impersonal, predictable and bureaucratically rational functioning of the state apparatus becomes impossible.*'

⁴⁷ Dambisa Moyo, *Dead Aid: Why aid is not working and how there is a better way for Africa* (Farrar, Straus and Giroux 2009)

⁴⁸ According to Transparency International, perceptions of judicial corruption are discouraging: seven out of eight African countries covered by TI's Global Corruption Barometer, majority of respondents perceive the judicial system to be corrupt; Cameroon tops the list with more than 80% of citizens regarding the judiciary as corrupt. Among African countries surveyed, an average of one respondent in five who had contact with the judicial system reported having paid a bribe. Transparency International Secretariat, 'Judicial corruption fuels impunity, corrodes rule of law, says Transparency International report' <https://www.transparency.org/news/pressrelease/20071002_judicial_corruption_fuels_impunity_corrodes_rule_of_law> accessed 15 November 2014

Transparency International corruption perception index as well as other studies ranks most institutions of government in the region as corrupt. Institutional corruption is pervasive among member states in the Sub Saharan Africa region. In Cameroun, for example, Global Corruption Barometer 2013 reported that the police⁴⁹ ranked as the most corrupt public institution in the country; the same is for all other states in the region. Business executives are not confident in the police to protect companies from crime and uphold law and other. In some public universities in Nigeria, extortion by lecturers and non-academic staff from students is a routine, ranging from payments for high grades, extortion through the sale of sub-standard handouts and harassments of students by lecturers for sexual gratification. Other institutions of the states in the region are also not free from corrupt practices: The World Bank 2012 report considers Ethiopia's customs administration the most corrupt sector in the country. The burden of customs procedure in the country is considerable, and ranked close to the bottom in the world ranking. In Burkina Faso, despite the government's efforts to increase customs and tax incomes, the customs administration in that country is very corrupt. Notably, economically efficient institutions are those that motivate self-interested individuals to act in ways that contribute to collective welfare and economic development, because of the menace of corruption, these organisations are less efficient.

⁴⁹ Transparency International, 'Global Barometer Report 2013: National Results - Cameroun' <<https://www.transparency.org/gcb2013/country/?country=cameroon>> accessed 27 October 2014

Each year millions of dollars are spent by respective countries on the fight against drug trafficking, human trafficking and child labour and some progress has been made in this respect including arrest, prosecution and imprisonment and the laundered monies confiscated. This is in contrast with economic crime perpetrated by officials in the comfort of their offices and homes, as there has not been significant arrest and prosecution of high profile officials.

Some scholars have argued that corruption is an unavoidable consequence of economic development and modernisation. Bayley explains that corruption, could in extreme cases, be not only desirable but essential to keep the economy going. He noted that 'the opportunity of corruption may serve to increase the quality of public servants.'⁵⁰ Alam argues that in modern bureaucracies, corruption is an attribute of all principal-agent relationships. Usually, the people or principal, grant the government (their agent) the power to impose taxes and provide them with public goods and services. However, in carrying out their duties, the agent may sacrifice the interests of the principal for his own.⁵¹ While the term corruption does convey a negative connotation in terms of cost and many see it as having a devastating effect for the country, a non-orthodox view, on the contrary, could see corruption as beneficial in certain circumstances.⁵² Inefficient and corrupt

⁵⁰ David H. Bayley, 'The Effects of Corruption in a Developing Nation' (1966) 19, 4 the Western Political Quarterly 719, 732. Also, David Kennedy, 'Laws and Developments', in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century. Essays in Honour of Peter Slinn*, (Cavendish Publishing, 2003), contends that corruption which can also refer to 'public discretion', would run parallel to those of formalisation. Eliminating corruption can seem much like eliminating judicial and administrative discretion. The State acts corruptly when it works by preference rather than mechanically, by rule.

⁵¹ M. Shahid Alam, 'Anatomy of Corruption: An Approach to the Political Economy of underdevelopment' (1989) *The American Journal of Economics and Sociology* 48,4

⁵² In her discussion of the Economic Impact of Corruption, Susan Aker-man provides some situations in which widespread corruption can determine who benefits and bears the cost of government actions. These situations include: 1. Where government is charged with the allocation of a scarce benefit to individuals and firms using legal criteria other than a willingness to pay in which case Bribe clear the market. 2. Officials in

governments are characterised by bribes,⁵³ and gifts which are the means that enable the penetration of domestic and foreign investors and possibly promote the accumulation of capital. In the same vein, the high rate of corruption in developing countries arguably is due to the transitional period they are in for which most developed countries had also experienced. A consideration of the impact of economic crime in Sub Saharan Africa will no doubt bring to bear the two faces of corruption and underscore the reason for effort in curbing the surge of this pattern of crime. From a cultural perspective, I argue that if existing regulations aimed at reducing the menace of corruption when modified to adapt to the local environment would yield positive results.⁵⁴ For example, would the promotion of homegrown havens discourage the laundering and concealing of corrupt proceeds overseas? I also argue that corruption thrives due to poor and ineffective enforcement of existing laws hinged upon strong socio-cultural, ethnic and vindictive system. But who will bring about the radical change we desire? Could it be the Parliament, with less and less credible individuals who vie for such elected political office, some been past governors alleged with one form of corrupt practice or the other? Would credible and willing individuals defy the norm of electoral violence, rigging, god-fatherism, cultural and social expectation of graft, the stigma of poverty and other

the public sector may have little incentive to do their jobs well, given official pay scales and the level of internal monitoring. As a result, officials may impose delays and other roadblocks leading to bribes, thereby reducing the cost.

⁵³ According to Susan Aker-man, 'the economic impact of bribes paid to avoid regulations and lower taxes depends on the efficiency of the underlying programs that are subject to corrupt distortions.' She further argued that 'suppose a state has many inefficient regulations and levies burdensome on business. Then, given the existing inefficient legal framework, payoffs to avoid regulations and taxes may increase efficiency.'

⁵⁴ Mbaku, argued that corruption in Africa is a direct consequence of poorly developed and inappropriate institutional arrangements as immediate independence leaders never took the time to engage the people in state reconstruction through democratic constitution making so that they could impact by themselves their own institutional arrangements. Instead, constitution making was top-down, elite-driven, opportunistic and reluctant. Thus, the outcome was laws and institutions that were not locally focused and did not reflect the values of the people to be governed. See John Mukum Mbaku, *Corruption in Africa: Causes, Consequences and Cleanups* (Lexington Books 2010) 3

societal expectations to steer the affairs of the state and promote the developmental strides necessary to snowball the economies for efficiency and effectiveness?⁵⁵

Corruption obscures the truth and leads to damaging consequences. In the first place, it undermines the revenue accruing to the coffers of government, and, therefore, limits the ability of government to invest in productivity-enhancing areas such as education, infrastructure and health that are vital ingredients for development. When government officials allow corruption to thrive, they promote an environment of distrust and impunity, thereby allowing taxpayers to by-pass processes or blatantly refuse to pay their taxes. Since corruption can reduce the revenue base of government, it will lead to inadequate funds necessary for infrastructural development resulting in borrowing by the government to meet the shortfall in expenditure. Borrowed money generates additional interest payment, which will further constrain government's ability to satisfy other obligations.

Corruption also distorts the entire decision-making process connected with public investment projects.⁵⁶ Large-scale public investment projects provide opportunities for corrupt public officials to inflate the value of such contracts for their gains

⁵⁵ This attitude is known as prebendalism. This draws from the work of Richard Joseph, whose 1987 study of Nigeria's Second Republic (1979 – 1983) highlighted the importance of prebendal or neopatrimonial networks based on ethnic and regional solidarity throughout Nigeria. Prebendalism refers to 'the pattern of political behaviour that rests on the justifying principle that offices should be competed for and then utilized for the personal benefit of office-holders as well as their reference support group.' See Leena Hoffmann and Insa Nolte, 'The Roots of Neopatrimonialism: Opposition Politics and Popular Consent in SouthWestern Nigeria' in Wale Adebani and Ebenezer Obadare (eds), *Democracy and Prebendalism in Nigeria: Critical Interpretations* (Palgrave Macmillan 2013) 25

⁵⁶ Vito Tanzi and Hamid Davoodi, 'Corruption, Public Investment, and Growth' [1997] IMF WP 97/139 <<https://www.imf.org/external/pubs/ft/wp/wp97139.pdf>> accessed 10 October 2014

resulting in some instances to abandoned white elephant projects. In other cases, the projects are of a sub-standard nature because the contractor would have failed to provide the minimum acceptable standard since the money voted into the project have been used as payment of bribes, or to serve an individuals' political interest. Often the projects are built with external loans, and when not completed, depletes the meagre revenues generated by the state, and, leading to reduction in spending in socially vital areas of the economy, or the maintenance of existing infrastructure.

1.2 The Cultural Perspective of Corruption

Culture is embedded in the language of the people. While there is no precise transliteration of the word 'corrupt' in the dialects and languages of many societies in sub-Saharan Africa, the nature and practice of corruption are now commonplace, and, as identified earlier, is the product of western civilisation in the form of colonialism. How does the culture - the way of life - of most communities, promote corruption? How far reaching is this menace of corruption globally?

Corruption is understood as behaviour that corrupts and undermines the cultural system in which it occurs. Since cultures operate in different ways, practices that are considered questionable in one culture may appear acceptable in others. As Hooker observes: 'the West tends to be universalist in its outlook: every society works or should work, essentially the same way...., a country that fails to conform to this model is underdeveloped or dysfunctional. It follows from this view that corruption is the same in Sweden as in Sudan. The reality, however, is that *different cultures use radically different systems to get things done. Whereas*

*western cultures are primarily ruled – based, most of the world's cultures are relationship based.*⁵⁷ For example, bringing of lawsuits for breach of contract may be corrupting and dysfunctional elsewhere.⁵⁸ In SSA, social solidarity is a necessary element of the African cultural basis. Gift giving is one of the noblest gestures in a relationship. It is accepted practice because indigenous people believe in prior anticipation of a new relationship before it is borne. This practice of gift giving promotes peaceful coexistence and harmony in the society. The defence counsel in the case of *World Duty Free vs the Republic of Kenya* argued that 'gifts are given as a way to say 'hello' or recognise the authority of the leader in many African communities in Kenya. In many cultural settings, when one visits friends or a relative, one does not go 'empty handed' nor does he leave the homestead of that friend or relative empty-handed. *Exchange of gifts irrespective of their worth is customarily acceptable, and failure to comply with those customary practices is indicative of extreme poverty, meanness or rebellion against cultural norms.*⁵⁹ It is worth noting though that the tribunal found the existence of Kenyan cultural practice, but did not invalidate that such cash payments intended to influence an official.⁶⁰ Akinseye-George also argued, 'the culture of gift giving as constituting the primordial infrastructure for the edifice of corruption, is.....misleading. African traditional practice of gift giving is by no means a factor

⁵⁷ John Hooker, 'Corruption From a Cross-Cultural Perspective'
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.157.4546&rep=rep1&type=pdf>> accessed 8 September 2014

⁵⁸ Ibid, 1

⁵⁹ Chatham House, 'World Duty Free v The Republic of Kenya: a Unique Precedent?'
<http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Moi_World_Duty_Free_Chatham_House_Mar_28_2007.pdf> accessed 8 September 2014

⁶⁰ Chatham House, 'World Duty Free v The Republic of Kenya: a Unique Precedent?'
<http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Moi_World_Duty_Free_Chatham_House_Mar_28_2007.pdf> accessed 8 September 2014

in explaining 'systematic' and 'grand' forms of corruption. The undeniable proclivity of many African political leaders, for subverting the law and constitution of their countries in the bid to personalise state resources or to perpetuate them in power⁶¹ is rather responsible for corruption. Mbaku also shares the same position when he argued that in Africa 'gift giving is a highly valued practice and remains an important part of the cultures and customs of societies on the continent.'⁶² More so, 'acts of political corruption as election rigging, manipulation of election results, oppression of minorities, and elimination of political opposition.....have nothing to do with the so-called culture of gift-giving.'⁶³ Some development economists have contended that such a tradition makes it difficult to distinguish between wrong and right behaviour. The abuse therefore of a legal culture is by no means an indication of the greed of the practice. The respective languages have different expressions of gift drawing a contrast between legitimate and illegitimate gift giving. No basis exists in assuming 'a uniform gift-giving culture in Africa which constitutes an affirmation of the venal practice of bribery.'⁶⁴ Whereas gift giving is an acceptable norm in African societies, Bribery is not. Bribery is corrupting since it induces people to depart from established rules and procedures. Where corruption becomes commonplace, it makes people lose faith in the system resulting in the flouting of rules routinely. Gift given to influence the decision/performance of a public official in the carriage of his lawful duties, no longer serves the custom as described above but it is in reality corruption.

⁶¹ Akinseye-George (n39)

⁶² Mbaku (n54) 71

⁶³ *ibid*

⁶⁴ *ibid*

The African Union Convention on Preventing and Combating Corruption definition provides what constitutes a corrupt practice. It includes, 'the solicitation or acceptance, the offering or granting, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as gift, favour, promise or advantage for himselfin exchange for any act or omission in the performance of his or her public functions.' In the same vein, 'an act of omission... for illicitly obtaining benefits' or 'the diversion by a public official....for purposes unrelated to those for which they were intended... of any property belonging to the state or its agencies, to an independent body, or to an individual that such official has received by his position. The definition also includes acts geared towards promoting the use of public office to give undue advantage to individuals in the private sector and even encompasses illicit enrichment, concealment of the proceeds of corruption, the participation and acting as an accomplice to perpetuate the corrupt act.

Corruption is widespread as it cuts across regional and international boundaries. In nearly all Asian countries, there has always been the tradition of corruption.⁶⁵ Public office means perquisites.⁶⁶ In India corruption with the passage of time became 'a convention, a psychological need and a necessity to say'.⁶⁷ Sajo observed, 'there is stealing and corruption in everywhere....but in Russia, I think there are more stealing and corruption than in any other state.'⁶⁸ The same is for

⁶⁵ Daniel Treisman, 'The Causes of Corruption: A Cross-National Study' [2000] 76 Journal of Public Economy 399

⁶⁶ Mohammed Usman, 'Corruption in Nigeria: A challenge to Sustainable Development in the Fourth Republic' (2013) 9 European Scientific Journal 118.

⁶⁷ Ibid 118

⁶⁸ Andras Sajo, 'Traditions of corruption, Corruption and Democracy. Political institutions, processes and corruption in transition states in East-Central Europe and in the former Soviet Union' [1994] Budapest Institute for Constitutional and Legislative policy 43-46

Europe and Latin America. Most societies in Sub Saharan Africa are bedevilled with corrupt practices in such a way that when an individual is appointed to hold any political or public office, the expectation from the people becomes what he or she can offer from his office to his immediate and extended family and friends. Non-performance is adjudged failure to meet these expectations. Popular sayings include, 'politics of settlement',⁶⁹ 'this is your time', or 'our time has come' or 'it is national cake so eat yours', or in other cases, 'since you assumed office, what have you done for the community'? This expectation is so intense that, an individual is expected to donate or provide money to support any/whatever activity being organised within ones locality or state. In addition to the role expectation, job insecurity is another major factor. Because public office is seen as a means to an end, those who vie and eventually occupy it, quickly get enriched by engaging in fraudulent activities before their tenure expires. Hence, when they leave the office, the expectation is what they were able to achieve, in terms of personal enrichment. This paradigm shift in cultural values has made instant gratification an acceptable norm in society. This is similar to the period of the collapse of communism whereby moral values declined to a low ebb. Because they ran a 'system of government...so completely in the hands of officials that their powers jeopardizes the liberties of ordinary citizens',⁷⁰ these 'could expect neither serious consideration nor fair treatment without some means of 'interesting' the official in their case.' Use of bribes and contacts became commonplace. In some instances, bribery or connections facilitates change to unwelcome work assignment or to get a dull child into a good university department. The same is true of some countries in SSA

⁶⁹ Akinseye-George (n39) 8

⁷⁰ William L. Miller, Tatyana Koshechkina and Ase Grodeland, 'How Citizens Cope With Post-Communist Officials: Evidence from Focus Group Discussions in Ukraine and Czech Republic' [1997] XLV Political Studies 597

where bribes and connections play a dominant factor in the award of government contracts, appointment of officials to responsible positions in government, entry into reputable universities for graduate and post-graduate studies and lots more. Notable too is the continuous recycling of corrupt government officials from one successive administration to the other in the pretext of their being 'elder statements', 'godfathers', or 'the wise men'. Officials indicted or accused of large-scale corruption later celebrated and cleared for further political responsibilities. New governments do not purge outgoing politicians; competent professionals are lost to the private sector, which offers better-paid jobs with less stress and harassment, rather than get their reputations tarnished by political foes and hawks.

The lack of cultural and moral discipline and the spirit of desperation or popularly called 'do or die politics' have metamorphosed into sophisticated rigging techniques adopted during elections. Free and fair elections are a mirage. The purpose of free and fair elections should 'do more than offer an often misleading choice of programmes and leadership, but should affect the general political culture, set the tone for democratic governance....turn officials and bureaucrats into civil servants and encourage government to respect individual citizens as well as the collective decision of the whole electorate. Voters get paid either in cash or kind; political thugs employed to compel the electorate to vote in favour of the preferred candidate; or the electorate is out rightly intimidated by the snatching of ballot boxes, stuffing of the boxes with multiple voters card, or providing an already prepared and arranged list of the would be winner of the elections.

1.3 Corruption and Its Effect on Development

Corruption as an economic crime has adverse socio-economic climate and moral chaos as a direct consequence of the handing over of power to the nationals from the colonial masters. A number of studies have documented that the elite in many developing countries had long placed assets offshore, but there appeared to have been a more recent acceleration of such capital flight. African leaders have been accused of looting government treasuries, with estimated billions of US Dollars leaving Africa yearly and find its way into the international banking system and often into western banks.⁷¹ To underscore the neglect in infrastructural development, fiscal spending on infrastructure is about 6-12 percent of GDP,⁷² which is less than \$50 per person. Road access rate in Africa is only 34% compared with 50% in other parts of the developing world, while transport cost is higher by 100%. Only 30% of the population in Africa have access to electricity compared to 70-90% in other parts of the developing world. Water resources are under-used with only 5% of agriculture under irrigation.⁷³ A report suggested that deficit infrastructure has been found to sap growth by 2% a year. Comparing SSA to most East Asian countries, the level of infrastructural development pales. For

⁷¹ According to Sharman, 'in a strict legal sense, taking public assets for private benefit abroad often may not have constituted a crime at all in the country that ended up hosting the stolen assets. Even if there were laws on the books against hosting the proceeds of foreign corruption, ..kleptocrats knew that their chances of being investigated, let alone prosecuted or convicted, were close to zero. See J. C. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press 2017)

⁷² African Development Bank Group, 'Handbook on Infrastructure Statistics'
<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AfDB%20Infrastructure_web.pdf>
accessed 1 November 2014

⁷³ African Development Bank Group, 'Programme for Infrastructure Development in Africa (PIDA): Addressing the Infrastructure Gap in Africa, to Speed up Regional Integration' Seventh Conference of African Ministers in charge of Integration 14-18 July 2014 Swaziland
<https://au.int/sites/default/files/newsevents/workingdocuments/12582-wd-pida-addressing_the_infrastructure_gap_in_africa_to_speed_up_regional_integration_0.pdf> accessed 2 December 2014

example, fixed capital formation doubled in China between 1998 and 2005 and by 2006 capital infrastructural investment was higher than 14% of GDP.⁷⁴ Infrastructure contributes to economic growth and is an important input to human development. It is a key ingredient for achieving the millennium development goals (MDGs). For instance, safe and potable water supplies save time and arrest the spread of serious diseases. Availability of electricity powers the health and education sectors and boosts small and medium scale businesses. For countries in SSA, the negative effect of inadequate infrastructure is estimated to be at least large as that of 'crime, red tape, corruption, and financial market constraints'.⁷⁵ If the amount of money carted away by corrupt leaders is channelled towards infrastructural development, or worse case, reinvested in the marketplace to create jobs for the teeming population of youths, this action would provide foreign exchange earnings and taxes to the government; fund charities and go a long way in addressing the severe developmental gap in the continent.

⁷⁴ The African Development Bank Group, 'Handbook on Infrastructure Statistics' <<https://www.afdb.org/>> accessed 1 November 2014

⁷⁵ Vivien Foster and Cecilia Briceño-Garmendia, *Africa's Infrastructure: A Time for Transformation* (World Bank 2010)

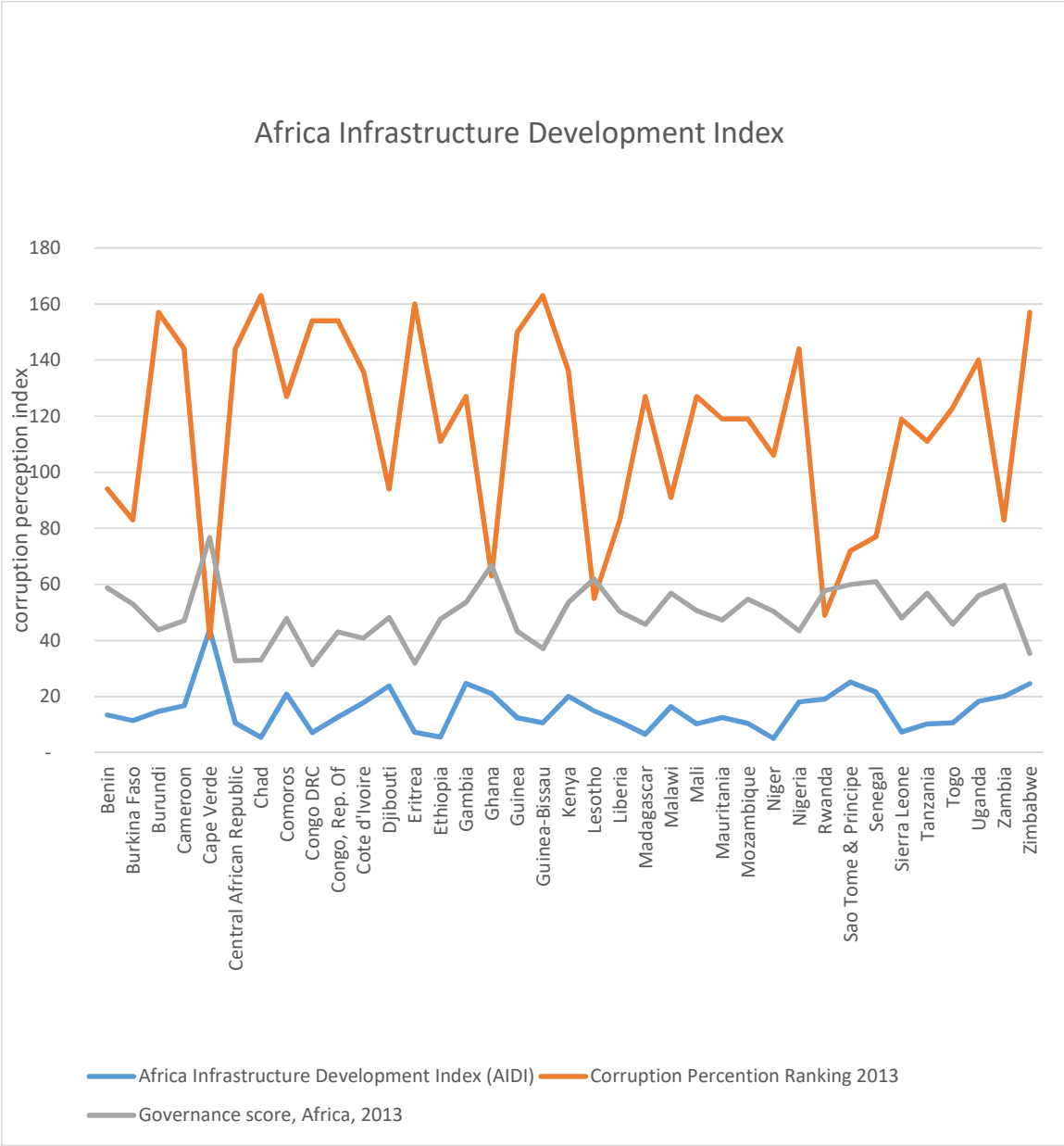


Figure 2- Africa Infrastructure Development Index 2015

A culture of distrust and private spiritedness is responsible for fostering the high rate of corruption. As Heywood noted, maladministration increases the discretionary and arbitrary power of administrators in every phase of the process which leads to public measures being purchased by bribery: the artificial creation of demand, the contamination of the tendering system, the weakening of proper

controls.⁷⁶ Akin to distrust and private spiritedness is ethnic polarisation. Treisman noted that 'the demand for corrupt services may be higher at any given price. For one thing, generalised trust is likely lower. Members of ethnic groups may feel that demanding favours from co-ethnics in office is the only effective way to obtain government services'.⁷⁷

Corruption obstructs development, harms the poor and impedes business growth, impedes investment, the proceeds of corruption been stashed overseas. Corruption can also reduce tax revenues reducing the funds available to governments for public spending. Thus, corruption lowers the quality of public services and infrastructure, distorts government-spending decisions, and decreases tax and customs revenues and damages confidence in the rule of law. Analysis shows that, if more is spent on education, this ensures enhanced human capital development, which is crucial to poverty eradication through good leadership; but sadly, corruption has robbed the developing countries' governments of their political legitimacy.

1.4 Economic Crimes and Sustainable Development

According to the 1987 Brundtland report, sustainable development is:

*Development that meets the needs of current generations without compromising the ability of future generations to meet their needs.*⁷⁸

⁷⁶ Ibid page 117. See Nicholas Ibekwe, 'Battle Over Kaduna DISCO: Reserved Bidder Threatens to sue BPE' Premium Times (Lagos, 2 September 2014); Bassey Udo, 'How VP Sambo, BPE DG Unilaterally Awarded Enugu DISCO to Emeka Ofor' Premium Times (Lagos, 29 September 2013)

⁷⁷ Treisman (n65)

⁷⁸ United Nations, 'Our Common Future, Chapter 2: Towards Sustainable Development' <<http://www.un-documents.net/ocf-02.htm>> accessed 2 November 2014

Sustainable development contains within it two concepts: the concept of 'needs', in particular, the essential needs of the worlds' poor to which overriding priority should be given, and the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs. A comprehensive approach to sustainable development should encompass environmental, economic, social and cultural sustainability. This method is about an improvement in the human condition and focuses more on the underlying philosophy that what is done now to improve the quality of life of people, should not degrade the environment and resources such that the future generations are put at a disadvantage. Extreme poverty and economic inequality undermines the concept of sustainable development, made worse where corruption and other forms of financial crimes thrive uncontrollably.

Poverty eradication was one of the three overarching objectives of the summit on sustainable development, and it is a significant challenge facing sub-Saharan Africa. The objectives include: to halve by 2015, the proportion of people who have an income less than US\$1 a day; establish a fund to eradicate poverty and promote social and human development; develop national programs to empower poor people and other organizations; deliver essential health services for all and reduce environmental health threats; build rural infrastructure through diversification of the economy and improvement of access to market and market information. The Development Assistance Communities factsheet shows that about 66% of

countries in SSA are least developed.⁷⁹ No doubt adequate development in infrastructure and flow of foreign direct investment is necessary to achieve meaningful progress. A country ranked as least developed would have met three criteria: low incomes; human resource weaknesses, based on indicators of health, nutrition, education and literacy; and economic vulnerability, based on an array of factors, including the stability of agricultural production and the exposure to natural disasters.⁸⁰ An environment that breeds corruption and weak political will to implement policies aimed at sustainability will undoubtedly remain in the web of poverty and backwardation. Of the 47 countries profiled in the DAC list, only six states representing 13% are among the upper-middle-income nations and territories in the world, seven countries are in the lower middle income but the most of countries in SSA, 72% are in the bottom half.

⁷⁹ UN-OHRLLS, <<http://unohrlls.org/about-lDCs/>> accessed 02.11.2014. A Least Developed Country (LDC) is one that exhibits the lowest indicators of socioeconomic development, with the lowest Human Development Index ratings of all countries in the world. The Least Developed Countries represent the poorest and weakest segment of the international community. They comprise more than 880 million people (about 12 percent of world population) but account for less than 2 percent of world GDP and about 1 percent of global trade in goods.

⁸⁰ United Nations News, 'UN advocate salutes Cape Verde's graduation from category of poorest States' <<http://www.un.org/apps/news/story.asp?NewsID=22918&Cr=cape&Cr1=verde>> accessed 2 November 2014

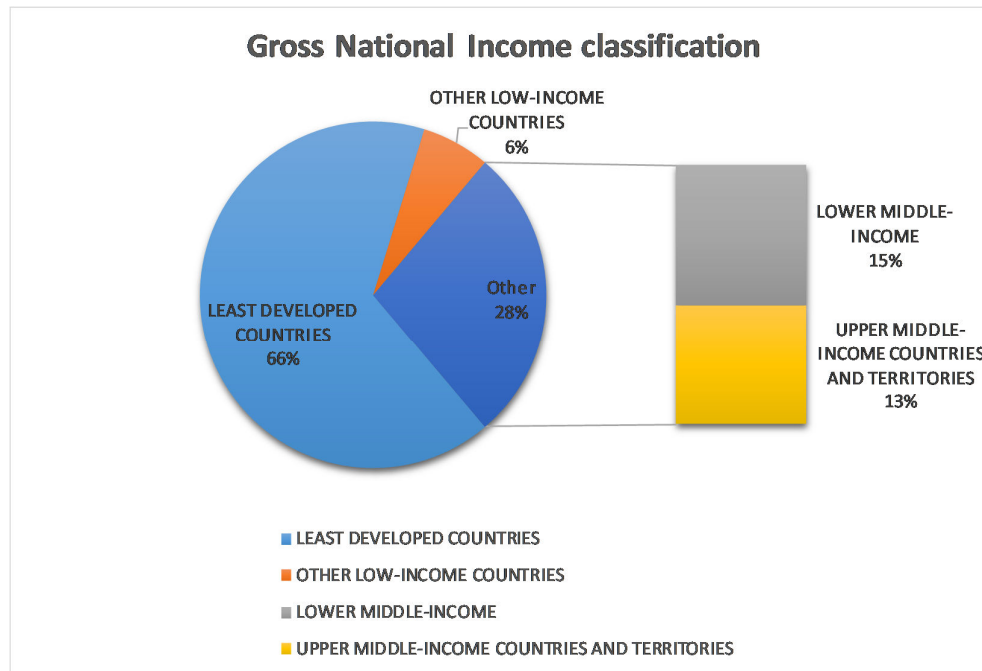


Figure 3 - Gross National Income Classification

Source: Adapted from the DAC list of ODA recipients, Factsheet – January 2012
www.oecd.org_dac_stats_49483614.pdf

Totentino noted that, 'it would indeed, be politically and environmentally disastrous for a country's population to grow without development.'⁸¹ Therefore, it is imperative that for economic crimes to be controlled and reduced significantly, there should be good governance. Good governance here means 'public service that is efficient, a judicial system that is reliable and an administration that is accountable.' While the practical meaning could vary 'according to the socio-economic and political characteristics', it means 'promoting limited government through strengthening public accountability, by the way of promoting participation in development and resource management'.⁸² This will amongst others, include a

⁸¹ Amado S. Tolentino, 'Good Governance Through Popular Participation in Sustainable Development' in Konrad Ginther, Erik Denters, and Paul J.I.M de Waart (ed.) *Sustainable Development and Good Governance* [Kluwer Academic Publishers, 1995] 137

⁸² Ibid 157

transparent and violence-free electoral process that selects leaders to manage the state's affairs that will themselves be accountable. Studies have indicated that states where governments have become more responsive, leads to increased infrastructural development, improved quality of education and health, peace and security.⁸³ The obvious fact however, is that in SSA it's common scene for electoral processes flawed with rigging, stuffing of ballot boxes and vote buying. In an inaugural speech, a governor in one Nigerian state assured the electorate of providing adequate 'stomach infrastructure' for their commitment towards his election to office. Opposition is repelled through violent means, or abuse of the judicial process.

To determine the effect of economic crime especially in relation to sustainable development, the role of the state is pertinent. Economic theorist have argued that the role of the state is to provide an enabling environment to maximize social welfare. According to Fischer and Thomas:

The new consensus on development policy places greater stress than before on the central role of the markets and on the private sector...as the engine of growth. The role of the public sector is seen as the creation of a favourable enabling environment for economic activity. The enabling environment consist of the legal, institutional and policy framework within which economic agents operate. A government that creates a favourable enabling environment has a large role to play, for instance in ensuring the provision of infrastructure, including social services, such as poverty

⁸³ Deepa Narayan, Lant Pritchett and Soumya Kapoor, *Moving out of Poverty: Success from the Bottom Up* (Palgrave Macmillan 2009) 2

*alleviation, basic education, and access to health care; public security; a stable macroeconomic framework; and an efficient fiscal and regulatory system.*⁸⁴

Some have equated development, which signifies progress in human well-being with economic growth. As long noted, increase in average per capita incomes⁸⁵ is an essential means to measure development. The World Bank uses one International Dollar a day as its poverty line and reports estimates of the percentage change of each country's population living below the line. However, most times average income fails to capture other essential aspects of human well-being such as people's health, education or security. The enhancement of people's capabilities or the opportunities that are open to people of being and doing a variety of things suggested as a development objective.⁸⁶ Viewed from this perspective, development objectives can be seen as those that enlarges people's choices in such a way that enables them to live longer, healthier and fuller lives. Furthermore, the problem of development in most countries can no longer be measured by such criteria as the growth of income in per capita of individuals, or the wealth of a nation as the size of its GDP. Instead, development is now defined primarily as 'the issue of freedom from want' being 'separately linked with the issue of freedom from fear',⁸⁷ because human security cannot be erased from issues of development.

⁸⁴ Stanley Fischer and Vinod Thomas. 'Policies for Economic Development' [1990] 72 AJAE 809. Adapted from Meier G. M and Rauch J.E, *Leading Issues in Economic Development* (7th Edition, Oxford University Press 2000) 422

⁸⁵ Gerald M Meier and James E Rauch, *Leading Issues in Economic Development* (7th Edition, Oxford University Press 2000) 5. Per Capita Income is an average over all the residents of a country. It is calculated by taking a measure of all sources of income in the aggregate and dividing it by the population of the country.

⁸⁶ Amartya Sen, *Development as Freedom* (Oxford University Press 1999)

⁸⁷ Owada (n37)

In the first UNDP human development report, it stated that ‘the primary objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives. The UNDP developed the concept of human security to encompass not only the achievements of minimal levels of material needs, but to also include the absence of severe threats to them of an economic or political kind: ‘Job security, income security, health security, environmental security, security from crime – these are the emerging concerns of all over the world.’⁸⁸ According to Sen, ‘human security is concerned with reducing and – when possible – removing the insecurities that plague human lives.’⁸⁹ The definition of Human Security as provided by the Commission of Human Security states that: *‘Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and healthcare. Also ensuring that each has opportunities and choices to fulfil his or her potential...freedom from want, freedom from fear, and the freedom of the future generations to inherit a healthy natural environment – these are the interrelated building blocks of human, and therefore national, security.’*⁹⁰

The definition above is adversely affected by individual or national insecurity concerns because insecurity cuts life short and thwarts the use of human potential⁹¹. In the same vein, if development ensures human happiness, insecurity

⁸⁸ ibid

⁸⁹ ibid

⁹⁰ United Nations Trust Fund for Human Security, ‘Final Report of the Commission on Human Security’ <http://www.un.org/humansecurity/sites/www.un.org/humansecurity/files/chs_final_report_-_english.pdf> accessed 3 November 2014

⁹¹ Francois Fouinat, ‘A Comprehensive Framework for Human Security’ in Robert Picciotto and Rachel Weaving *Security and Development: Investing in Peace and Prosperity* (Routledge Taylor & Francis Group 2006)

caused by underdevelopment will also cause severe adverse effects even when there are no violent conflicts. According to a UN Report, Kofi-Annan, then Secretary-General remarked: '*we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without the respect of human rights*'.⁹² Frances Stewart argues that 'social stability is implicitly premised on a social contract between the people and the government: people accept state authority as long as the state delivers services and provides consistent employment and incomes. With economic stagnation or decline, and worsening state services, the social contract breaks down and violence results. Hence high and rising levels of poverty and a decline in state services would be expected to cause conflict.'⁹³ Furthermore, what matters in reducing conflicts is not only the increase in the level of development but the reduction of levels of poverty, horizontal inequalities and public spending on social services.⁹⁴ Where government resources are diverted by a few privileged individuals who control the machinery of government under the guise of corruption, it can inevitably lead to violent conflicts.⁹⁵ Following this argument, it is evident that a vicious cycle would continue to exist, which is: lack of development leading to conflict leading to lack of progress. The virtuous cycle of security leading to development and development further promoting security in their view can be broken if economic growth is not inclusive because the potentials for conflicts in that case remains.⁹⁶ Corruption erodes the foundations of a stable society and economy. To a

⁹² United Nations Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20A%2059%202005.pdf>> accessed 2 December 2014

⁹³ Frances Stewart, 'Development and Security' in Robert Picciotto and Rachel Weaving *Security and Development: Investing in Peace and Prosperity* (Routledge Taylor & Francis Group 2006) 55

⁹⁴ Ibid 59

⁹⁵ Arms struggle for resource control in the oil rich Niger Delta in Nigeria due to neglect by the Government.

⁹⁶ Stewart (n 93) 61

considerable extent, it undermines government revenues and limits its ability to invest in productivity-enhancing activities such as education, health and social infrastructure. In developing countries where road and rail networks are in a state of disrepair, much-needed funds necessary for upgrade or repair are either starved away to foreign bank accounts or spent in frivolous activities by politicians. Payment of taxes is seen a questionable business proposition because monies are not reliably utilised, the government is neither accountable nor willing to take responsibility for their financial recklessness. For sustainable development, there is the need for much-needed funds to be channelled into beneficial infrastructural development initiatives that would help both in the short and long run to alleviate the many difficulties experienced in sub-Saharan Africa.

Economic crimes infringe on the rights of individuals. Recent rulings in some jurisdictions lay credence to this point. For instance, the Constitutional Court of South Africa has held that ‘corruption and maladministration are inconsistent with the rule of law and the fundamental values of our constitution.’⁹⁷ They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms’.⁹⁸ Human right as defined by Nickel is ‘international norms that help to protect all people everywhere from severe political, legal, economic and social abuses, or that serve to secure and preserve essential goods, protections and freedoms in those important areas for all people

⁹⁷ The Constitution of the Republic of South Africa 1996.

⁹⁸ (CCT 27/00) [2000] ZACC 22 South African Association of Personal Injury Lawyers v Health and Others, 28 November 2000 par 4. See also Hugh Glenister v President of the Republic of South Africa and other, 17 March 2001 (CCT 48/10); [2011] ZACC 6 par. 176: ‘Endemic Corruption threatens the injunction that government must be accountable, responsive and open (...)’: Par 177: ‘it is incontestable that corruption undermines the rights in the Bill of Rights, and imperils Democracy.’

everywhere'.⁹⁹ Kofele-Kale argues that economic crimes deprives the society in general of their human rights, and using available statistical information, there is no doubt that corruption deprives the entire population of their rights. For instance, when one defines human rights as 'an international norm that helps protect all everywhere from severe political, economic and social abuses', then the multi-dimensional index on poverty in Sub Saharan Africa lends credence to the fact that corruption is perhaps the most. For a privileged few to divert the collective good defeats the purpose of government, defeats the declaration that humans are born equal in dignity and rights and that their moral claims are inalienable and inherent by their humanity. Consistent with the Lockean vision of rights, the owners of these evidently basic rights of humankind – life, liberty and property have never surrendered them to the state, rather, all that the individual surrenders upon entering civil society are the right to have these rights enforced by the state.¹⁰⁰ The right to a corruption free society according to Kofele-Kale is a 'basic human right, because other important values depend on this right and it derives from the right of a people to exercise permanent sovereignty over their natural resources and wealth. That is, their right to economic self-determination, recognized in common in article 1 of the International Convention on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights'.¹⁰¹ The right to the exercise of sovereignty over a nation's natural wealth and resources, he argues meant two things: first, the right of states to exercise control over their natural resources; and, second, the right of all peoples within the state to freely use, exploit

⁹⁹ James Nickel, 'Human Rights' <https://h2o.law.harvard.edu/text_blocks/28861> accessed 2 December 2014

¹⁰⁰ Ndiva Kofele-Kale, *Combating Economic Crimes; Balancing Competing Rights and Interests in Prosecuting the Crimes of Illicit Enrichment* [Routledge Taylor & Francis Group 2012] 135

¹⁰¹ Ibid 136

and dispose of their natural wealth and resources in the supreme interest of their national development.¹⁰² A violation occurs where the state 'alienates the people's patrimony in its resources by corrupt or unwise concessions to companies' or it 'engages in the corrupt transfer of ownership of national wealth to those select nationals who occupy positions of power or influence in the society.' Furthermore, the right to a corruption free society also 'implicates the collective right to development.' The importance of development in the human rights context rests on the 'predicate that, without development, it would not be possible to respect and insure individual rights.' Corruption by public officials infringes on the human rights of those in the state, and as shown by several studies, the economic cost of corruption and other financial crimes are intrinsically linked to the overall enjoyment of the right to development. More so, corruption does pose a formidable threat to democratic governance and the rule of law both of which are essential to the implementation of the United Nations Declaration of Human rights.

1.5 Economic Crimes Impugns Physical Fairness And Stability

That corruption remains unchecked and continues unabated in developing countries results in the general call for equity, justice and fairness. What is fair and equitable has being a subject of controversy. For example, a renowned professor may not earn a salary as much as a footballer playing in one of the premier league top sides, or a farmer's meagre wages who toils all day long to produce the very essence of our continued living (food) is not comparable to a movie star. While arguments may arise by a professor's earnings and that of a footballer's, it does

¹⁰² Ibid 136

not extinguish the burning desire for fairness. A cursory view of justice from the perspective of national wealth distribution becomes even more worrisome. Granted, the foundation of taxes assumes that there should be no *quid pro quo* in aspects of societal life, premised on the equitable distribution of wealth as to assure the provision of social welfare to the masses. The everyday news about corruption and looting of the resources cuts short this expectation instead, the economy is characterized by a growing number of unemployed youths, rising levels of poverty, lack of welfare infrastructure such as potable water, electricity, road network and affordable transportation, and insecurity of lives and property. Good governance and equity are thrown to the wind, there is social unrest resulting in military takeovers in some parts of the continent and continued unrest in other areas. Conflicts have given rise to the proliferation of small arms resulting in the high rate of armed robberies, kidnapping and increased political assassination. In recent times, the rise of insurgency premised by the long period of misrule and bad governance have resulted in vices such as suicide bombings and kidnappings, concepts which were strange to the continent some years ago.

Fairness is a value of universal appeal, and in every facet of life, there are some notions concerning equality and justice in economic, social and political status. It governs all aspects of our society and grips issues both considered trivial and essential. Sen defines fairness as: '*Demand for impartiality uninfluenced by our respective vested interests, or by our priorities or eccentricities or prejudice.*'¹⁰³ Fairness is the foundation of justice.¹⁰⁴ As Pierre-Joseph Proudhon noted: '*Justice,*

¹⁰³ Amartya Sen, *The Idea of Justice* (Harvard University Press 2009) 54

¹⁰⁴ L. Sun, *The Fairness Instinct: The Robin Hood Mentality and Our Biological Nature* (Prometheus Books 2013) 18

*under various names, governs the world – nature and humanity, science and conscience, logic and morals, political economy, politics, history, literature and art. Justice is that which is most primitive in the human soul, most fundamental in society, most sacred among ideas and what the masses demand today with most ardour. It is the essence of religions and at the same time the form of reason, the secret object of faith, and the beginning, middle and end of knowledge. What can be imagined more universal, more strong, more complete than justice?*¹⁰⁵ A fair system is one that ensures 'stability and progressive change'¹⁰⁶ and have 'consequential values by which institutions and processes are judged: do they provide the consequences which people expect, using an appropriate discursive and distributive process?'¹⁰⁷ A system that fails to provide for basic needs¹⁰⁸ in a manner that satisfies reasonable expectations such as food, peace, good order and security and those duly authorised fails to act by procedures which protect against corrupt, arbitrary or idiosyncratic decision-making processes would inadvertently show as an unfair system. As stated by Franck, 'the fairness of a....system will be judged, first by the degree to which the rules satisfy the participant's expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants expect as the right process.'¹⁰⁹ Therefore, when government fails to distribute burdens equitably, it will provoke resistance and discord within the society. Conversely, when individuals perceive the system to promote distributive justice, it will engender compliance within and outside government.

¹⁰⁵ Robert C. Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Rowman & Littlefield Publishers 1995) 4

¹⁰⁶ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995) 7

¹⁰⁷ *Ibid* 7

¹⁰⁸ *Ibid* 7

¹⁰⁹ *Ibid* 7

The search for fairness begins with ‘a search for agreement on a few basic values which take the form of shared perceptions as to what is unconditionally unfair.’¹¹⁰ What are those fundamental values?¹¹¹ In most countries, the constitution is the primary source of law to elaborate in varying degrees the limits of government power and their exercise. Because of the prevalence of corruption, the development of active codes of conduct to regulate public office holders and commercial organizations¹¹² will help to stem this social and economic problem. Indeed all arms of government should be independent, accountable and maintain a high degree of honesty and integrity. About the judicial arm, fairness requires ‘impartial and fair legal institutions’, which means ‘guaranteeing the independence of judicial decision making against political interference’. Fairness entails that the courts would not be perceived to be partisan or arbitrary in their application, judges are held accountable for their actions, and the entire judicial system is socially responsible. It has been suggested that one way to build social accountability in the legal order is through the free media and civil society organisations.¹¹³

The abuse of executive power results in corruption with facets such as bribery, inflation of contracts, and nepotism which is very widespread in the routine

¹¹⁰ Ibid 7. See Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Studies in International Law, Hart Publishing 2014) He noted that, ‘it is rare to find any country in Africa without legal frameworks or institutions to prevent and combat corruption.’ 119

¹¹¹ In the UK for example, the Seven Principles of Public Life is outlined: *Selflessness*, Integrity, Objectivity, Accountability, Openness, Honesty, Leadership. See Colin Nicholls and Others, *Corruption and Misuse of Public Office* (2nd edition, Oxford University Press 2011) p.348. See Committee for Standards in Public Life, First Report (also known as the Nolan Report), Cm 2850-1 (1995).

¹¹² P Fennell and PA Thomas, ‘The Law Relating to Corruption in England and Wales: An historical analysis’ (1983) 11 International Journal of Social Law 167.

¹¹³ The World Bank, *World Development Report 2002: Building Institutions for Markets* (Oxford University Press 2002) 29.

operations of government. The constitution and other laws regulate executive activities and provide an accountability framework for governance that would justify that the people and their elected representatives have the power to control the operations of government. According to Brentham, the self-interest of rulers is in a state of natural and diametrical opposition to that of the subjects will inevitably harm the interests of the vast majority of the community who are subject to them in promoting their selfish ambitions. To ensure fairness in the performance of their responsibilities, public office holders¹¹⁴ are to abide by the constitution, take an oath of office, conform to existing codes of conduct and conform to all rules and regulations.

CONCLUSION

Economic crimes mostly perpetrated by political office holders and their cronies create the much adverse effect on the economy. Inadequate infrastructure, lack of essential social amenities such as potable water supply, electricity, education, just to mention a few are the order of the day. The teeming masses provide social welfare for themselves whereas funds appropriated for meaningful developmental activities are misappropriated, laundered out of the country to safe havens, thereby creating the development gap. The attitude exhibited by these egocentric leaders promotes an opportunistic culture in the minds of potential office holders to 'grab' whatever they can within their stay in office. The fear that future office holders with

¹¹⁴ A 'public officer' means a person employed or engaged in any capacity in the civil service of the Federation, State or Local Government, public corporation or private company wholly or jointly floated by the any government or its agency including the subsidiary of any such company whether located within or outside Nigeria and includes judicial officers serving as magistrate, area or customary courts in tribunals. Cited in the Corrupt Practices and other related offences Act 2000.

differing political ideologies may subject the past administration to investigation and ridicule, an effort is made to impose only desired candidates in office contrary to the mandate of the people. Elections are fraught with massive rigging marred by violence and bloodshed; sensitive election materials are high jacked, ballot boxes stuffed, electoral officers are either intimidated or compromised with juicy financial offers. The judiciary to make matters worse is highly compromised with judges bribed for favourable judgments, and in other instances, series of injunctions and counter injunctions are filed to abuse the judicial process and the smooth administration of justice.

Good governance, transparency and accountability are real hallmarks of a sane society, and this is lacking in most sub-Saharan Africa countries. Impunity, ethnic and religious differences, greed and non-compliance with laid down procedures makes the fight against economic crimes mostly corruption unsuccessful. I argue that there are laws, institutions and processes in these countries otherwise there would be total anarchy, however, what is lacking is respect for the rules by the highly placed, the so-called elites and leaders. They use their positions to loot and perform all sorts of fraudulent activities for personal gains. The few public office holders with integrity are suppressed; no protective whistleblowing legislative framework in place, and no respect for the rule of law. Therefore, an honest person is practically on his/her own. Governance is more or less an investment initiative as those vying for political offices embark on massive capital accumulation from friends and associates to pursue such interest and when successful, loot or embezzle to recoup their investment.

To manage economic crimes in the sub-region requires attitudinal change especially on the part of political office holders and their sponsors since it is the

fastest means of making money. Similarly, the incentives associated with political offices curtailed to desensitise potential occupants to focus mainly on service delivery and good governance other than to gain wealth illicitly. In spite of adequate regulatory and institutional reforms and enforcement of civil service procedures and controls, the drawback is that those who are responsible for the monitoring and enforcement are the perpetrators themselves! Encourage cooperation between Financial Intelligence Unit and the office of the Auditor-general to monitor graft and share information including all procurement activities of government. In the same vein, introduce whistle-blowing legislation to encourage anonymous reporting of non-compliant officers with adequate protection for whistle-blowers.

As will be highlighted in Chapter 8, an impediment to good governance and accountability is the immunity clause enshrined in some constitutions in the region. Because serving government officials are immune from prosecution during their tenure of office, even with glaring allegations of corruption and embezzlement, no one can arrest the situation until the office holder completes his/her tenure. Suggested constitutional amendments, include the reverse onus clause, criminal immunity and independent funding of anti-graft agencies. There is the need for legislative and judicial reforms to strengthen existing institutions. Chapter 8 highlights vital areas in which improvements would be required primarily to enhance the systems of government established to fight economic and financial crimes other than allowing a so-called 'strong man' in the helm of affairs to dictate the tone.

CHAPTER TWO

SPECIAL CHARACTERISTICS OF MONEY LAUNDERING IN DEVELOPING COUNTRIES

Africa enjoys significant attention in world affairs partly due to the negative signals of high levels of underdevelopment; its historical past including but not limited to colonialism, the slave trade, the varied forms of dictatorships and misrule and the grand level of corruption perpetrated by the political elites. On a positive note, the continent is seen as the next destination for investors. It is estimated that half of the world's population growth between now and 2050 will occur in Africa with longer life expectancy as 'rising per capita income coupled with rising population equals an expanded market'. In the same vein, it has the fastest growing population of young people. Additional opportunities such as the spread of urbanisation and the increase in technological development resulting in increased socio-political connectivity, with its rich natural endowment, available workforce, enviable tourist attractions, access to market information and finance are all positive signals of growth.¹¹⁵ While each state government makes considerable effort in providing infrastructural development to its teeming population, the continent is overwhelmed with failure of leadership and good governance with enormous consequences. Africa is a fertile ground for money laundering due to its corrupt and weak institutions lacking the capacity to stem the tide favourably. Some regions in the continent are good routes for narcotics and drug trade, sea piracy,¹¹⁶ oil theft and

¹¹⁵ Africa Progress Panel, *Grain, Fish, Money: Financing Africa's Green and Blue Revolution* (2014) Africa Progress Report.

¹¹⁶ United Nations Office on Drugs and Crime, 'Transnational Organised Crime in Eastern Africa: A Threat Assessment' (UNODC 2013). Somali pirates 'brought in an estimated US\$150 million in 2011, which is equivalent to 15% of the country's GDP.

bunkering,¹¹⁷ and, of late, there is the increase in human¹¹⁸ and organ trafficking activities, poaching activities,¹¹⁹ kidnapping and smuggling creating vast amounts of profits necessary for laundering activities. This chapter is in four parts. First is a consideration of money laundering and its general features. Second, the varied forms of corruption in Nigeria and how money is laundered using the peculiar methods available in the country. Third, capital flight within sub-Saharan Africa, with some focus on South Africa. The fourth part concludes with a discussion on the issues raised within the chapter.

2.1 Money Laundering Defined

In line with most social constructs, there is no consensus on the definition of money laundering. Multiple definitions have been developed by criminologists, economists, legal practitioners and law enforcement agencies over the years with most scholars agreeing that it involves the concealment of value (not restricted to monetary funds or cash), in order to hide its origin or destination from legal authorities. It is the process used by criminals to move, conceal and legitimise their proceeds of crime. The purpose is 'to render it almost impossible for evidence to be obtained which allow a court to establish the derivation of the money.'¹²⁰ The goal of the money laundering process is to make funds derived from, or associated

¹¹⁷ Christiana Katsouris and Aaron Sayne, *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil* (Chatham House 2013) 2 <<http://www.chathamhouse.org/nigeriaoil>> accessed 5 January 2015. According to the report, Nigerian crude is stolen on an industrial scale and are exported. Proceeds are laundered through world financial centres and used to buy assets in and outside Nigeria.'

¹¹⁸ UNODC, *ibid.* 'Due to conflict and poverty, Eastern Africa produces a large and vulnerable stream of migrants who are abused and exploited at multiple stages of their journey'. 'More than 100,000 people paid smugglers to transport them across the Gulf of Aden....Yemen in 2012, generating income for the boatmen of over US\$15 million'.

¹¹⁹ *Ibid.* 'between 5,600 and 15,400 elephants are poached in eastern Africa annually producing between 56 and 154 metric tonnes of illicit ivory of which two thirds (37 tons) is destined for Asia worth around US\$30 million'.

¹²⁰ Barry A. K. Rider, 'Fei Ch'ien Laundries: The Pursuit of Flying Money (Part I)', (1992)1 *Journal of International Planning*, 77

with the illicit activity appear legitimate.¹²¹ The expression money laundering, some have believed emanated from the United States authorities¹²² given, quite understandably, the fight against drug cartels when 'describing the mafia's use and ownership of 'washing salons' through which they intermixed their criminal proceeds with legitimate business revenues to avoid potential seizure by authorities'¹²³, but as Professor Rider noted, Money laundering has been for a long time.¹²⁴

The European Community Directive of October 2005 definition of money laundering as *intentional conduct* include predicate crimes¹²⁵ other than drugs and proceeds of illicit narcotics as part of the scope of money laundering: it defines it as:

¹²¹ Arun Srivastava, Mark Simpson and Nina Moffatt, *International Guide to Money Laundering* (4th Edition, Bloomsbury 2013) 4; J. Richards, *Transnational criminal organisations, Cybercrime and Money Laundering* (CRC Press 1999); *United States v Kramer and Others* 807 F. Supp 707 (1991) in Anthony Kennedy, 'Dead Fish across the Trail: Illustrations of Money Laundering Methods' [2005] 8,4 JMLC 1

¹²² William Gilmore notes that the term money laundering is of relatively recent origin since it appears to have entered widespread usage during the Watergate inquiry in the United States in the mid 1970's. See Williams S. Gilmore, 'Money Laundering: The International Aspect'(1993) 1(2) *Hume Papers on Public Policy* Unger Brigitte, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in Brigitte Unger and Daan van der Linde (eds) *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013), stated that money laundering owes its name to Al Capone. He used launderettes for disguising illegal alcohol revenues during the 1930s, when almost every household had a washing machine, were an ideal location to slip the money from illegal alcohol sales into the cash register. See Linde D, op cit 19.

¹²³ Ibid 4

¹²⁴ Professor Barry Rider notes the antiquity of the crime when he said: 'it is as old as the need to hide one's wealth from prying eyes and jealous hands and concerns about the uses and misuses of hidden money is not just an issue of the century.' He further noted that 'as far back as 1471 Minister Yau Ku'el complained that the practice of ensnaring young and rival officials that of providing 'secret loans', which would ensure the lender greater influence in the future had become a scandal and called for the reporting of such advances. See P. M Reid, 'Money laundering – an Irish Perspective' in Barry Alexander K. Rider and T. Michael Ashe (eds), *Money Laundering Control* (Round Hall Ltd 1996) 207

¹²⁵ Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, (Hart Publishing 2003) 100. In the case of DPP of Mauritius v Bholah [2012] 1 WLR 1737, it was held by the Privy Council that proof of a specific predicate offence was not required in order to establish guilt under the Economic and Anti-Money Laundering law Act (Mauritius)...and it was sufficient to show that property represented the proceeds of any crime and a failure to identify and prove a specific offence was not a breach of the constitution of Mauritius.

- '(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or an act of participation in such activity, for concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
- (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights concerning, or ownership of property, knowing that such property is derived from criminal activity or an act of participation in such activity;
- (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or an act of participation in such activity;
- (d) Participation in, association to commit, attempts to commit and to aid, to abet, facilitating and counselling the commission of any of the actions mentioned in the preceding points'.¹²⁶

Predicate crime is the underlying crime that generates the money laundered. Black's Law dictionary defines predicate act as 'an act that must be completed before legal consequences can attach either to or to another act or before further action can be taken. A predicate act itself may be criminalised if it is followed by or performed in tandem with another prohibited act.'¹²⁷ Based on the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention), predicate offences was limited to drug trafficking offences so crimes unrelated to drug trafficking were not within the ambit of money laundering offences. However, with the Palermo convention, the

¹²⁶ European Law Union, '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' <<https://eur-lex.europa.eu/eli/dir/2005/60/oj>> accessed 5 June 2015

¹²⁷ B. A. Garner, (ed.) *Black's Law Dictionary*. (Thomson Reuters 2014)

definition of predicate crime expanded to include other serious crimes. The United Nations Convention against Transnational organised crime (2000) requires all participant nations to apply it to 'the widest range of predicate offences.' Predicate offences 'include: the categories of criminal offences defined in Article 3(1)(a) of the Vienna Convention; the activities of criminal organization as defined in Art 1 of Joint Action 98/733/JHA; serious fraud as defined in Art 1(1) and Art 2 of the Convention of the protection of the European Communities' financial interests; corruption; and any other offence which may generate substantial proceeds and which is punishable by severe sentence of imprisonment in accordance with the penal law.' In Nigeria, predicate crimes are included in the definition in Part II S.15 of the Money Laundering Act 2011.¹²⁸ The European Directive defined serious crimes as: 'all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months'¹²⁹. This is in addition to such recognised criminal activities as 'corruption, offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, fraud and the activities of criminal organisations'.¹³⁰

Money laundering is not only related to the proceeds of drug trafficking, terrorism, arms dealings or the proceeds of organised crime but also includes all indictable

¹²⁸ Ibid, S.15(1)(a)(ii)

¹²⁹ ibid

¹³⁰ ibid

offences which among others includes forgery,¹³¹ corruption, theft, or obtaining money by deception, advanced fee fraud and the like. A preferred definition of money laundering is the process by which the proceeds of crime¹³² are hidden from investigators by moving it around financial and economic systems with the sole aim of making it difficult to know the source. As observed by Professor Rider, the processes involved in money laundering are not necessarily harmful or abusive per se, simply keeping wealth secret may not be intolerable in either a legal or moral sense, and it might even be prudent and beneficial in certain circumstances. However, the money laundering process 'will inevitably involve resort to transactions, real or imagined, which will be designed to confuse the onlooker and confound the inquirer'.¹³³

Available literature categorised money laundering into three distinct stages: placement, layering and integration (Samantha Maitland Irwin et al., 2011; Buchanan, 2004). Hinterseer observes money laundering, 'as a process that links the informal and formal economies, the money laundering process is dynamic.'¹³⁴ Money laundering 'does not merely facilitate the flow of goods and services...the associated methods and techniques can be *used to create coherent, adaptive, and flexible strategies* that enable entrepreneurs to move resources back and forth

¹³¹ As in *Agip (Africa) Ltd v Jackson* [1991] 3 WLR 116. In this case, Mr Zdiri, an Agip Ltd employee, changed the name on a payment order of \$518,000 to Baker Oil Services Ltd, a puppet controlled by Mr Jackson and other accountants, who acted on clients' instructions. The money was transferred from Banque du Sud in Tunisia to Baker Oil's account with Lloyds Bank in London. All but \$43,000 was then paid on to unknown parties. Agip Ltd sued Mr Jackson for the return of the money. Millet J held that Agip Ltd was entitled to an equitable proprietary claim for the \$43,000 from Mr Jackson and the accountants were liable for 'knowing assistance in a breach of trust'.

¹³² Kris Hinterseer, *Criminal Finance, The Political Economy of Money Laundering in a Comparative Legal Context* (Kluwer Law International 2002). He observed: 'Governments may be inclined to support money laundering activity'. He contends that Money laundering helps to facilitate a range of political objectives.

¹³³ Barry A.K. Rider, 'The Practical and Legal Aspects of Interdicting the Flow of Dirty Money' (1996) 3(3) JFC 234

¹³⁴ Hinterseer (n132)

between the two economies on a regular basis'.¹³⁵ The placement state sees the generated proceeds put into the financial system (Austrac, 2015; Samantha Maitland Irwin et al., 2011). The methods used to launder proceeds of criminal activities and finance illicit activities are in constant evolution: as the international financial sector implements the FATF standards, criminals must find alternative channels.¹³⁶ Typologies of money laundering includes identity theft and use of documents and straw men; concealment within complex business structures; through politically exposed persons; exploitation of international jurisdictions; physical transportation of cash and many more. In some cases, criminal proceeds often begin in the form of cash or cash equivalents¹³⁷ or in other cases in the acquisition of assets in favour of the receiving party where it involves bribes or kick-backs. Additionally, objects¹³⁸ of value can also be hidden, disguised and concealed. Therefore, money laundering does not only involve cash but relates to all items acquired illegally for which the launderer intends to conceal that illicit enrichment and finally transform it to legitimate use. This can be done in a variety of ways: physical transportation of cash in suitcases;¹³⁹ stored in safe deposit facilities; lodged into domestic or foreign bank accounts; cash exchanged for precious metals and gems; purchase of art and antiquities; purchase of real estate, shares or given out as loans. Alldridge notes that 'except small thefts of fungibles like cash, and the fantasy of case of a criminal art collector who wishes to sit alone

¹³⁵ Ibid 13

¹³⁶ Financial Action Task Force, 'Methods and Trends: Money laundering and Terrorist Financing Risks' <<http://www.fatf-gafi.org/publications/methodsandtrends/>> accessed 16 January 2015

¹³⁷ Cash equivalents can be in the form of bank cheque; stock, treasury bills or bond certificates; or other promissory notes.

¹³⁸ Hinterseer (n132) 14

¹³⁹ The African Sun Times 3 September 2015, reported that a Nigerian man was caught with 1.05Billion Naira (4.6M Euros) at the Diori International Hamani Airport in Niamey, en route Dubai in the United Arab Emirate. <<http://africansuntimes.com/2015/09/niger-arrests-nigerian-with-5-2-million-in-cash-seizes-money/>> accessed 15 June 2016.

gloating over a painting so famous that it could not be resold, virtually all income from activities must be disguised to be of use to the criminal.¹⁴⁰ The cash involved in money laundering is always huge, and since criminals are unable to absorb small amounts of cash into their lifestyle, the need for money laundering will continue. The propelling factor in money laundering is that these criminal activities (in the case of SSA, mostly the proceeds of bribe and corruption of public office holders) generate huge profits which would attract high suspicion. The perpetrators strive to devise the strategy of concealing the source of the proceeds to evade the glare of the public, by moving the funds to a country or business activity where they are less likely to attract a suspicion and detection. In many cases, secrecy domains offer ease of nominee company formation,¹⁴¹ banking confidentiality and a minimum amount of banking regulation. Other havens are the hub of centres of financial service in the world thereby attracting illicitly acquired wealth laundered through their jurisdiction.¹⁴² Money launderers take advantage of the loopholes in the financial laws of financial havens to effect corporate transactions and transfers as corporate structure is a most suitable means of disguising criminal proceeds. Until very recently where some countries in Sub Saharan Africa have made modest effort to achieve cashless policy¹⁴³ and a handful are in the bid of doing so,¹⁴⁴ most economies in Sub Saharan Africa is principally cash based. Payments are

¹⁴⁰ Alldridge (n125) 1

¹⁴¹ Naomi O'Leary, 'British Property has become a Safe Haven for Stolen Cash' (Business Insider, Mar 4, 2015) <<http://www.businessinsider.com/afp-british-property-safe-haven-for-corrupt-cash-campaigners-2015-3>> accessed September 3, 2015.

¹⁴² The US and UK are recipients of Illicit Wealth, see Secrecy Index.

¹⁴³ World Bank, 'Outcomes of Global Payment Systems Survey 2010: Preliminary Outcomes' (The World Bank 2010). It is estimated that 0.2% of Africa's population use non-cash payment systems in their transaction.

¹⁴⁴ Ibid. Over 12% compared with the world's average of 2% of adults in Sub Saharan Africa. In a survey carried out between Kenya and Nigeria, 80% of payment for utility bill made in Nigeria was by cash as against 80%+ respondents in Kenya who made payments through an electronic transfer means.

denominated in cash ranging from minor purchases of groceries to purchase of cars and other high-value items as property and equipment. Though major contracts are bank driven, officials nonetheless, use cash to bribe those who may have masterminded their winning the job. Because of this trend, large amounts of cash are maintained in the houses of political office holders who virtually receive all facilitating payments and bribes in cash.

2.2 Corruption and Money Laundering

From a historical perspective, corruption is traceable to the very origin of man himself. Lending credence to the holy writings, man is said to have fallen from grace to grass as a result of 'eating from the tree of knowledge of good and bad' having being influenced by 'the serpent' which appears to be one of the 'cautious of the wild beast of the field'. By eating from the forbidden fruit man became morally corrupt, the 'inclination of the thoughts of his heart was only bad all the time'¹⁴⁵ In his classic work, James Scott noted that corruption 'we would all agree, involves a deviation from certain standards of behaviour....what criteria do we use to establish those standards? If our concern is public corruption, perhaps the most obvious place to start is..., *corruption involves the violation of the law.*'¹⁴⁶ When government actors commit such unlawful activities as bribery, fraud, embezzlement and take kickbacks on public contracts, these are deemed corrupt practices. Corruption is a breach of duty. Breach of duty has been identified as the very essence of the corrupt act. Duties involve both acts and omissions. McMullen noted that corruption is the 'common understanding that a public official

¹⁴⁵ Watchtower Bible and Tract Society, *New World's Translation of the Holy Scriptures* (Watchtower Bible and Tract Society of Pennsylvania 2010) Genesis 6:5

¹⁴⁶ James C. Scott, Comparative Political Corruption in Laura S. Underkuffler (eds), *Captured by Evil: The Idea of Corruption in Law* (p. 253).

is corrupt if he accepts money or money's worth for doing something that he is under duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons.¹⁴⁷ Seen through the eyes of confidence reposed on someone, corruption by public officials is a betrayal of those whom he serves¹⁴⁸, and as Laura observed 'the existence of trust and its betrayal is the core of the corrupt conduct. It is the particular nature of the trust relationship between the citizen and her legislator, or the citizen and her judge, which makes the relationships particularly crucial and their betrayal particularly heinous. As a result, her intentional violation of those sworn duties is particularly condemnatory; she has betrayed that relative weakness and trust she has exploited'.¹⁴⁹

Corruption can be seen from different perspectives: economic, cultural, political and so on. As an ethical problem, it has no regional bound; it is a global phenomenon that affects developed, developing and the underdeveloped nations of the world. Corruption is widespread in Nigeria and has engulfed discussions of daily life with the civil service is at the core of it. Between 1960 and 1999, Nigerian officials had stolen or wasted more than \$440 billion. That is six times the Marshall Plan, the total sum needed to rebuild a devastated Europe in the aftermath of the Second World War. The festering corruption within the civil service has been traced to the inherited colonial legacy.¹⁵⁰ Feseke, posit that Nigerian civil service

¹⁴⁷ M. McMullen, A Theory of Corruption, in Laura S. Underkuffler (eds) *Captured by Evil: The Idea of Corruption in Law* (Yale University Press 2013) 255

¹⁴⁸ Ibid 334

¹⁴⁹ Ibid 335

¹⁵⁰ Faseke remarked that 'under the British colonial administration, the civil service was an instrument of exploitation because it served the interest of the colonial overlords and structured to perpetuate colonial economic imperialism, given that, the Nigerian economy was meant to generate surpluses for metropolitan power through the supply of cheap raw materials for the British industries in return for manufactures with the terms of trade continuously against Nigeria.

transformed 'from an instrument of exploitation in the colonial era to one of corruption and fraud in post-independence period especially under military rule which created job insecurity....and consequently deepened the tendency to short-change the system for self-enrichment.'¹⁵¹ Ekanem and Ekefre maintained that 'corruption has its root in the civil service' which was made worse 'with the incessant military coups in the country. With the military at the helm of affairs, there was no respect for the constitution, rules and due process. Everything was done with military fiat and dispatch. These uniquely cleared the way for corruption to thrive in the civil service and top military.'¹⁵² The regime of Major Gen. Ibrahim Badamasi Babangida was credited with the dubious achievement of 'democratising corruption' in Nigeria. As cited in Akinola, Babangida's government encouraged official peculation, warning military officers being appointed as state governors 'don't come back and tell me you are still poor.'¹⁵³ Since corruption flourishes in conditions of poverty and weak public institutions,¹⁵⁴ the wrong incentives of senior civil servants also makes those in the middle and low level of the structure to cut corners in a bid to get rich quickly, perpetuating acts such as hiding files in an attempt to force Nigerians to pay before they are found and treated expeditiously, expecting a bribe for every bit of government work that is to be performed. The motivation to extract corrupt payments is high when irregular salaries are received, and workers face significant risks of illness, accidents due to the deplorable condition of road infrastructure, and unemployment. Because people are

¹⁵¹ Modupeola Faseke, 'Corruption and the Image of the Nigerian Civil Service: A Historical Discourse' (2006) 6,1 *The Constitution*, 101

¹⁵² Samuel Asuquo Ekanem and Ekeng Nyong Ekefre, 'Governance and Corruption in Nigeria: A Psycho-psychological Management Analysis' (2013) 4(14) *Mediterranean Journal of Social Sciences* 142

¹⁵³ Samson Adesote and John Ojo Abimbola, 'Corruption and National Development in Nigeria's fourth republic: A historical discourse' (2012) 14(7) *Journal of Sustainable development in Africa*

¹⁵⁴ Daniel Kaufmann and Phyllis Dininio, 'Corruption a Key Challenge for Development' in Rick Stapenhurst, Niall Johnson and Riccardo Pelizzo (eds) *Role of Parliament in Curbing Corruption* (World Bank 2006) 14

impoverished, civil servants with large family dependency ratio are more focused on survival, therefore, cutting corners to get rich quickly is seen as a way out. Corruption can be categorised into political corruption, judicial corruption, contract inflation and kickbacks, bribery, fraud of diverse kinds, embezzlement, nepotism and cronyism.

Political corruption in the public sector stems from the nature of government itself. Fundamentally, government is responsible for the provision of goods and services that the private sector is unable or unwilling to provide, sometimes due to the size and nature of capital involved. Such opportunities can be exploited by corrupt individuals because of the discretionary powers they enjoy. The risk of corruption exist whenever someone has discretionary authority to influence the others' framework condition which depends on the specific authority he or she exercises and the benefits obtainable from the service. Soreide asserts that 'if an extra price is demanded a service provided free or at low price, the extra charge is a form of theft. The amounts accruing to the civil servant who makes such demand can be significant even if the extra payment made by each client is low'. Where the demand for such service is higher than the supply, and the civil servant have the powers to create some form of shortage - in this instance, limiting the number of pre-qualified bidders – the desperate client will have the willingness to pay. Lederman argued that the institutional design of government largely influences the occurrence of corrupt opportunities.¹⁵⁵ First, is political accountability: this is a mechanism which encourages punishment of corrupt individuals and reduces

¹⁵⁵ Daniel Lederman, Norman V. Loayza, and Rodrigo R. Soares, 'On the Political Nature of Corruption' in Rick Stapenhurst, Niall Johnson and Riccardo Pelizzo (eds) *Role of Parliament in Curbing Corruption* (World Bank 2006) 29

informational problems relating to government activities. It includes the degree of competition in the political system, the existence of checks and balances and the transparency of the system. Political competition arises where there is free and fair election, which ensures that the populace can hold politicians liable. The more a system allows politicians to face the electorate, giving the risk of losing office due to poor performance, the higher their incentives to stick to good governance. Political corruption arises when politicians apply unethical and illegal means within the political system to bring themselves to political office. This can occur through the rigging of elections arising from outright intimidation of the voting population, buying of votes, multiple thumb printing, stuffing of ballot boxes, falsification of results and many more. The general apathy shown by Nigerians in the general elections reflects the growing concerns of the populace as people refused to go out to vote because of the firm belief that votes will not count.¹⁵⁶ Electoral fraud is one of the unusual challenges in Nigeria, as it tends to destroy and deny the legitimacy of government. Because elections are not transparent, the politicians act in a way they owe the people no commitment hence the looting of the public treasury. Second, the structure relating to the provision of public good is questionable. A system that allows competition in the provision of public good tends to minimise corruption. The most prevalent forms of corruption are bribery and kickbacks; extortion; self-dealing and conflict of interest; embezzlement by a variety of fraudulent including securities vote fraud and inflation of contracts.

¹⁵⁶ The 2015 General Election adjudged free, fair and credible, although fraught by nullifications and allegation of widespread rigging and falsification of the card reader.

Bribery

Bribery mainly occur from a private entity to a government official in exchange for the grant of some government concession, or by government to government through one or more of its agencies for national security concerns,¹⁵⁷ or for a contract for the supply of goods or services, or the right to extract a resource from the state. Payments to win significant contracts and concessions are the preserve of large businesses because it represents a substantial expenditure of funds and would have a considerable impact on government budget and the growth prospects of the country. The powers to approve such magnitude of investment lies in the hands of top government officials, and for capacity, contracts are performed by multinational corporations operating either alone or jointly in partnership with local operators. As Rose-Ackerman observed, a firm could pay bribe to officials to include it in the list of prequalified bidders and to restrict the length of the list or for insider information or to induce officials to structure the bidding specifications so that the corrupt firm is the only prequalified supplier or to be selected as the winning contractor; and, once a firm wins the contract, it may pay to get inflated prices or

¹⁵⁷ Regina (Corner House Research and Another) v. Director of the Serious Fraud Office (JUSTICE intervening) [2008] EWHC 714 (Admin). The investigation, which commenced in July 2004, pursuant to Section 1(3)3 of the Criminal Justice Act 1987 ('the 1987 Act'), concerned allegations that the British Company BAE Systems plc ('BAE') had engaged in corruption contrary to the Anti-terrorism, Crime and Security Act 2001, in particular, in relation to the Al-Yamamah arms contract between the United Kingdom and Saudi Arabia. BAE contacted the Attorney General, seeking to stop the investigation on public interest grounds, arguing that it would adversely affect UK-Saudi relations and jeopardize the contract. Based on BAE's request, on 14 December 2006, the Director publicly announced his decision to discontinue the investigation on national security grounds, stating that he considered his decision was consistent with Article 5 of the Bribery Convention, but that, even if he had thought otherwise, the risk was such that he would still have discontinued the investigation. The plaintiff brought an action against the Director for halting the investigation but on appeal, it was held that he could use his discretionary powers to halt the investigation. *Per* Lord Rodger of Earlsferry: The Director would have made the same decision even if he had believed that his decision was not compatible with Article 5 of the Bribery Convention. He received advice from several sources as to the national security threat posed by continuing the investigation, and clearly weighed that advice carefully before acting on it, as he was so entitled. Even supposing the House was competent, it was unnecessary to interpret Article 5 (paras. 50–1).

to skimp on quality'.¹⁵⁸ There are allegations that leading politicians manipulated the procurement process for a South African arms deal worth USD 5 billion at the time in return for bribes of as much as USD 300 million.¹⁵⁹ Allegations of improper payments by TSKJ agent of about \$180 million to Nigerian Government officials in exchange for favourable treatment in contracts connected with the construction of a multibillion-dollar natural gas liquefaction complex at Bonny Island, Nigeria.¹⁶⁰ The infamous Siemens scandal, Siemens made approximately \$12.7 million in suspicious payments for the Nigerian telecommunications projects.¹⁶¹ An alleged bid to secure the acquisition of an offshore oil block in Nigeria two multinational companies operating in Nigeria (Shell and Eni) paid \$1.1billion to the Nigerian Government.¹⁶² Bribery also occurs among public officials seeking to occupy perceived juicy offices in government or to increase budgetary allocation to the ministry or agency of government. A past Nigerian Senate President, Adolphus Wabara was alleged to have received a bribe of 55 million Naira from the then Education Minister to inflate the budgetary allocation to the education ministry.

¹⁵⁸ Susan Rose-Ackerman, *Corruption and Government. Causes, Consequences and Reforms* (Cambridge University Press 1999)

¹⁵⁹ Samuel Piero-Freeman, 'The South African Arms Deal' <<https://sites.tufts.edu/corruptarmsdeals/2017/05/05/the-south-african-arms-deal/>> accessed 8 April 2018; Christopher Drew and Nicola Clerk, 'BAE Settles Corruption Charges' <<https://www.nytimes.com/2010/02/06/business/global/06bribe.html>> accessed 8 April 2018.

¹⁶⁰ Barbara Crutchfield George and Kathleen A. Lacey, 'Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement' (2006) 96(2) *Journal of Criminal Law and Criminology*; Francie Grace, 'Halliburton To pay SEC \$7.5M' CBS News (New York, 4 August 2004) <<https://star.worldbank.org/corruption-cases/node/19845>>. See also accessed 5 February 2016

¹⁶¹ Siri Schubert and Christian T Miller, 'At Siemens, Bribery Was Just a Line Item' <<https://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>> accessed 5 February 2016

¹⁶² Barnaby Pace and Oliver Courtney, 'Shell and Eni's Misadventures in Nigeria' <<https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria/>> accessed 5 February 2016

Contract Inflation and Kick-backs:

Kickbacks are mainly a government official's share of a contract awarded in favour of the contractor. In some cases, this amount ranges from between 5 to 20% of the contract value and as Hobbes suggests bribes are usually between 10-15% of the contract value, often recovered in the mark up the bidder places on the unit prices of the procurement items. As Rose-Ackerman observed that, 'top officials may select projects and make purchases with little or no rationale...if kickbacks are easier to obtain on capital investments and input purchases than on labour, rulers will favour capital-intensive projects irrespective of their economic justification'. Tanzi and Davoodi noted that 'high levels of corruption are associated with higher levels of public investment as a share of GDP. More corrupt countries spend relatively less on operations and maintenance and have lower level of infrastructure'. Because kickbacks have to be paid, the contract value is increased to proportions far exceeding the actual cost of the project to cover the interest of all stakeholders in the approval process. In a case brought before a Federal High Court In Kano, a past governor of Jigawa State, Nigeria, was alleged to have received over 1.35 Billion Naira in bribes and kickbacks as share of contract awarded to Dantata & Sawoe (a road construction company) for some road projects in the state. The proceeds of the kickback, paid into accounts controlled by the governor and his sons. Contract inflation constitutes a serious drain on a countries resources and the sole reason for the high cost of most government projects.

Embezzlement.

This is outright theft of entrusted funds by public officers and involves the misappropriation of money or property. Embezzlement is a widespread form of corruption in Nigeria. In embezzlement schemes, money flows can occur in a different number of ways and involve a variety of techniques. Techniques such as outright diversion of allocated funds, presentation of the false funding request, payments to non-existent companies for contracts deemed to have been performed, physical defalcation of government property. Defalcation of government property occurs where political office holders and their cronies cart away government property, from vehicles, office furniture, air conditioning set and every other valuable equipment for personal use. A former National Security Adviser to the Nigeria President, created and presented false funding request on national security issues, duly approved by the president, and physically siphoned cash in truckloads from the Central Bank of Nigeria and laundered these through domestic banks and foreign businesspersons to offshore accounts held by family members. In a related development, a Central Bank of Nigeria survey of highways in Nigeria between 1999 and 2001 revealed that through outright embezzlement, most of the road construction contracts awarded of over 2.03billion naira (\$13.54 million) were not performed as less than 10% of the appropriated amounts were actually expended, the rest amounts were embezzled by politicians and their cronies. Other notable cases of charges brought against past serving governors include: Orji Uzor Kalu of Abia State, charged with criminal diversion of public fund, official corruption and money laundering of 5.4 billion Naira (\$36 million); a former head of the anti-corruption agency, Ibrahim Lamorde is alleged to have diverted

over 1 Trillion Naira (\$5 Billion) of seized funds into his private use,¹⁶³and the alleged embezzlement of pension fund.¹⁶⁴

2.1.1 Money Laundering in The Real Estate Sector

Luxury investment such as in goods and real estate are preferred means for concealing illicit wealth from public office holders and criminals alike. The proceeds of corruption are often used to acquire real estates, sports cars and limousines, jet planes, yachts, precious metals and jewellery. This sector goes mostly unchecked by law enforcement agents in spite of the many known cases. Newspaper headlines abound as to the use of illicitly acquired wealth hidden in the purchase of assets of different magnitude. The following excerpt testifies: 'Abuja court orders seizure of property over pension fraud; 'ICPC seizes 100 houses acquired with the proceeds of corruption';¹⁶⁵ 'EFCC confiscates Igbinedion's property';¹⁶⁶ 'The UK property market has become a haven for corrupt capital stolen from around the world, facilitated by the laws which allow UK property to be owned by private secret offshore companies'.¹⁶⁷ In an article entitled 'Put an end to money laundering, bribery and corruption', Cobus de Swardt, Managing director of Transparency International stated that 'banks, real estate companies, and retailers

¹⁶³ Ikechukwu Nnochiri, 'Alleged Diversion of Recovered Loot: FG Okays Lamorde Probe', Vanguard (Lagos, 27 October 2015) <<http://www.vanguardngr.com/2015/10/alleged-diversion-of-recovered-loot-fg-okays-lamorde-for-probe/>> accessed 10 January 2016

¹⁶⁴ Soni Daniel, 'N33bn police pension scam: EFCC gets court order to seize suspects' property' Vanguard Newspaper (Lagos, 4 September 2013)

¹⁶⁵ 'ICPC Seizes 100 houses acquired with proceeds from corruption' Vanguard Newspaper (Lagos, 9 October 2013) <<http://www.vanguardngr.com/2013/10/icpc-seizes-100-houses-acquired-proceeds-corruption/>> accessed 16 March 2016

¹⁶⁶ Emma Ovuakporie, 'N3.2bn scam: Court Orders EFCC to Seize Igbinedion's Properties' Vanguard Newspaper (Lagos, 3 March 2011) <<https://www.vanguardngr.com/2011/03/n3-2bn-scam-court-orders-efcc-to-seize-igbinedions-properties/>> accessed 16 March 2016

¹⁶⁷ Transparency International, 'Property in the UK: A Home for Corrupt Money' <www.transparency.org/news/feature/property_in_the_uk_a_home_for_corrupt_money> accessed 18 July 2016

on high-end goods are the final links in this chain as they facilitate criminal behaviour by accepting illicit money as payment'.¹⁶⁸

The real estate sector has the following characteristics, which makes it vulnerable to money laundering: it has high value, making it attractive to both legal and illegal investment; it is a safe and prestigious investment; it has objective value that is difficult to access and dwells in a sector in which speculation is the order of the day. Criminals launder illicit funds in the real estate sector because it provides the opportunity for cash payment; the ultimate beneficial owner can be disguised; value of the estate can be increased through renovation or improvements; and most importantly, the purchases escape appropriate due diligence checks even in countries that require their non-financial businesses to comply with anti-money laundering regulations. In some cases, the acquisition of luxury goods occurs in jurisdictions different from where funds were initially misappropriated or mismanaged. The purchase of these luxury goods while it tends to extend the lavish lifestyle of the criminal perpetrators but ultimately seeks to allow dirty money to enter into the legitimate economy by converting it to seemingly clean assets. In an investigation into arms deal by former president Goodluck Jonathan's administration, it was alleged that proceeds of corrupt enrichment by a former governor of Sokoto State amounting to N4.6 billion are allegedly linked to 'ownership of luxury property in Abuja and Dubai in the United Arab Emirates.' The investigators also alleged that a then serving state governor, 'built for himself a multi-billion naira sprawling palatial complex at Iyamho. This one of a kind country

¹⁶⁸ Cobus de Swardt, 'Put an End to Money Laundering, Bribery, and Corruption' <www.gfintegrity.org/put-end-money-laundering-bribery-corruption/> accessed 1 July 2016

home, referred to as Mobutu Sese Seko Ranch, so named after the late brutal dictator of former Zaire, complete with a 18-hole golf course; swimming pools and Jacuzzi; kebab/suya grottos; mini-zoo with exotic animals/birds' sanctuaries; football/basketball court and an underground discotheque; amphitheatre; manmade lakes and caves as well as an helipad. Mobutu had an airstrip! Astonished observers refer to it as the Versailles of the jungle.¹⁶⁹

The following reasons adduced by the GIABI report provides the attractiveness of the real estate sector as a vehicle for money laundering in West African region: 'Investment in real estate easily serves as a means to wash criminal proceeds in order to gain legitimate profits, which are then used to commit further crimes: as financing the proliferation of small arms and light weapons used to fuel conflicts in most parts of the region; illicit fund directly invested in real estate are laundered when properties are subsequently hired, leased or used as educational, health or other facilities; ownership of real estate can often be held as trusts and companies; and in the names of fictitious persons or front men, while beneficial owners live in other countries'.¹⁷⁰ Other reasons adduced as responsible for laundering in the real estate sector include: lack of AML/CFT experience and expertise within the region, purchasing of real estates are done mainly in cash thereby leaving no trail.

According to PIDA estimates, urbanisation in Africa will increase from 40% in 2010 to 56% in 2040, which portends the increase in portable houses for the inhabitants of major cities throughout the continent. This is coupled with the growth of real-

¹⁶⁹ 'PDP Asks Governor Oshiomhole to Return N42 Billion Security Votes' <<http://news247ng.com/pdp-asks-governor-oshiomhole-to-return-n42-billion-security-votes/>> accessed 4 April 2016

¹⁷⁰ Shehu Abdullahi, 'Typologies of Money Laundering through the Real Estate Sector in West Africa: Final Report' (GIABA 2008) 16

estate-backed investment and the development of property investment funds that offers attractive returns. Corrupt officials who steal government monies have found this as a legitimate means of integrating their illicit proceeds. The motive of corrupt enrichment in some cases is to guarantee their future. Purchasing real estate provides officials with a significant investment that has the appearance of financial stability as it offers them a prolonged supply of cash to meet their daily needs after leaving office. To political office holders, the knowledge that the position held is temporary is inevitable; therefore for sustainability, illicit wealth can be invested in the construction of portable houses, build hotels and shopping complexes to earn rental income. These estates can be acquired using front men (solicitors, accountants, other professionals, investment fund managers or agents).

2.1.2 Security Votes and Money Laundering

Internationally and locally, the issue of national security is continuously on the front burner, and its administration sits within the top hierarchy of government. National security has been broadly seen to consist of the protection and defence of a country's territorial integrity, promotion of peaceful co-existence in the polity, containing/eliminating threats to internal security, ensuring systemic stability and bringing about sustainable and equitable socio-harmony, peaceful culture, nurturing civility, promoting good governance, transparency and structural reforms amenable to democratization.¹⁷¹ Governments often get involved in corrupt deals in the guise of national security, for public interest or on legal grounds.¹⁷² For

¹⁷¹ Okechukwu I. Eme and Nkechi Anyadike, 'Security Challenges and Security Votes in Nigeria 2008 – 2013' (2013) 2 Kuwait Chapter of Arabian Journal of Business and Management Review 8

¹⁷² UK Bribery Act, 2010. S.13 states that 'it is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for: a) the proper exercise of any function of an intelligence service, or, b) on the proper exercise of any function of the armed forces when engaged on active service.' This means that a person who is engaged on active service herein described as 'an action or

instance, moneys paid for tipoffs to informants and whistle blowers is a corrupt deal in itself but for legal and national security considerations, it is defined otherwise.

In Nigeria three security agencies – State Security Services (SSS), National Intelligence Agency (NIA) and Defence Intelligence Agency (DIA) are the creation of law¹⁷³ requires to carry out security operations within and outside the country and to be co-ordinated by the National security Adviser.¹⁷⁴ The agencies have their respective spheres of coverage. The Defence Intelligence agency is responsible for the ‘prevention and detection of crime of a military nature against the security of Nigeria;¹⁷⁵ the protection and preservation of all military classified matters concerning the security of Nigeria within and outside the country;¹⁷⁶ and such other responsibilities affecting defence intelligence of a military nature.¹⁷⁷ The National Intelligence Agency is charged with the responsibility of the general maintenance of the security of the country concerning matters that are not related to military issues and such other matters affecting national intelligence that is outside the country. The last creation of the Act is the State Security Service, whose responsibility is to protect and defend the Federal Republic of Nigeria against domestic threats; to uphold and enforce the criminal laws of Nigeria; and, to provide leadership and criminal justice services to both Federal and State law-enforcement organs responsible for intelligence gathering within the country and for the

operation against an enemy, an operation for the protection of life or property or the military operation of a foreign country or territory’ who gives a bribe for the purposes of performing his lawful duty may have no case to answer.

¹⁷³ National Security Act No. 19 of 1986 Laws of the Federal Republic of Nigeria.

¹⁷⁴ Section 4(1) states that ‘to coordinate the intelligence activities of the National Security Agencies...there should be appointed by the President a Co-ordinator on National Security. National Security Act No. 19 of 1986 Laws of the Federal Republic of Nigeria.

¹⁷⁵ National Security Act S.2(1)(a) – Laws of the |Federal Republic of Nigeria

¹⁷⁶ National Security Act S.2(1)(b) – Laws of the |Federal Republic of Nigeria

¹⁷⁷ National Security Act S.2(1)(c) – Laws of the |Federal Republic of Nigeria

protection of senior government officials, particularly the President and State Governors. Specifically, S.3 provides the responsibilities of the state security services, which includes: the prevention and detection within Nigerian of any crime against the internal security of Nigeria, the protection and preservation of all non-military classified matters concerning the internal security of Nigeria; and such other responsibilities affecting internal security within Nigeria. As Nwozor observes: National security in Nigeria is still conceived from the prism of the realist paradigm. The strategy often adopted by the Nigerian state is anchored on the deployment of superior firepower to contain what the state has identified as threats to it, which often coincides with the interest of the ruling elite.¹⁷⁸ Worldwide, national security expenditure is substantial and Nigeria is not an exception. The Nigerian government spends significant portions of its federal budget on defence and national security. It is estimated that between 2005 and 2015 over 768 billion Naira (\$4.6 billion)¹⁷⁹ have been budgeted and spent on national security alone and non-budgetary spending based on national interest has been allowed in some appropriation Acts.

Security vote is a budget line that acts as a source of discretionary spending that the executive arms of government can use to respond quickly and efficiently to threats of peace and security in their jurisdictions. It is a known fact that national security issues are dealt with utmost secrecy and over time evidence of abuse and the utility value of the covert operations have been questioned.¹⁸⁰ During the

¹⁷⁸ Nwozor, A 'National Security, Religious Anarchism and the Politics of Amnesty in Nigeria' (2013) 1(1) *Convent Journal of Politics and International Affairs*

¹⁷⁹ Based on researcher's computations from the Nigerian Approved Appropriation Acts.

¹⁸⁰ John Stockwell, *In Search of Enemies: A CIA Story* (George J. McLeod Limited 1979)

Nigerian military regimes, large-scale violations of the security vote system occurred at the very top of the hierarchy. The issue of corruption and outright theft through the diversion of public funds under the guise of national security has raised very alarming signals in Nigeria. Egbo argued that this abuse of security vote commenced with the administration of General Ibrahim Babangida who was 'ruthless in the way he amassed his immense wealth through the illegal self-allocation of free oil, sold on the spot market, and how he initiated the corrupt culture of maintaining a huge monthly security vote virtually as personal pocket money.'¹⁸¹ Under Babangida, it was widespread for government cheques running into millions of tens of dollars to be in ones' name. A case in point was a \$75 million cheque for the procurement of arms and ammunition for the armed forces intended to fund weapons procurement for Nigerian troops stationed in Liberia written in the name of General Sani Abacha with little or nothing received.¹⁸² During the regime of General Sani 'between November 1993 and June 1998, Abacha directed his national security adviser, Alhaji Ismail Gwarzo to withdraw from the Central Bank of Nigeria a total of \$1.6 billion and £417 Million for security purposes, only £250,000 and \$195 million went for that purpose.'¹⁸³ Former President Olusegun Obasanjo is alleged to have tried to force through a constitutional amendment that would allow him to contest for the presidency a third time with the aid of the security vote.¹⁸⁴ In a related instance, the then Minority leader of the Federal House of Representatives Mr Ndume asserted that 'it was during his tenure (Olusegun Obasanjo) that corruption moved from low to high level. It was during his tenure

¹⁸¹ Obiamaka Egbo, Ifeoma Nwakoby, and Josaphat Onwumere, Chibuiké Uche, 'Legitimizing Corruption in Government: Security Votes in Nigeria' (2010) ASC Working Paper 91/2010

¹⁸² *ibid*

¹⁸³ *ibid*

¹⁸⁴ Although Olusegun Obasanjo denied to have lobbied for a third term in office, former President Goodluck Jonathan confirmed otherwise.

that he (Obasanjo) gave N50 million each to members of this house to extend his tenure.’ To further underscore the wanton looting of public fund in the name of national security, President Muhammadu Buhari opened an investigation on the procurement of hardware and munitions in the armed forces from 2007 till 2015 with the mandate to identify irregularities and make recommendations for streamlining the procurement process in the Nigerian armed forces. Preliminary findings of the committee reveal extra-budgetary interventions of N643.8 billion (\$3.2 billion) and a foreign currency counterpart of \$2.2 billion. Furthermore, the committee observed that of the ‘513 contracts awarded at \$8.356 billion; N2.2 trillion and €0.054 million; Fifty Three (53) were failed contracts amounting to \$2.4 billion and N13.7 billion respectively’. It further observed that the amount of foreign currency spent on failed contracts was more than double the \$1 billion loan approved to fight the insurgency in the country. Other findings include the payment to a single company N3.85 billion without documented evidence of contractual agreements or fulfilment of tax obligations; the award of fictitious contracts not executed of N2.2 trillion, \$1.67 billion and €9.9 million respectively; and the transfer of \$132.05 Million and €9.9 million to the accounts of Societe D'equipement Internationalaux in West Africa, United Kingdom and United States of America for un-ascertained purposes, without any contract documents to explain the transactions.¹⁸⁵ Further investigations revealed that some moneys appropriated for security vote were used to finance the 2015 presidential election of the incumbent. According to a Chairman of DAAR Communications Group, Mr Raymond Dokpesi, alleged to have received N2.1 Billion in the arms deal scandal, he explained to the anti-graft agency that payments were received from the

¹⁸⁵ ibid

national security adviser's office 'for publicity and media political campaigns during the 2015 general elections which were dutifully carried out based essentially on contractual obligations/relationships.'

The abuse of security votes in Nigeria is not only limited to the office of the national security adviser but across the three tiers of government (federal, state and local government). According to Chief Ebitu Ukiwe, a retired air commodore and former Chief of General Staff (Vice – President) in the administration of General Ibrahim Babangida, 'the amounts mentioned as security votes these days... are outrageous and subject to abuses since nobody accounts for them'. Human Rights Watch asserted that 'the use of the funds is notoriously opaque; there are no requirements that governors or local government chairpersons account for the use of those funds. In many cases, security vote has been used by state and local governments to incite violence and co-opt political opponents or has been lost to graft and patronage.' The use of security vote has been widely criticised as a virtual carte blanche to the president and state governors to squander billions of naira in state allocations without scrutiny. For instance, in a single year over N410 billion is allocated to security vote to the state governors who in most cases are accused of pocketing the funds for their private use¹⁸⁶. While security vote is a yearly appropriated item, it is evident that accountability on the part of its discretionary use is what fuels corruption in the system. Although the

¹⁸⁶ Punch Newspaper December 4, 2015. The President of the Nigeria Labour Congress, Ayuba Wabba, warned that workers would not take any reduction in the minimum wage lightly. He said, 'The problem is that they have not been able to reduce the cost of governance. They should reduce their security votes. Let them also cut down on the number of their entourage.' See also The Nation Newspaper December 3, 2015, a former governor of Bauchi State Isa Yuguda alleged of diversion of N6.1 Billion security votes for personal use.

constitution¹⁸⁷ empowers the national assembly to have an oversight function over the expenditure of the executive, this is far from the case as both arms cases use such as bargaining chips for their interest.

2.2 Capital Flight

Sub Saharan African countries are riddled with heavy debt burdens, shortages in foreign exchange, infrastructural deficits, and poverty which has created a lot of concerns among policymakers and researchers. However, the problem of capital flight is one area in which substantial proportion of resources has gone unchecked, would have helped to finance economic growth necessary to reverse the perversely apparent economic trend. A report released emphasising the enormity of the problem of capital flight; it is estimated that between 1970 and 2010 total capital flight from 33 countries in SSA amounts to USD 814.2 billion. These countries lost USD 202.4 billion between 2005 and 2010 alone. Regarding cumulative capital flights, the African LDCs account for 69 percent of total capital outflow from the world LDCs, followed by Asia (29 percent) and Latin America (2 percent).

Historically, several initiatives and legislations have been put in place to curtail capital flight in SSA:¹⁸⁸ Exchange Control laws, Indigenization laws, controls on diamond trade, peso black market, sanctions and other policy measures just to name a few geared towards retaining the outward flow of capital.

¹⁸⁷ Constitution of the Federal Republic of Nigeria. [Nigeria] Act No. 25, 5 May 1999.

¹⁸⁸ Andrew A. Beveridge, 'Economic Independence, Indigenization, and the African Businessman: Some effects of Zambia's Economic Reforms' (1974) 17 (3) African Studies Review 477

Capital flight has been given a wide range of definition as there is no consensus about its meaning. Outflows from developed countries are called foreign direct investment or development aids, while from developing nations the same activity is called capital flight.¹⁸⁹ Perception also varies between investors in developed countries who are seen as responding to opportunities abroad as opposed to an investor in the developing country seen to be escaping the high risks perceived at home. In this regard, Capital flight has been defined as one that, ‘appears to consist of a subset of international asset redeployment or portfolio adjustments – undertaken in response to significant perceived deterioration in risk/return profiles associated with assets located in a particular country – that occur in the presence of conflict between objectives of asset holders and government. It may or may not violate the law. It is always considered by authorities to violate an implied social contract.’¹⁹⁰ The definition rather focuses on the capital flight as private sector phenomena and does not address the situation of developing countries since it makes no distinction between government officials and private enterprises¹⁹¹. Capital flight is an economic activity performed by rent seekers who intend to maximise their portfolio by investing in reasonably safer climes. Evidence indicates that ‘African agents move their portfolios as a result of deteriorating domestic investment climate where the risk adjusted rate of return is unfavourable’ and this is a direct consequence of policy distortions, poor profitability as well as the structural and institutional features of African economies. While this would explain

¹⁸⁹ Ajayi, S. I, ‘An Analysis of External Debt and Capital Flight in Severely Indebted Low-Income Countries in Sub-Saharan Africa, (1997) 11 WP/97/68

¹⁹⁰ Walter, I. ‘The Mechanisms of Capital Flight’ in D.R. Lesand and J. Williamson (eds) *Capital Flight and the Third World Debt* (Institute for International Economics 1987)103

¹⁹¹ Ajilore, O. T, ‘External Debt and Capital Flight in Nigeria: Is there a revolving door?’ (2005) 8 (2) SAJEMS NS

the outflow of private capital from SSA arising from legitimate business dealings, one cannot fathom the huge deposits in foreign banks the stolen wealth by officials in government. For instance, the Democratic Republic of Congo (formerly Zaire) was enmeshed in heavy debt burden, but it was reported that the President, Mobutu Sese Seko siphoned between USD 4 to 6 billion well invested in Swiss accounts and in foreign real estate. From 2004 to 2008, Teodoro Nguema Obian Mangue, the son of the president of Equatorial Guinea, used U.S lawyers, bankers, real estate agents, and escrow agents to move over USD 100 million in suspect funds in to the United States. The Swiss account of General Sani Abacha who ruled Nigeria for five years, reportedly contain as much as USD 2 billion at the time it was frozen in 1999 and a US Senate enquiry in the same year revealed that the Abacha family held multi-million dollar accounts with Citibank in London and New York. Ajayi noted that 'capital flight is motivated by corruption and political instability'¹⁹² for many countries in sub-Saharan Africa. He explains that 'when corrupt officials have access to foreign exchange through political offices and the prerequisites of the office, there is the tendency to siphon some of the money abroad not primarily to earn interests but to a safe haven where the money cannot be easily detected, and outside the purview of domestic authorities.'¹⁹³ Funds are less subject to seizure if a new regime takes over power, it could provide access to luxury goods that may not be available locally and such funds could be used to curry favour in other countries which might later provide a haven if the new government decides to clamp down on past corrupt officials. Taking this into cognisance, he defined capital flight as:

¹⁹² Ajayi (n189) 12

¹⁹³ Ibid 12

*The acquisition or retention of a claim on non-residents that is motivated by the owner's concern that the value of this asset would be subject to discrete losses or impairment if his claims continued to be held domestically.*¹⁹⁴

Capital flows from developing countries could reasonably be labelled capital flight, first 'for the presumption in economics that the movement of capital should be from capital surplus countries to scarce capital countries'. It is therefore unusual that developing countries suffering from the scarce capital have huge capital outflows. According to a recent estimate, the cumulative stock of capital flight – the voluntary exits of private resident capital either for a safe haven or for investments made in foreign currency – from sub Saharan Africa amounts to USD 606.7 billion over the three decades spanning 1970 – 2004.¹⁹⁵ Furthermore, a recent study by Ndikumana and Boyce shows that SSA is a 'net creditor' to the rest of the world.

Second, from a policy perspective, external funds held abroad could be utilised at home to reduce the level of foreign indebtedness and relieve the inherent liquidity problems brought about by external debt service obligations.¹⁹⁶ Capital flight undermines economic growth and the effectiveness of debt relief and foreign aid. Ajayi argues that any 'money sent away to foreign lands cannot contribute to domestic investment, therefore, capital flight is a diversion of domestic savings away from real domestic investment.'¹⁹⁷ The monies are also not available for the importation of equipment and materials that are necessary for the growth of the domestic economy. Furthermore, foreign aids, direct investment, and debt relief

¹⁹⁴ Ibid 11

¹⁹⁵ Hippolyte Fofack and Leonce Ndikumana, 'Potential Gains from Capital Flight Repatriation for Sub-Saharan African Countries' (2009) WPS5024

¹⁹⁶ Ajayi (n189) 12

¹⁹⁷ Ibid 12

are intended to allow developing countries to use domestic resources to exit from poverty rather than forcing domestic savings to flow out of the country. Sachs et al. argue that poor nations, especially in Africa are caught in the coils of poverty trap characterized by high transport costs, low agricultural productivity, high disease burdens, unfavourable geopolitical factors, and slow diffusion of technology from abroad.¹⁹⁸ Unfortunately, many of these countries are losing more resources through capital flight than through debt servicing. The efforts by donor countries to improve savings is ineffective as capital flight results in loss of scarce domestic resources. The issue of capital flight is best described in the words of Ajilore: *'capital enters the country in the guise of external borrowing and simultaneously slips out of the country as private capital flight'*.¹⁹⁹ More so, capital flight weakens not only capital formation but 'also causes an economic slowdown, leading to a sluggish rate of regional integration and productivity'. It is also argued that the tendency 'puts on adverse effects on performance of the economy as it makes the financial sector to lose potential resources and negatively affect the balance of payment and as well develop rent-seeking behaviours'.²⁰⁰ While public sector corruption accounts for some percentage of capital flight, it has been argued that 'the lion's share of developing countries tax losses result from tax dodging (evasion and avoidance) by multinational corporations'.²⁰¹

¹⁹⁸ Jeffery Sachs and others, 'Ending Africa's Poverty Trap' in Cerra Valerie, Rishi M, and Saxena S.C 'Robbing the Riches: Capital flight, Institutions, and Instability' (2005) WP/05/199

¹⁹⁹ Ajilore (n191) 211

²⁰⁰ Eshete Z, S. 2014 'The Political economy of capital flight: Governance Quality and Capital Flight in East Africa Community' (2014) 2(5) American Journal of Social Sciences 95

²⁰¹ Henri Purje, Matti Ylönen and Pasi Nokelainen (eds), *Illegal Capital Flight from Developing Countries: Development Assistance from the Poor to the Rich* (The Service Centre for Development Cooperation, KEPA 2010)

Capital flight defined as ‘the unrecorded and (mostly) untaxed illicit leakage of capital and resources out of a country’²⁰² Flight capital involves ‘domestic wealth put beyond the reach of appropriate domestic authorities due to deliberate misreporting. It is associated with active attempts to hide its origin, destination, type, true ownership and flees to secrecy; and it is associated with public loss and private gain because little or no tax is paid on it.’²⁰³ Capital flight is interchangeably, referred to as illicit financial flows. Illicit financial flows are ‘generated by methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national and international laws’²⁰⁴. The definitive characteristics of illicit are that: ‘(1) the acts involved are themselves illegal (corruption or tax evasion) in a regime that has some democratic legitimacy, or (2) the funds are the indirect fruits of illegal acts (for example, benefits given to those who have provided illegal funding of a presidential election)’.²⁰⁵ About nine times the amount of world's total development assistance budgets ends up in rich countries using illegal capital flights.²⁰⁶ Illicit financial flow involves the following practices: money laundering, bribery by international companies, tax evasion and trade mispricing. It could also include embezzlement of borrowed funds, kickbacks on government contracts, misappropriation of revenues from state-owned enterprises and smuggling of natural resources.²⁰⁷ Evidence shows that between 2003 to 2012 Sub Saharan Africa accounts for 8% of illicit financial flows and has the highest illicit outflow to

²⁰² Sony Kapoor, ‘Haemorrhaging Money: A Christian Aid briefing on the Problem of Illicit Capital Flight’ <<http://www.financialtransparency.org/wp-content/uploads/2015/04/haemorrhaging-money-briefing-on-the-problem-of-illicit-capital-flight.pdf>> accessed 1 February 2016

²⁰³ Ibid 7

²⁰⁴ Organization for Economic Co-operation and Development, *Illicit financial Flows from Developing Countries: Measuring the OECD Responses* (OECD Publishing 2014) 16

²⁰⁵ Peter Reuter, *Draining Developments? Controlling Flows of Illicit Funds from Developing Countries* (World Bank 2012)

²⁰⁶ Purje (n201) 3

²⁰⁷ Ajilore (n191) 212

GDP ratio of 5.5%²⁰⁸ which represents significant lost capital and investment resources with adverse ripple effects far into the future. The motivation for illicit flows from political actors in SSA as Blankenburg and Khan (2014) contends is that ‘their opponents may expropriate their assets if the opponents come to power’.²⁰⁹ Since the legality of their wealth can be ‘questioned by the ruling coalition for some reasons, including expeditious political reasons...to undermine the ability of previous ruling factions to return to power’.²¹⁰ Weeks asserts that, it is quite difficult to transform the common sense ideas that money runs away to avoid taxation, confiscation, in search of better treatment or of higher returns into rigorous economic definitions and analysis. It is perhaps better to first identify capital flight as ‘an illegal or semi-legal activity that governments must take action to prevent, not as financial reallocation in reaction to government macroeconomic policies’.²¹¹ He contends that capital flight results from ‘anti-social activities recognised to be illegal in all but a few countries....its control requires interventions specifically designed for the *regulation of cross-border financial flows*’.²¹²

Capital flight is further facilitated by tax havens and offshore financial centres who offers an extensive array of facilities to willing investors who are unwilling to disclose the source of their assets. It is estimated that \$21 - \$32 trillion of private wealth is located, untaxed or lightly taxed in secrecy jurisdictions around the world, of which since 1970 African countries alone have lost over \$1 trillion in capital flight

²⁰⁸ Dev Kar and Joseph Spanjars, *Illicit financial flows from Developing Countries 2003 – 2012* (Global Financial Integrity 2014)

²⁰⁹ Reuter (n205) 45

²¹⁰ Ibid 45

²¹¹ John Weeks, ‘Macroeconomic impact of capital flight in Sub-Saharan Africa’ in Ibi S. Ajayi and Léonce Ndikumana (ed) *Capital Flight from Africa: Causes, Effects, and Policy Issues* (Oxford University Press 2014)

²¹² Ibid 7

while combined external debts are less than \$200 billion.²¹³ Offshore financial centres secure global business through the provision of trust and company administration; provide specialized services involving banking, shipping, corporate consultancy, structured financial transactions, insurance and mutual fund administration prompting wealthy citizens and companies with keen advice from professionals. Professionals give advice on appropriate tax planning mechanisms to claim residence in such havens with a view to avoid or reduce tax payments and a host of regulations.

The secrecy world creates a 'criminogenic hothouse for multiple evils including tax fraud, tax cheating, escape from financial regulations, embezzlement, insider dealing, bribery, money laundering and many more.'²¹⁴ Below are countries with high financial secrecy ranking attracting proceeds from corrupt public officials who embezzle the public treasury.

²¹³ Financial Secrecy index, 'Introduction'
<<http://www.financialsecrecyindex.com/index.php/introduction/introduction>> accessed 15 December 2017

²¹⁴ Financial Secrecy Index, 'FSI Ranking 2015'
<<https://www.financialsecrecyindex.com/Archive2015/Notes%20and%20Reports/FSI-Rankings-2015.pdf>> accessed 15 December 2017

RANK	Jurisdiction	FSI Value ⁴	Secrecy Score ⁵	Global Scale Weight ⁶
1	Switzerland ²	1,466.1	73	5.625
2	Hong Kong ²	1,259.4	72	3.842
3	USA ²	1,254.8	60	19.603
4	Singapore ²	1,147.1	69	4.280
5	Cayman Islands ^{1,2}	1,013.2	65	4.857
6	Luxembourg ²	817.0	55	11.630
7	Lebanon ²	760.2	79	0.377
8	Germany ²	701.9	56	6.026
9	Bahrain ²	471.4	74	0.164
10	United Arab Emirates (Dubai) ^{2,3}	440.8	77	0.085
11	Macao	420.2	70	0.188
12	Japan ²	418.4	58	1.062
13	Panama ²	415.7	72	0.132
14	Marshall Islands	405.6	79	0.053
15	United Kingdom ^{1,2}	380.2	41	17.394
16	Jersey ²	354.0	65	0.216
17	Guernsey	339.4	64	0.231
18	Malaysia (Labuan) ³	338.7	75	0.050
19	Turkey	320.9	64	0.182
20	China	312.2	54	0.743
21	British Virgin Islands ^{1,2}	307.7	60	0.281
22	Barbados	298.3	78	0.024
23	Mauritius ¹	297.0	72	0.049
24	Austria ²	295.3	54	0.692
25	Bahamas ¹	273.1	79	0.017
26	Brazil ²	263.7	52	0.678
27	Malta	260.9	50	0.990
28	Uruguay ²	255.6	71	0.037
29	Canada ²	251.8	46	1.785
30	Russia	243.3	54	0.397

Figure 4 - Financial Secrecy Index 2015

Source: <https://www.financialsecrecyindex.com/Archive2015/Notes%20and%20Reports/FSI-Rankings-2015.pdf>

The table shows that among the top financial havens are the world's biggest and wealthiest nations such as the USA, UK and its colonies, Switzerland which underscores the problem of curtailing capital flight in sub-Saharan Africa. Senator Patrick Leahy a United States Senator who played a crucial role in passing the congressional amendment barring corrupt officials from entering the United States once said, 'natural resources are the only significant source of wealth in many developing nations, and we have seen how the proceeds can be exploited by

government officials for their self-interest. Some of these depots have used this ill-gotten wealth to live in luxury in the United States. *We should not facilitate their crimes against their people*.²¹⁵ Some have identified the lack of action by these developed economies for curbing the tide of illicit capital flows to the close relationship between developing countries' wealth and multinational oil and other natural resources companies in the developed economies. Global Witness – a UK based non-governmental organisation, states that 'British banks have accepted millions of pounds from corrupt Nigerian politicians raising questions about their commitment to talking financial crime.' Global Witness argues that without 'access to the international financial system corrupt politicians from the developing world' would find it 'difficult to loot their national treasuries' and transfer to safe havens. The typical image of a tax haven is a tropical island like Bermuda or the alpine scenery of Switzerland, but tax havens are also found in the European Union.²¹⁶ It is estimated that the city of London is the world's biggest tax haven.²¹⁷ According to one report, 'the European Union and its leaders appear to be active in tackling capital flight, but concrete initiatives have so far had only a minor impact on the capital flight leaving developing countries'.²¹⁸ Since access to the international financial system is not restricted, and businesses transacted through proxies, agents and other legal means, it behoves on the governments of developed countries to use necessary control mechanisms to prevent the illicit flow. In most instances, poor PEP controls have resulted in states receiving millions of stolen wealth. Pierre Falcone, a notorious arms dealer and ally of Angolan President

²¹⁵ *ibid*

²¹⁶ *ibid*

²¹⁷ *ibid*

²¹⁸ *ibid*

Jose Edmondo dos Santos, for 18 years, between 1989 to 2007 made use of 30 bank accounts (made up of personal, family and shell companies) in Bank of America to bring in millions of US dollars in suspect funds into the United States and move those monies among a worldwide network of accounts.²¹⁹ The report admits that ‘although aware of his status as an arms dealer, the Bank of America did not treat Mr Falcone as a PEP, did not designate his account as high risk and maintained the Falcone accounts with few questions’.²²⁰ Similarly, Teodoro Obiang was able to move over \$100million in suspect funds into or through the US financial system²²¹ mainly due to lack of amphitheatre PEP controls and safeguards. Capital flight also takes other forms among which are criminal acts, tax evasion, trade based money laundering, over/under invoicing and trade mispricing.

Trade Based Money Laundering

The FATF defines Trade Based Money Laundering (TBML) as ‘the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origins’.²²² Trade based money laundering can be achieved through the misrepresentation of the price, quantity or quality of imports and exports. The FATF study identifies the following TBML techniques:

- over-and under-invoicing of goods and services;

²¹⁹ Carl Levin, Tom Coburn, ‘Keeping Foreign Corruption out of the United States: Four Case Histories’ <<https://www.hsgac.senate.gov/imo/media/doc/FOREIGNCORRUPTIONREPORTFINAL710.pdf>> accessed 4 February 2016

²²⁰ Ibid 249

²²¹ Ibid 105

²²² Financial Action Task Force, ‘Trade Based Money Laundering’ <<http://www.fatf-gafi.org/media/fatf/documents/reports/Trade%20Based%20Money%20Laundering.pdf>> accessed 8 June 2016

- multiple invoicing of goods and services;
- over-and under-shipments of goods and services; and
- falsely described goods and services

TBML practices varies in complexity which involves the abuse of both the financial international trade system and more complex schemes integrate the above mentioned techniques into a web of multifarious transactions that obscures the money trail and complicates detection. TBML risk arises due to the enormous volume of cross border trade, often-complex trade/financing transactions, possibility of commingling of illicit funds with legitimate fund transactions and limited exchange of customs data on international level. The FATF also notes that, 'the size and scope of Free Trade Zones makes it difficult to effectively monitor incoming and outgoing cargo, repackaging and relabeling. Some FTZs export billions of dollars of transactions per year but have fewer authorities to monitor and examine cargo and trade transactions. The relaxed oversight in FTZs makes it more challenging to detect illicit activity and provides opportunity for misuse. As a result, the FTZs provide a setting in which certain TBML schemes are more easily conducted'.²²³

Trade Mispricing refers to the intentional misstating of the value, quantity, or composition of goods on customs declaration forms and invoices, usually for the reason of evading taxes of money laundering. Trade mis-invoicing could be in the way of import under-invoicing, import over-invoicing, export under-invoicing and

²²³ Financial Action Task Force, 'Money Laundering vulnerabilities of Free Trade Zones' <<http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20vulnerabilities%20of%20Free%20Trade%20Zones.pdf>> accessed 8 June 2016

export over-invoicing. The excess of funds to cover the inflated invoice are transferred abroad and deposited in offshore bank accounts, while in under-invoicing, the aim is to reduce associated tax payments and retain the difference. Companies also engage in fictitious trade transactions in the form of services rendered which are paid for even though the products or services do not exist. Capital flight occurs in a disguised way since it is under a legitimate sounding transaction aimed at recording the invoice value in spite of the fact that the real value is not captured in official government statistics. As a result, millions of dollars are deprived of developing countries by corporations. In one survey, Global financial integrity estimates that in 2006 €375 – 400 billion were sent offshore from developing nations through transfer pricing mechanisms. The primary issue with capital flight related to trade mispricing is that in SSA commodities imports are over-priced whereas exports are low-priced thereby creating a loss position in the region. The money transferred abroad in the form of capital flight entails that the domestic entity reports below-normal profits, as a result, pays lesser taxes that would be required. In sub-Saharan Africa, trade mispricing accounts for 68.2 percent while illicit hot money outflows accounts for 31.8%.²²⁴ As Kapa report observes, 3.5% of all capital flights in developing countries is due to corruption, 30% due to international crime and 64% is due to illegal commercial capital flights. Studies indicate that for South Africa alone, mis-invoicing is an important source of capital flight and has remained consistently high for the period under review.²²⁵

²²⁴ Kar (n208) 16

²²⁵ Gabriel Palmer, 'The Three Routes to Financial Crises: The Need for Capital Controls' (2000) 18 Centre for Economic Policy Analysis 17; Seeraj Mohamed and Kade Finnoff, 'Capital Flight from South Africa, 1980 – 2000' (Forum on African Development and Poverty Reduction The Macro-micro linkage, Somerset West, South Africa, October 2004)

Tax evasion by companies, especially multinational corporations is apparently a significant source of capital flight. Funds generated are transferred to a subsidiary located in tax havens at either high or low price, the associated profits distributed to minimise the tax burden. Attention in this research is focused on capital flight arising from corruption so less attention is paid on tax evasion and trade mispricing.²²⁶

CONCLUSION

Combating capital flight and illicit financial flows, which is a cross-border activity, requires international cooperation and support from the developed countries. It is widely believed that the developed countries do little or rather pay lip service to the massive looting of the economies of developing countries since they inadvertently benefit from the inflows. While this belief may not be sufficiently substantiated, in the end, illicit flows help to fund development in those tax havens at the expense of the looted economies. There is, therefore, the need to strengthen bilateral and multilateral agreements and cooperation between the known shelters and most countries in Sub Saharan Africa to curtail the tide of illicit financial flows. All relevant deliberations and proceedings initiated by the appropriate agencies of government geared towards developing strategies and mechanisms in the entire range of international cooperation including extradition, mutual legal assistance, and transfer of sentenced persons, transfer of criminal proceedings, international cooperation for confiscation including asset recovery and international law

²²⁶ According to Amnesty international, the vast majority of (illegal) capital flight in South Africa arises out of transfer pricing by conglomerates, especially in and around mining and forms part and parcel of a more general adjustment. See Sam Asman, Ben Fine and Susan Newman, 'Amnesty International? The Nature, Scale and Impact of Capital Flight from South Africa' (2011) 37(1) *Journal of South African Studies*,7

enforcement cooperation. A robust framework developed within the region to enhance cooperation and discouragement of the tide of illicit financial flows.

Greater transparency in the financial systems is at this moment advocated which amongst others things includes: curbing the opacity in the global economic system such as tax haven secrecy, the formation of anonymous companies and improving detection techniques of politically exposed persons and their modus operandi. Also, institutional reforms necessary to strengthen existing laws and framework designed to mitigate illicit outflows from the region should be pursued vigorously. In the same vein, appropriate mechanism and legal framework to seek the repatriation of stolen funds hidden in havens and appropriate sanctions imposed on political office holders who are involved in this selfish act be pursued. As emphasised in Chapter 8, strong political will, independence of the judiciary and other law enforcement agencies, will reduce the impunity by political elites. Individual countries should strengthen initiatives to check tax evasion by ensuring that there are adequate checks in place to investigate transfer pricing, trade mispricing, over/under-invoicing and tax planning methods employed by multinational cooperation who under disclose profits thus reducing the tax payable. Also, trust schemes and other offshore investments embarked upon by legal entities should be ex-rayed to determine the beneficial owners of those entities, since politically exposed persons could be owners of these companies. Strengthening anti-money laundering controls, increase the cost of sanctions and penalties to banks so that the cost of compliance should outweigh non-compliance.

CHAPTER THREE

IMPLEMENTATION OF INTERNATIONAL MONEY LAUNDERING INITIATIVES

Over the years we have witnessed the ever increasing burdens imposed by law, regulation or just best conduct, on those who mind other people's wealth in the ordinary course of their business to be fully aware for whom they act and the circumstances and derivation of any relevant property.²²⁷ How appropriate are measures designed to inhibit the laundering of criminal property and other suspect wealth, when balanced against the risks and responsibilities and therefore costs imposed on banks, other financial institutions and increasingly professional advisers. The obligation to report suspicions that wealth is the proceeds of crime or related to terrorist activity has resulted in arguably the great burden on intermediaries and their advisers.²²⁸ There are jurisdictions in which there is a broad obligation to report to the authorities almost all serious crime, but, there are, of course, exceptions and the one that is perhaps most pervasive relates to suspicion that property constitutes or represents a benefit derived from criminal conduct.²²⁹ The principle of collective security entails that nations could deal with mutual problems through collaboration and by concerted effort instead of handling issues in isolation. Money Laundering initiatives is further necessitated by growth of international regimes and institutions; proliferation of non-state actors, the increasing interpenetration of domestic and international systems,²³⁰ and the creation of formal and informal regimes within the international arena.

²²⁷ Barry A. K. Rider, 'Editorial: A Privilege or a Curse!' (2017) JFC 24(4), 494–495

²²⁸ *ibid*

²²⁹ *ibid*

²³⁰ Harold Hongju Koh, 'Why Do Nations Obey International Law' (1997)106 Yale L.J. 2599

Though earlier efforts abound in a bid to provide an international framework to deal with drug trafficking,²³¹ a coordinated action against money laundering began in earnest in the 1980s within the context of international efforts to combat drug trafficking and money laundering. It was then thought that criminal organizations generate substantial profits from illicit drug trafficking and related crimes which enables them to penetrate, contaminate and corrupt the structures of government, notable effort could be made to develop and strengthen law enforcement strategies aimed at disrupting the organization and management of these criminal elements which may ultimately break their economic power.

Furthermore, a significant factor giving rise to the increased international attention on money laundering and corruption is the 'appreciation of the negative impact which significant flows of 'dirty money' can have on the banks and other financial institutions through which they pass, or which they are deposited or invested.'²³² Also, there is the realisation that money launderers can utilise 'any form of corporate and trust activity to launder their profits. The mainstream and underground financial systems in all their varieties are susceptible. Describing how money launderers can use corporate entities and trust to launder profits Lord Denning in the case of *Wallersteiner v. Moir* said:

Even so, I am quite clear that these distinct legal entities were just puppets of Dr Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled strings....they were his agents to do as he

²³¹ Alldridge (n125) 93

²³² Srivastava (n121) 238

commanded. He was their principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as his creatures.²³³

Several corporate vehicles such as companies, trusts, foundations, non-governmental organisations, fictitious entities and even unincorporated economic organisations are within the wimps of launderers. In the same vein, and more recently, there is the increased focus on the involvement of professionals such as lawyers and accountants serving as advisers to money launders. Akin to the participation of professionals is the continued use of the world's financial system and offshore financial centres for money laundering activities. Below, we, therefore, look at international initiatives designed to combat corruption and money laundering.

This chapter examines various international, legal and policy instruments and initiatives created to surmount the problem of corruption and money laundering and by extension other transnational organised crimes. In particular, organizational efforts such as the United Nations organization, the European Union, the African Union, the Organization for Economic cooperation and Development, Financial Action Taskforce, Egmont Group of Financial Intelligence, would be the focus of the research effort as a means of finding better ways of combating the trend in sub Saharan Africa.

²³³ *Wallersteiner v. Moir* [1974] 1 WLR 99, 1013; Willebois and others, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What To Do About It* (Solomon & Peters Ltd Stolen Asset Recovery Initiative, World Bank 2011) 11

3.1 The United Nations Organization.

Corruption and money laundering are a global phenomenon involving cross-border financial transactions, which require international cooperation for the fight against it to be successful. Remarkably, commonwealth countries have made a significant effort at influencing the making of an international legislative framework to combat money laundering. Among these are Interpol, 45th General Assembly Session, Accra, 14th-20th October 1976, the Commonwealth law ministers meeting held in Winnipeg, August 1977, and the Commonwealth law ministers meeting held in Barbados, August 1980.

The United Nations has established some initiatives to deal with the threat posed by money laundering. At the very heart of anti-money laundering strategy is the need to criminalise money laundering and impose sanctions to serve as a deterrent to money launderers, and to garner international support these requirements must be designed to meet global acceptance.

3.1.1 Vienna Convention of 1988

Among the first instruments released to address the challenge of money laundering are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (called the 'Vienna Convention'.)

Article 3(1)²³⁴ Provides that parties are required to enact legislation necessary to establish a modern code of criminal offences of illicit trafficking in all dimensions

²³⁴ United Nations Convention against Illicit traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988

this will in so far as it is not contrary to its constitutional principles and the basic concepts of the country's legal system. It also obliges signatory nations to take steps to ensure that bank secrecy does not impede enforcement, and in particular, cross-border enforcement. This article of the convention criminalizes money laundering. In particular Article 3(1)(b) requires that money laundering is established as a criminal offence when committed intentionally. The scope of the Article's requirement is as follows:

- 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 or offences 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;

To ensure uniformity in its application, the Article requires each state to 'adopt measures to establish a criminal offence under its domestic law,²³⁵ to render as criminal 'the acquisition, possession or of use of property, knowing at the time of the receipt, that such property was derived from an offence or..., in accordance with

²³⁵ Article 3(1)

the offences of subparagraph (a) of this paragraph or an act of participation in such offence or offences.²³⁶ The domestic laws should provide for the confiscation of all forms of property, proceeds or instrumentalities used in or derived from covered offences.²³⁷ Participating signatories to the convention are to empower its courts or other competent authorities to order that bank, financial or commercial records be made available in such a way as to override its local bank secrecy laws.²³⁸ Furthermore, Article 6 provides for the extradition of launderers,²³⁹ participating countries to provide legal assistance and prohibit state signatories from invoking banking secrecy²⁴⁰ as a basis not to proffer mutual legal assistance.

Admittedly, the Vienna convention is the first significant anti-money laundering framework set up internationally but its primary focus is money laundering emanating from drug trafficking and proceeds arising therefrom.²⁴¹ However, its importance cannot be overemphasized as it remains the pioneer effort towards the criminalisation of money laundering, the trial of offenders, extradition and confiscation of the proceeds arising from the crime.

²³⁶ Article 3(1)(C)(i)

²³⁷ Article 5(1)

²³⁸ Article 5(3)

²³⁹ Article 6(2). In particular, S.6 (9) provides that 'without prejudice to the exercise of any criminal jurisdiction established by its domestic law, a party whose territory an alleged offender is found, shall a) if it does not extradite him in respect of an offence established in accordance with paragraph 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph a) submit the case to its competent authorities for prosecution, unless otherwise agreed with the requesting party; b) if it does not extradite him in relation to that offence in accordance with article 4, paragraph 2 subparagraph b) submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting party for the purpose of preserving legitimate jurisdiction.'

²⁴⁰ Article 7(5)

²⁴¹ Article 2(1) provides that the '*purpose of the convention is to promote co-operation among parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.*'

3.1.2 Palermo Convention²⁴² in 2000

The adoption of the United Nations Convention Against Transnational Organised Crime is another landmark effort towards the fight against money laundering and organised criminal activities. The Vienna convention made adequate provision for money laundering activities arising mainly from the trafficking of drug and psychotropic substances, this agreement made significant inclusions in the areas of criminalizing proceeds stemming from corruption and organized crime, the addition of corporate liability and sort to clarify the prevention, investigation and prosecution of stipulated offences and other serious crimes.²⁴³

The scope of the convention applies 'to the prevention, investigation and prosecution of a). Offences established by articles 5²⁴⁴, 6²⁴⁵, 8²⁴⁶, and 23²⁴⁷ of this convention; and b). Serious organised crime as defined in article 2 of this convention; where the offence is transnational and involves an organised criminal group.'²⁴⁸ The convention expands the definition of predicate offences to include

²⁴² United Nations Convention against Transnational Organized Crime of 2000.

²⁴³ Article 2(b) defines serious crime as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.'

²⁴⁴ Article 5 relates to the criminalisation of participation in an organised criminal group. Each state is to adopt such 'legislative and other measures' to establish as criminal offences when committed intentionally.

²⁴⁵ Article 6 provides for the criminalisation of laundering of the proceeds of crime.

²⁴⁶ Article 8 of the convention provides for the criminalisation of corruption. Corrupt practices as provided by the convention includes a). The promise, offering or giving a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, so that the official act or refrain from acting in the exercise of his or her official duties; b). The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, so that the official act or refrain from acting in the exercise of his or her duties.

²⁴⁷ Article 23 criminalises the obstruction of justice. States are to ensure through domestic legislation to establish as criminal offences when committed intentionally: the use of force, threats or intimidation or the promise or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences; and the use of force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences as prescribed by the convention.

²⁴⁸ Article 3(1) (a) and (b).

other serious crimes and urges all participants to apply the convention's money laundering offences to 'the widest range of predicate offences.'²⁴⁹

The convention also made vital provisions which ensures that there is adequate regulatory and supervisory framework for banks and non-bank financial institutions as well as other bodies particularly susceptible, to have machinery in place to detect, deter all forms of money laundering which must among other things emphasize customer identification, record keeping and the reporting of suspicious transactions. In addition, signatories to the convention are to consider 'implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital.'²⁵⁰ It also calls for the establishment of a financial intelligence unit²⁵¹ which will serve as a national centre to collate, analyse and disseminate information regarding potential money laundering. Furthermore, parties are advised to use as a guideline²⁵² 'the relevant initiatives or regional, interregional and multilateral organisations against money laundering'²⁵³ and authorise the cooperation and exchange of information both domestically and internationally.

3.1.3 The United Nations Convention Against Corruption

The issue of corruption has always been on the front burner of discussions, the earliest and quite ambitious project embarked upon was Resolution No. 3514 of

²⁴⁹ Article 2(2)

²⁵⁰ Article 7(1)

²⁵¹ Article 7(1)(b)

²⁵² The best known and most firmly established such guidance is contained in the 40 FATF Recommendations. See Srivastava (n121) 247

²⁵³ Article 7(3)

August 1975.²⁵⁴ The General Assembly, ‘concerned by the corrupt practices of certain transnational and other corporations, their intermediaries and others involved’ resolved to condemn all corrupt practices, including bribery, and reaffirmed the rights of member states to enforce laws against corporations involved in corrupt practices. It further invited the UN Commission on Transnational Corporations to prepare recommendations that would help to eliminate corrupt practices, including bribery. Understandably, this resolution lacked substance, but it paved the way for more work to be done leading to the signing by 96 countries of a more robust convention in 2004 now referred to as the ‘United Nations Convention against Corruption’.

The adoption of this convention provides the opportunity for a global response towards the fight against corruption. The convention has as its principal focus ‘to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;²⁵⁵ facilitate and support international cooperation and technical assistance in the prevention and fight against corruption, including asset recovery;²⁵⁶ and to promote integrity, accountability and proper management of public affairs and public property.’²⁵⁷ Principally, the convention's central elements relate to the prevention, criminalisation, international cooperation and asset recovery. To this end, it recommends the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. Signatories to the convention are urged to promote the involvement of

²⁵⁴ United Nations, ‘General Assembly: Resolutions Adopted by the General Assembly during its Thirtieth Session’ <<http://www.un.org/documents/ga/res/30/ares30.htm>> accessed 5 July 2016.

²⁵⁵ Article 1(a) UNCAC

²⁵⁶ Article 1(b) UNCAC

²⁵⁷ Article 1(c) UNCAC

non-governmental organisations and community-based groups as well as elements of civil society²⁵⁸ to raise awareness of corruption.

To strengthen the state apparatus to fight corruption of public officials whether, in the form of bribery, embezzlement, money laundering or related acts, the convention established a variety of measures. Foremost is the requirement by all states to 'develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability'.²⁵⁹ In addition, a comprehensive overhaul of the states' apparatus in terms of the relevant 'legal instruments and administrative measures' is required to ensure effectiveness while ensuring that there is adequate collaboration 'with each other and with international and regional organizations in promoting and developing the measures'.²⁶⁰ Akin to the development of policy framework is the establishment within the legal system 'the existence of a body, or bodies, as appropriate, that prevent corruption by such means as: ...overseeing and coordinating the implementation of policies; and increasing and disseminating knowledge about the prevention of corruption'.²⁶¹ The body so established to fight corruption is to be independent to enable it to perform effectively and without undue influence. Other measures aimed to ensure the seriousness in the fight against corruption are approaches to be adopted in the procurement process,²⁶² proper

²⁵⁸ Article 13 UNCAC

²⁵⁹ Article 5(1) UNCAC

²⁶⁰ Article 5(4) UNCAC

²⁶¹ Article 6(1) UNCAC

²⁶² Article 9(1) UNCAC

accounting²⁶³ both in the private²⁶⁴ and public sectors, ensuring judicial independence by strengthening integrity of the process and preventing opportunities where the judicial process could be compromised.²⁶⁵

There is also an explicit provision on measures to prevent money laundering. The convention provides that each state shall institute ‘a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value.... To deter and detect all forms of money laundering, which regime shall emphasise requirements of the customer and, and where appropriate, beneficial owner²⁶⁶ identification, record keeping and the reporting of suspicious transactions.’ The convention appreciated the importance of ensuring ‘that individual country put in place measures to ensure that transfers of funds could be properly tracked and that a particular paper trail be created which could assist law enforcement authorities investigating the transfers of illicit assets and enrichment’.²⁶⁷ It is provided that appropriate codes of conduct for public officials are crafted within the legal system for the ‘honourable performance of public functions’,²⁶⁸ in addition to having appropriate channels to facilitate the reporting of acts of corruption perpetrated by corrupt officials in the discharge of their duties. To ensure transparency, public officials are required to declare to the appropriate authorities, ‘their outside activities, employment, investments, assets

²⁶³ Article 10 UNCAC

²⁶⁴ Article 12 UNCAC

²⁶⁵ Article 11(1) provides that ‘bearing in mind the independence of the judiciary and its critical role in combating corruption, each state party shall..., take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.’

²⁶⁶ Beneficial Owner discussed in Chapter 5. See Van der Does de Willebois (n234) 19

²⁶⁷ Srivastava (n121) 248

²⁶⁸ Article 8(2) UNCAC

and substantial gifts or benefits from which a conflict of interest may result concerning their functions as public officials'.²⁶⁹

The convention identified a broad range of activities that fall under the umbrella of corruption. It includes bribery of public officials, bribery of foreign public officials and officials of international organisations, embezzlement, misappropriation or diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment,²⁷⁰ bribery in the private sector, embezzlement of property in the private sector, laundering in the proceeds of crime, concealment, and obstruction of justice. The convention defined a public official as 'any person holding a legislative, administrative or judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of the person's seniority; or a person who performs a public function, including for a public agency or public enterprise, or provides a public service; or any other person defined as public official in the domestic law of a state'.²⁷¹ A foreign official similar to a public official is one who exercises the legislative, administrative or judicial office of a foreign country.

To underscore the severity of bribery the convention requires states to adopt measures as may be necessary to establish as a criminal offence when committed intentionally the act of bribery and expressly defines it as:

The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for himself or herself or another person or

²⁶⁹ Article 8(5) UNCAC

²⁷⁰ Defined as 'a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.' Article 20 UNCAC

²⁷¹ Article 2(a) UNCAC

entity, so that the official act or refrain from acting in the exercise of his or her official duties; the solicitation or acceptance by a public official.

One of the most significant innovations of the convention is the asset recovery and return of such stolen assets to the country of origin. This is contained in Chapter Five of the convention and includes provisions such as prevention and detection of transfer of proceeds crime; measures for direct recovery of property; mechanisms for the recovery of property through international cooperation in confiscation, international cooperation for the purposes of confiscation; return and disposal of assets; the requirement for the establishment of financial intelligence unit as well as bilateral and multilateral agreements and arrangements.

The convention has faced some criticisms in the number of ways: first, that even though it starts with some sort of mandatory provisions, most critical provisions are left to the discretion of states to adopt since it relies heavily on non-mandatory wordings.²⁷² Also, the convention was drafted with a ‘tendency to give priority to political and economic interest, besides human, legal and moral interests’.²⁷³ The requirement that member states.....return assets obtained through corruption to the country from which they were stolen’ has a significant setback as states parties have noted ‘many difficult and implicit slow progress’ because it is difficult to

²⁷² Y, A, Shehu, ‘International Initiatives against Corruption and Money Laundering: An Overview’ (2005) 12(3) JFC 221

²⁷³ Antonio Argandoña, ‘The United Nations Convention against Corruption and its Impact on International Companies’ <<http://iesee.edu/research/pdfs/DI-0656-E.pdf>> accessed 9 July 2016. Argued that the West is interested in promoting democracy and human rights values most vigorously in those areas of the world where it has significant economic interests, so the West only seems interested in enforcing corrupt practices law when it is profitable and when it does not compromise their national interests. See Thompson A. Keith, ‘Does Anti-Corruption Legislation Work?’ (2013) XVI International Trade and Business Review Law 51

‘establish ...and [prove] a link between proceeds of corruption in the requested state and the crime committed in the requested state’

3.2 African Union Convention on Preventing and Combating Corruption

This convention was adopted by the African Assembly of Heads of State and Government on July 1, 2003 and came into force August 5, 2006. African leaders acknowledged that corruption not only undermined accountability and transparency in the management of public affairs²⁷⁴ but also results in impunity on the political, economic, social and cultural stability of African states.²⁷⁵ Corruption has its devastating effect on the socio-economic development of the African people. The convention aims to achieve the following five objectives: to promote and strengthen the development in Africa mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;²⁷⁶ promote, facilitate and regulate cooperation among state parties to ensure the effectiveness of measures and actions to prevent corruption and related offences;²⁷⁷ to coordinate, harmonise the policies and legislation between state parties for prevention, detection and eradication of corruption in the continent;²⁷⁸ remove obstacles to the enjoyment of human rights, including economic, social and cultural rights;²⁷⁹ and, to establish conditions necessary to foster transparency and accountability.²⁸⁰ The convention seeks to criminalise corruption in the public and

²⁷⁴ African Union Convention on Preventing and Combating Corruption (AUCPCC), Preamble Para.7

²⁷⁵ Ibid, Preamble Para. 6

²⁷⁶ Ibid, AUCPCC 2006, art 2(1)

²⁷⁷ Ibid, AUCPCC 2006, art 2(2)

²⁷⁸ Ibid, AUCPCC 2006, art 2(3)

²⁷⁹ Ibid, AUCPCC 2006, art 2(4)

²⁸⁰ Ibid, AUCPCC 2006, art 2(5)

private sector by obligating states to adopt legislative, administrative and other measures to tackle corruption.

The convention defines corruption and related offences to include: the solicitation or acceptance either directly or indirectly by a public official of any goods of monetary value or other benefits in exchange for an act or omission in the performance of his functions;²⁸¹ the granting or offering to a public official of any goods of monetary value or other benefits in exchange for an act or omission in the performance of his functions;²⁸² any act or omission in the discharge of his or her duties for the purpose of illicitly obtaining benefits for himself or a third party;²⁸³ the diversion of property belonging to the state for purposes unrelated to those for which they are intended that such official has received by virtue of his position;²⁸⁴ offering or giving of any undue advantage,²⁸⁵ illicit enrichment,²⁸⁶ use or concealment of proceeds derived from any acts referred to in the convention,²⁸⁷ and participation as a principal, co-principal or accessory after the fact, or on any other manner in the commission or attempted commission, any collaboration or conspiracy to commit, any acts referred to in Article 4.²⁸⁸

Article 5 on legislative and other measures mandates member states to adopt measures to establish as offences acts mentioned in article 4 and quite significantly to create and maintain an independent national anti-corruption authorities or

²⁸¹ Ibid, AUCPCC 2006, art 4(a)

²⁸² Ibid, AUCPCC 2006, art 4(b)

²⁸³ Ibid, AUCPCC 2006, art 4(c)

²⁸⁴ Ibid, AUCPCC 2006, art 4(d)

²⁸⁵ Ibid, AUCPCC 2006, art 4(e)(f)

²⁸⁶ Ibid, AUCPCC 2006, art 4(g)

²⁸⁷ Ibid, AUCPCC 2006, art 4(h)

²⁸⁸ Ibid, AUCPCC 2006, art 4(i)

agencies. This is a worthy inclusion because where tailored correctly, it will help in the fight against corruption and money laundering. Among other notable provisions in the convention includes the strengthening of internal control framework regulating accounting, auditing and follow up systems in such areas as public income, tax and customs receipts, procurement and management of public goods.

Since whistleblowing is a useful feature in the fight against corruption, Article 5 requires member state to provide legislative and other measures to protect informants and witnesses in corruption and related offences, including the protection of their identities.²⁸⁹ As Transparency International noted, 'corruption is a notoriously secretive activity, and it is usually those engaged in corrupt deals or those who work with them that are aware of it.'²⁹⁰ Insiders are among the very few who can report cases of corruption and identify the risk of future wrongdoing.²⁹¹ Whistleblowers help to 'convert a vicious cycle of secrecy to a virtuous cycle'.²⁹² Without adequate protection, informants could become victims of corrupt officials, and information gathering becomes a tedious job. Detection of corruption is a precondition for investigation and prosecution of the offence. Informants who refuse to break the law or decide to alert the relevant agencies could be victims of demotion, dismissal or they may face other personal hardships. Like the Sarbanes-Oxley Corporate Reform Act of 2002, internal and external whistleblowing protection provided to government employees who desire to report

²⁸⁹ Ibid, AUCPCC 2006, art 5(7)

²⁹⁰ Transparency International, 'Whistleblowing: An Effective Tool in The Fight Against Corruption' Policy Position No. 01/2010 published 1 January 2010

²⁹¹ Ibid 1

²⁹² Ibid 1

cases of wrongdoing and sue a government official or contractor deemed to be defrauding the government. For instance, the Sarbanes-Oxley Act makes it illegal to discharge, demote, suspend, threaten, harass or in any manner discriminate against whistle-blowers and establishes criminal penalties against executives who retaliate against whistle-blowers. While this Act protects individuals in the private sector, its provisions could be adopted in the public sector to ensure that corruption cases are quickly reported to deter would be offenders. Similarly, respective governments could design programmes to encourage employees and other officials to bring ethical and legal violations they are aware of to an appropriate agency that would guarantee their protection and identity. Transparency International further observes that ‘major bribery and corruption scandals demonstrate the damage done by failure to report wrongdoing as soon as it is discovered. Indifference, fear of reprisal and misplaced loyalty as well as a culture of silence often deter potential witnesses and whistle-blowers from speaking out.’²⁹³ While the convention requires member states to have legislative and other measures in place for the establishment of whistleblowing legislation, it is imperative that established legislations are enforced and practical approaches adopted to protect informants.

Article 10 proscribes the use of funds acquired through illegal and corrupt practices to finance political parties and requires member states to incorporate the principle of transparency into the funding of political parties. Party politics is one of the many conduits of corruption and corrupt practices in the sub-region. For instance, in Nigeria, before the General Elections of 2015, the nomination form for the People's

²⁹³ Ibid 2

Democratic Party (PDP) ranges from N1million to N10million depending on the seat one is vying for, which shows in clear terms that securing candidature for an elective position is not for the poor. As Oji observed, 'parties are seen as investments bereft of any ideological foundation. There must be returns if they must stay in business. This profit motive has consistently given rise to the Godfather syndrome where an individual or group of individuals bankrolls the party and claims ownership.'²⁹⁴ Elections cost money, and the tendency exists for government officials to use public funds to support their political ambition or support another. Before the 2015 Nigerian elections, the All Progressive Congress, is said to have embarked on raising N10 billion from the general public through direct contribution and N40 billion donations from the party's elected members including *state governors*.²⁹⁵ Admittedly, most countries in Sub Saharan African are signatories to the convention but as the Institute of Democracy and Electoral Assistance observed, 'all parties in government try to use their incumbency in some way to increase their chances of re-election. When often scant public funds are redirected from their intended purposes to campaign activities, however, the abuse of state resources threatens both a country's effective and inclusive democracy'.²⁹⁶ Besides abuse of state resources, there is also the problem of illicit funding of the political process²⁹⁷ from the proceeds of drugs, oil bunkering and other organised

²⁹⁴ R. O Oji, 'Political Party Funding in Nigeria: A Case Study of the People's Democratic Party' [2014] 2, 11 AJBMR

²⁹⁵ Lekan Bilesanmi, 'Campaign Funding: APC targets N50billion' Vanguard Newspaper (Lagos, 22 February 2015) <<http://www.vanguardngr.com/2015/02/campaign-funding-apc-targets-n50billion/>> accessed 3 March 2016

²⁹⁶ Magnus Ohman, Regional Studies on Political Finance: Regulatory Frameworks and Regional Realities – Africa' in Elin Falguera, Samuel Jones and Magnus Ohman (eds.) *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International Institute for Democracy and Electoral Assistance 2014) 40

²⁹⁷ Ibid 41

criminal activities. This makes political office holders who are direct beneficiaries complicit and unable to combat corruption.

Article 11 addressed the influence of the private sector, which requires state parties to adopt legislative and other measures to prevent and combat acts of corruption in the private sector including measures to 'prevent companies from paying bribes to win tenders'²⁹⁸. Bribery to win a contract is one visible form of corruption. Bribery scandals discussed in Chapter 2 provides obvious basis for state commitment.

Article 16 of the convention provides for the confiscation and seizure of the proceeds and instrumentalities of corruption. It requires parties to adopt legislative measures to enable: its competent authorities to search, identify, trace, administer and freeze or seize the instrumentalities of corruption pending final judgment; confiscate the proceeds or property derived from the offences; repatriate the profits of corruption. The repatriation of the proceeds of corruption and other offences requires cooperation from other member states. Additionally, Article 17 requires measures to be adopted to empower its courts of member states to order the confiscation or seizure of banking, financial or commercial documents. State parties are refrained from invoking banking secrecy laws to justify their refusal to cooperate about acts of corruption, and where there are doubtful accounts, competent authorities should be allowed to obtain from banks and other financial institution evidence from their possession relating to the proceeds of corruption.

A major issue with the convention is the level of compliance from member states and their preparedness to implement the fine provisions contained therein. African

²⁹⁸ Article 11(3) AUCPCC

governments would need to strengthen institutional and legal reforms to successfully combat corruption.

3.3 Council of Europe

European countries have played a fundamental role in shaping legislation towards the fight against money laundering and corruption. Established in 1949 with the primary purpose to ensure the values underpinning the European Convention on Human Rights have over the years, extended its reach with agreements to states to criminalize various crimes.²⁹⁹

One of the foremost significant regional efforts against money laundering is the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990.³⁰⁰ This was a direct fall out of the request by the European Ministers of Justice to develop 'international norms and standards to guarantee effective international cooperation between judicial (and where necessary police) authorities as regards the detection, freezing and forfeiture of the proceeds of illicit drug trafficking.'³⁰¹ The convention provides for and emphasizes the search and seizure of proceeds of crime through collaborative efforts by member states, through the adoption of special investigative techniques aimed to foster and strengthen cross-border cooperation. The collaboration was to be fostered through cooperation among the Central banks and for individual

²⁹⁹ Hinterseer (n132, 124), 'over the years, European officials have pursued various legal initiatives with respect to criminal related matters. Important legislations such as the mutual assistance in criminal matters 1959, the European convention on the international validity of criminal judgments 1970 and the European convention on the transfer of proceedings in criminal matters 1972.'

³⁰⁰ Council of Europe, 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime' Europe Treaties Series No. 141 < <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141>> accessed 1 July 2015

³⁰¹ Alldridge (n125) 96

banks to perform 'identity checks' on customers. Article 6³⁰² Of the convention sought to extend the criminalisation of money laundering activities beyond drug trafficking to include other predicate offences and should not be limited to money laundering offences committed within one's immediate jurisdiction. The convention further requires cooperation in the investigation and confiscation of proceeds.

Due to the evolution in money laundering techniques and strategies whereby launderers target the non-bank sector and massively use professional intermediaries and legal persons to invest their criminal proceeds, the need arose to have yet an updated convention that would be all-inclusive. The New 2005 European Convention, 'Laundering, Search, Seizure of the proceeds of Crime and on the Financing of Terrorism' came into force on May 1, 2008.³⁰³ The convention expands the list to include what constitutes 'predicate offences' for money laundering purposes other than drug trafficking. This includes: participation in an organized criminal group; terrorism (including terrorist financing); human trafficking and migrant smuggling; sexual exploitation; illicit traffic in narcotic drugs and psychotropic substances; illegal arms trafficking; unlawful trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily injury;

³⁰² As stated in Srivastava (n121), the UK House of Lords Select Committee on the European Communities stated that the basic approach of this article is to 'establish an offence of international money laundering. The property involved in any conversion or transfer could proceed not only from drug trafficking or terrorism but of any criminal offence (described as the predicate offence) and the state party prosecuting need not have criminal jurisdiction over the predicate offence. Although this constitutes a very wide definition of money laundering, it is open to States on signature or ratification to limit the definition for themselves to more limited categories or predicate offence.' In HL Select Committee on European Communities 'Money Laundering' December 1990, session 1990-91, 1st Report (with evidence).

³⁰³ Council of Europe, 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism' < <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>> accessed 1 July 2015

kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; and insider trading and market manipulation.³⁰⁴

Besides the need to introduce clauses to deal with terrorism,³⁰⁵ the convention brought in a couple of notable innovations not present in the previous convention,³⁰⁶ among which are: the inclusion of clauses for Financial Intelligence Unit given the predominance of each state of the EU having fully functional Unit following the FATF 40 recommendations. Article 12 requires states to ‘adopt such legislative and other measures as may be necessary to establish FIU³⁰⁷ and to ensure that ‘it’s FIU has access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of suspicious transaction reports;’³⁰⁸

Secondly, the introduction of corporate liability³⁰⁹ given the diverse and talented methods devised to integrate into the legitimate economy the proceeds of crime. This article provides for criminal liability of legal persons³¹⁰ where money laundering offence is established to have been perpetrated by such person, committed ‘for their benefit by any natural person, acting either individually or as part of an organ of a legal person, as well as for involvement of such a natural person as accessory

³⁰⁴ Council of Europe (n303) Appendix to CELSSPCFT. (ETI 198, 2005)

³⁰⁵ Council of Europe (n303) Chapter II, article 2

³⁰⁶ Ibid

³⁰⁷ Article 12(1) CELSSPCFT. (ETI 198, 2005)

³⁰⁸ Article 12(2) CELSSPCFT. (ETI 198, 2005)

³⁰⁹ Article 10 CELSSPCFT. (ETI 198, 2005)

³¹⁰ Article 10 (1) CELSSPCFT. (ETI 198, 2005). Legal persons include the legal person and ‘a natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person.’

or instigator.³¹¹ The legal person can be held liable where a lack of supervision or control of a natural person results in committing a criminal offence.³¹² The liability of the legal person shall not exclude the natural persons who are perpetrators, instigators of, and accessories to the criminal offence.³¹³ Where a legal person is held liable for committing a criminal offence, it shall be subjected to effective, proportionate and dissuasive criminal or non-criminal sanction including monetary sanctions';³¹⁴

Thirdly, the convention under investigative assistance provides that parties should take measures to answer to request of a criminal investigation sent by one party to the other relating to either natural or legal person. Ensure to provide particulars of identified bank accounts, monitor the banking operations within a specified period that are being carried out through one or more accounts of the natural or legal person under investigation.

Fourthly, each member state to institute a comprehensive regulatory and supervisory regime to require financial institutions and non-bank financial institutions having the potentials for money laundering activities to perform appropriate know your customer and due diligence. Report suspicious activities as well prohibit personnel from disclosing the fact that a suspicious transaction report or related information has been transmitted to the appropriate authority,³¹⁵ train internal personnel and establish internal policies³¹⁶ and procedures aimed at

³¹¹ Article 10(1) CELSSPCFT. (ETI 198, 2005)

³¹² Article 10(2) CELSSPCFT. (ETI 198, 2005)

³¹³ Article 10(3) CELSSPCFT. (ETI 198, 2005)

³¹⁴ Article 10(4) CELSSPCFT. (ETI 198, 2005)

³¹⁵ Article 13(2)(b)

³¹⁶ Article 13(2)(a)(i)(ii)(iii) CELSSPCFT. (ETI 198, 2005)

strengthening the internal control systems in the organisation. In carrying out the customer identification requirement, financial institutions are required to satisfy themselves that the identity of their customers is consistent with the account in order to prevent the institution used as a channel for criminal activity. The holding of anonymous account is not consistent with the provision for customer due diligence as particular care is required to be taken to ascertain beneficial ownership. Since cash can be laundered across border in large quantities,³¹⁷ it is required that member states respond appropriately to adopt legislative or other measures to detect the 'significant physical cross-border transportation of cash and bearer negotiable instruments'.³¹⁸

3.4 The Financial Action Task Force

At its 1989 summit held in Paris, the Group of Seven ('G-7') formally recognized the threat money laundering had to the banking and financial system and moved to establish a Financial Action Taskforce comprising of summit participants and other interested parties with a view to evaluating contemporary anti-money laundering measures and to propose additional preventive measures. In 1990, the task force issued forty recommendations aimed at stopping money laundering. Having admitted to the ever-changing nature of money laundering techniques,

³¹⁷ Group, 'EFCC identifies owner of \$2.1m seized cash' The Nation Newspaper (Lagos, 6 August 2015) <<http://thenationonlineng.net/efcc-identifies-owner-of-2-1m-seized-cash/>> accessed 21 May 2016

See also: BBC, 'World: Africa Nigeria recovers Abacha's cash'

<<http://news.bbc.co.uk/2/hi/africa/211324.stm>> accessed 30 May 2016 wherein 125M\$ cash stuffed in 38 suitcases by the wife of the former Nigerian Dictator, Gen. Sani Abacha, was seized in Lagos airport while attempting to leave the country. In a related case, in November 1991, a female Ghana immigrant, under interrogation of customs officers, acknowledged carrying \$9000 in cash, just under the customs declaration of \$10,000. Nevertheless, customs officers found \$24,000 small bank notes packed in some sheets in her luggage, \$224,000 in 100 rolls hidden in shampoo bottles, and \$53,000 in small bags in her stomach, which was detected by x-ray test; See Ping He 'A typology of Money Laundering', (2010) JMLC

³¹⁸ Article 13(3) CELSSPCFT. (ETI 198, 2005)

more so, money laundering taking a higher and sophisticated dimension where launderers adopt legal persons and seasoned professionals to legitimize criminal proceeds, the task force is poised to review and implement a comprehensive framework of combative and preventive measures to tackle the hydra-headed monster of money laundering and terrorist financing. The FATF can best be described as the most comprehensive multidimensional and multi-sectorial³¹⁹ approach in the global fight to combat money laundering. In its introductory page, The FATF has as its core mandate *'to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system.'*³²⁰

The first 40 recommendations by the FATF were issued in 1990, which place greater emphasis upon financial institutions, laying a foundation of a series of concrete steps the banks should take to combat money laundering activities. In 1996 the FATF required that predicate offences should extend beyond drug-related offences to also include serious crimes. Further amendment was substantially made in 2003 to include proper customer due diligence, the need to identify beneficial owners and the role of the financial intelligence unit. More recently, in 2012 the FATF adopted revised recommendations with a view to 'strengthen the requirements for higher risk situations, and to allow countries to take a more focused approach in areas where high risk remain or implementation could be

³¹⁹ Shehu (n273) 221

³²⁰ Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 7 August 2015

enhanced.’ This approach will help countries to conduct a risk assessment by first identifying and assessing what money laundering and terrorist financing risk they face, and identify proper measures to mitigate these identified risk. This risk-based approach would allow countries to adopt flexible measures, to target their resources more effectively and apply preventive measures that are commensurate with the nature of risks.

The FATF sets out the essential measures to combat money laundering. They include: identification of money laundering and terrorist financing risk; developing policies and ensuring domestic coordination; pursue money laundering and terrorist financing and the financing of proliferation; apply preventive measures for the financial sector and other designated sectors; establish powers and responsibilities for the competent authorities and other institutional measures; enhance the transparency of and availability of beneficial ownership information of legal persons and arrangements; and facilitate international cooperation.³²¹ The FATF strongly recommend the criminalisation of all money laundering offences by the Vienna and Palermo conventions of the United Nations and apply the crime of money laundering to all serious offences, to include the most comprehensive range of predicate offences.³²²

The FATF is not part of the OECD or any other international organisation. It is a freestanding specialist body with the primary focus on the fight against money laundering. In so far as, its functions are concerned, it publishes a wide range of

³²¹ Ibid 9

³²² Ibid 12

guidance notes, best practice papers and conducts the country assessment of anti-money laundering and counter-terrorism frameworks and their performance to determining a level of compliance of member countries and provide necessary support in the implementation of the recommendations.

To ensure proper dissemination of the recommendations, the FATF has eight partners, FATF-style regional bodies. The local bodies act as focal points for the implementation of the recommendations. In sub-Saharan Africa two regional bodies exist: Inter-Governmental Action Group against Money Laundering in West Africa (GIABA)³²³ and the Eastern and Southern Africa Anti Money Laundering Group (ESSAAMLG).³²⁴ In furtherance to this objective of seeking to encourage and monitor the implementation of the programme of action, it has in place an innovative multilateral surveillance and peer review mechanism which centres

³²³ The GIABA is an institution of the Economic Community of West African States (ECOWAS) responsible for facilitating the adoption and implementation of Anti Money Laundering and Counter-Financing of Terrorism in West Africa. Member States of GIABA agree to subject themselves to a mutual assessment process in conformity with international standards for preventing money laundering and financing of terrorism as contained in Articles 12 to 14 of the GIABA Statute. The scope of the Evaluations is to assess whether the necessary laws, regulations or other measures required under the essential criteria are in force and effect, that there has been a full and proper implementation of all the necessary measures, and that the AML/CFT system as implemented is effective. GIABA has adopted the FATF procedure in the evaluation of Member States. The evaluated country is rated depending on the efficacy of measures put in place to detect, prevent or sanction cases of money laundering and terrorist financing. Ratings range from **compliant, mostly compliant, partially compliant, to non-compliant**. A report is issued after completion of the mutual evaluation. It is then discussed and adopted at GIABA Plenary. Once the report is adopted by the Plenary, it will be published on GIABA website unless the country objects to the publication of the report. In such a situation, the Secretariat would publish a note to indicate that the country has chosen not to publish its report. The mutual evaluation onsite visits are based on the calendar approved from time to time by the GIABA Ad Hoc Ministerial Committee. The Ad Hoc Ministerial Committee is made up of three Ministers from each Member State namely the Ministries of Justice, Finance, and Interior. See in GIABA, 'Mutual Evaluation' <http://www.giaba.org/about-giaba/mutual-evaluation_629.html> accessed 11 August 2015

³²⁴ The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is a Regional Body subscribing to global standards to combat money laundering and financing of terrorism and proliferation. Its 18 Member Countries are Angola, Botswana, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

around an annual-self assessment exercise duly complemented by a more detailed mutual evaluation process under which each member is subjected to an on-site examination. The purpose of the evaluation is to ascertain if the necessary laws, regulations or other measures required under the FATF are in force and effect and correctly implemented and to determine if the system in place is adequate and the review is then ranked against each of the FATF recommendations.

The FATF has also sought to remain dynamic to the nature of money laundering since it is ever evolving, and to this effect has initiated a periodic review of the recommendations to stay in tandem with global financial innovations and practice. It noted that 'the risk-based approach is central to the effective implementation of the FATF recommendations adopted 2012.'³²⁵ To achieve this objective the FATF sought to partner with the public and private sectors in reviewing current practices, strengthen international safeguards against money laundering and in turn bring it in line with the requirement of the revised recommendations. For instance, the guidance note on risk-based approach to virtual currencies was updated in July 2015 and seeks to 'show how specific FATF recommendations should apply to convertible virtual currency exchangers in the context of VCPSS, identify AML/CFT measures that could be required, and provide examples; and identify obstacles to applying mitigating measures rooted to VCPSS technology, and/or business models and in legacy legal frameworks'.³²⁶ The report noted, 'The FATF recognises financial innovation, and at the same time, VC payment products and services present money laundering and terrorist financing risks and other crime

³²⁵ Financial Action Task Force, 'Risk-Based Approach' <<http://www.fatf-gafi.org/documents/riskbasedapproach/>> accessed 11 August 2015

³²⁶ Financial Action Task Force, 'Guidance for a Risk-Based Approach: Virtual Currencies' <<http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf>> accessed 11 September 2015

risks that must be identified and mitigated. The periodic reviews also stem from the need for the recommendations to address challenges being faced by the different global financial scenarios such as 'the role of gatekeepers (accountants and lawyers), international payment system, corporate vehicles, stolen state assets, beneficial ownership and issues on transparency.'³²⁷

3.5 The Organization for Economic Cooperation and Development (OECD)

The organization for economic cooperation and development (OECD)³²⁸ is one of the significant regional bodies that have shown considerable will in the fight against corruption and money laundering. Against the backdrop of corruption scandals and resulting dramatic cases which engulfed Europe in the late 1980s and early 1990s, the OECD Convention on Bribery of Foreign officials was signed on 17th December 1997 and came into force on 15 February 1999. The convention deals with 'active corruption' or active bribery, meaning the offence committed by a person who promises or gives the bribe as contrasted with passive bribery, the offence committed by the person who receives the bribe. It also seeks to assure a functional equivalence among the measures taken by parties to sanction bribery of foreign public officials without requiring uniformity or changes in the party's legal

³²⁷ The principles state that companies should maintain their beneficial ownership information and that the information should be available to law enforcement and other competent authorities; additionally, countries were to consider making such information available to financial institutions and other regulated businesses. Trust information should be collected and accessible, the principles explained, but only to law enforcement.

³²⁸ Organisation for Economic Co-operation and Development, 'List of OECD Member countries - Ratification of the Convention on the OECD'
<<http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>> accessed 18 August 2015

system.³²⁹ In its footnote to Commentary on combating bribery, bribe solicitation and extortion, the Convention defines a bribe as ‘...offer, promise, or give(ing) of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of *international* business.’ The main elements and scope of the convention fall into three distinct categories: the criminalisation of bribery and inducement of officials in their official conduct; imposing specific responsibilities and obligations and impose dissuasive penalties and sanctions on offenders; and with multilateral initiatives, allow international cooperation and mutual legal assistance. The convention, in particular, requires member states to establish as a criminal offence for any person to intentionally offer, promise or give any undue pecuniary advantage either directly or through a subsidiary to obtain or retain an international business advantage. Furthermore, complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery constitutes a criminal offence. To give further bite on the extent of the definition of bribery. In the same vein, ‘improper advantage’ is explained as something ab-initio to which the business entity concerned was not entitled. It does not matter whether the offer or promise was given on the official's behalf or legal body or any other natural person.

³²⁹ OECD, ‘Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions and Related Documents: Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: General (2)’ <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 3 July 2015

3.6 The Egmont Group of Financial Intelligence Units

As part of the provisions of the conventions described above, it has been recognised that regional and international cooperation is a crucial factor in the fight against money laundering and corruption with specific emphasis on mutual legal assistance, extradition, and cooperation in the tracing, seizure and confiscation of the proceeds of crime. While most of the legislation has been carried out by the public sector, there was a real need for private sector actors to collaborate with the public sector for the fight against money laundering to get more momentum that is significant. The creation of the Egmont Group is a meaningful response in this regard, as it serves to face the challenges posed for 'national authorities in securing the effective implementation of agreed anti-money laundering measure.' The formation of the group has helped to provide new, extensive and valuable sources of information now at the disposal of national authorities arising from an elaborate collaboration of state actors and information received from the private sector, principally banks and other financial institutions. A case in point is the mandatory reporting of suspicious transactions as directed by the FATF recommendations and the European Directive. The Egmont group consist of national FIUs serves as a forum for FIUs to improve their respective national anti-money laundering programmes. The support includes 'expanding and systemizing the exchange of financial intelligence information, improving expertise and capabilities of personnel of such organisations, and fostering better communication among FIUs through application of technology'.³³⁰ A financial Intelligence unit has been defined as: '*a central, national agency responsible for receiving (and, as permitted, requesting),*

³³⁰ Egmont Group, 'Information Paper on Financial Intelligence Units and the Egmont Group' <https://www.assetsearchblog.com/wp-content/uploads/sites/197/migrated/34345425.pdf> accessed 5 July 2015

analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspicious proceeds of crime; or (ii) required by national legislation or regulation, in order to counter money laundering and terrorist financing.' The FIUs are responsible for receiving the suspicious transaction and other reports, analysing them and then disseminating the resulting financial intelligence. In its statement of purpose, priority is given to the enhancement of international information exchange and other measures to improve cooperation between participating jurisdictions. To this effect, the Egmont Secure Website permits members to have access to information on FIUs, money laundering trends, financial analysis tools and technological developments. Thus, information received from this pool provides assistance to law enforcement (police) and prosecutorial authorities to combat money laundering.

3.7 The Wolfsberg Anti-Money Laundering Principles

This private sector initiative put forward to combat money laundering arising mainly from the initial efforts of eleven banks who originally signed the principles. These principles are the non-binding set of best practices governing the establishment and maintenance of relationships between private bankers and their clients. In its preamble, to guidance on a risk-based approach for managing money laundering, the group recognises that to curtail the continuing threat of money laundering through financial institution is by understanding and addressing the potential risk associated with customers and transactions. Individually, the following principles are in place as measures to prevent the facilitation of money laundering operations through the financial institutions with particular reference to private banking.

First, in general terms, the principles require banks to set up policies that will prevent the use of its operations for criminal purposes. This can be achieved through 'reasonable measures to establish the identity of its clients', be it natural or legal persons (corporations, partnerships, foundations), and trust companies. It also requires proper identification of beneficial owners, conducting appropriate due diligence exercise on each account holder, given attention to ascertaining if the client is acting on his or her behalf. Where a limited liability company is involved, the bank needs to understand the structure of the company sufficiently to determine the provider of the funds, the principal owners of the company and their shareholding and those who have control of the funds. In the case of a trust company, the banker must take reasonable care as to identify settlors, trustees, and any persons or entities with power to remove the trustees. Evidence shows that out of 150 cases of grand corruption reviewed, companies were used to hide the proceeds of corruption in 128.³³¹ A trust, which hides the identity of the grantors and the beneficiaries, has become a standard part of money laundering arrangements. A reported case of misuse of the trust company is that of Diepreye Alamiyeseigha.³³² On the advice of UBS bank, Diepreye Alamiyeseigha (popularly called 'Alamco'), settled a Bahamian trust – the 'Salo Trust', for the benefit of himself and his family. Upon examination by the court,³³³ he admitted being the Settlor; the trustee in so far as the UBS account, legally opened and controlled in his name, was held to be a trustee account; and a beneficiary. This case showed that he was a trust in name only with no valid legal separation

³³¹ van der Does de Willebois (n234) 34

³³² Diepreye S.P. Alamiyeseigha was once a Governor of Bayelsa State, Nigeria.

³³³ In the case of Nigeria v Santolina Investment Corporation & Ors [2007] EWHC 437

between himself and the asset.³³⁴ The case also underscores the need for customer due diligence.³³⁵

The Principles also requires banks as part of their internal policies to define categories of persons whose circumstances needs additional due diligence³³⁶ to be performed on them as a measure to prevent money laundering. The indicators³³⁷ include: persons residing in/or having funds sourced from countries identified by credible sources as having inadequate anti-money laundering standards, representing high risk of crime and corruption; persons engaged in types of business activities or sectors known to be susceptible to money laundering; and 'politically exposed persons', referring to individuals holding or having held positions of public trust, such as government officials, senior executives of government corporations, politicians, important political party officials, etc., as well as families and close associates.³³⁸ Furthermore, the internal policies of the bank should provide for senior management approval³³⁹ for persons identified above falling within the threshold of the indicators.

Principle 3 concerns the updating of client files. The private banker is required to update the client file on a defined basis, and where there are significant changes,

³³⁴ van der Does de Willebois (n234) 46

³³⁵ Principle 1.3 states that it is essential to collect and record information covering the following categories: purpose and reason for opening the account; anticipated account activity; source of wealth (description of the economic activity which has generated the net worth); estimated net value; source of funds (explanation of the origin and means of transfer for monies that are accepted for the account opening); and references or other sources to corroborate reputation information where available.

³³⁶ Principle 2.1 Wolfsberg AML Principles

³³⁷ Principle 2.2, Wolfsberg AML Principles

³³⁸ The Wolfsberg Group, 'Global Anti-Money Laundering Guidelines for Private Banking'

<https://www.ethic-intelligence.com/images/Resources/Anti-money_laundering_texts/wolfsberg_aml_principles2.pdf> accessed 10 July 2016

³³⁹ Principle 2.3 Wolfsberg AML Principles

there should be a regular review of the client's activities by either the supervisor or an independent control person to ensure consistency and completeness of the action. In red flag cases, the internal policies should indicate if senior management will be responsible for the review, but for PEPS, senior management must do the review.

CONCLUSION

There are laudable international and regional legal framework designed to combat money laundering and corruption. Notable among all the pieces of UN, EU and AU legislations are the provisions of mutual legal assistance, bilateral and multilateral cooperation which underscores the recognition that money laundering is a global phenomenon and requires a comprehensive approach to combat it. Sub Saharan African countries have adopted many facets of the legislation in their local laws to form a formidable force against corruption and money laundering - see Chapter 4. Additionally, whistleblowing as a piece of legislation should be encouraged and pursued vigorously as a means of building confidence within the public and private workforce to deter potential corrupt officials from embarking on that course. When there are the visible signals that a corrupt act will be reported and the informant is adequately protected, it can serve as an incentive to honest and law-abiding individuals to perform their work without fear or intimidation. Finally, political will is one essential ingredient in the implementation of these measures otherwise the status quo of corruption persist.

CHAPTER FOUR

NON-INTERNATIONAL MONEY LAUNDERING RELATED LAW

One of the most pervasive economic crimes in Nigeria and Sub Saharan Africa, in general, is the endemic corruption of which a right companion is money laundering. Money laundering by its nature is an offence, which involves several persons from the planning to the final execution stages, comprising the corrupt government officials and his cronies - professional intermediaries such as solicitors, accountants, bank officials and agents - traversing different country's jurisdictions. Money laundering can distort and corrupt the economic system because officials responsible for the implementation of rules become compromised, funds allocated to developmental initiatives diverted for personal self-aggrandisement leaving the populace at the mercy of poor welfare infrastructure and social unrest. In recognition of the adverse consequences to the domestic and international economy, several global initiatives and measures have been put in place to curb money laundering and corruption among which are the United Nations Convention against Corruption (UNCAC), African Union Convention on Preventing and Combating Corruption (AUCPCC), and the Financial Action Task Force recommendations.

Corruption and money laundering in sub-Saharan Africa is attributable partly because of weak institutions to implement legislations geared towards curbing this hydra-headed menace and the tendency of high-level impunity amongst the various arms of government regarding accountability and non-compliance with rules and procedures relating to procurement and expenditure controls. The Chapter recognises that SSA has adequate legislations that conform to

international requirements and in most cases are amended to meet with current realities, but there are setbacks in implementation. In SSA the system relies mainly on a 'strongman' to enforce rules other than allowing the process (institutions) to work, ethnic and religious affiliations are the overarching factors to determine if an individual is deemed to be corrupt or prosecuted other than relying on prosecutorial evidence.

The chapter examines Nigeria and South African legislation and underscores their relevance in the fight against corruption and money laundering. It further makes an evaluation of their objective and substantive offences, highlights the relevant provisions in the constitution targeted at preventing corruption and money laundering, examines the nature of obligations assumed by the state parties to criminalise money laundering and corruption and provide an assessment of the extent to which domestic legislations are compatible with the international conventions. Furthermore, we make an analysis of these laws vis-a-viz the provisions of the UNCAC and AUCPCC with particular emphasis on offences, mutual legal cooperation, asset recovery, problems arising from jurisdiction and identification of channels of laundering relating to the process of corruption and money laundering. The chapter concludes with the need for adequate reforms aimed at improving the institutional framework, recommends a paradigm shift in cultural and attitudinal behaviour in respect of political appointment and mostly public service, and the need to reinforce legislative framework towards greater independence of the anti-corruption agencies of government.

4.1 Anti Money Laundering/Anti-Corruption Agencies

Article 5(3) of the African Union Convention on Preventing and Combating Corruption, requires states to 'establish, maintain and strengthen independent and national anti-corruption authorities or agencies' for the purposes of: (i) preventing, detecting, punishing and eradicating corruption and related offences in the public and private sectors; and (ii) establishing the necessary conditions to foster transparency and accountability in the management of public affairs.' Similarly, the UNCAC requires state parties to 'ensure the existence of a body or bodies as appropriate that prevents corruption'. Article 36 of UNCAC which deals with 'specialised agencies' provides that each party 'shall ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement.' There is no mandatory requirement for the setting up of an independent commission³⁴⁰, however, it provides the opportunity for state actors to either establish a stand-alone commission or vest the anti-corruption provisions into an existing institution(s). While some countries have preferred to have a stand-alone agency vested with the powers to enforce and prosecute offenders, others have conferred such powers to an existing institution. Those who sought to establish a separate anti-corruption commission³⁴¹ have based this on the Hong Kong Model³⁴² owing to its 'relative operational success, freedom from internal corruption and outside interference, its ability to attract widespread public support

³⁴⁰ John Hatchard, *Combating Corruption. Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Eglar 2014) 178

³⁴¹ Such countries like Benin, Botswana, Burkina Faso, Burundi, Cameroun, Congo, Cote d'Ivoire, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Nigeria, Senegal, South Africa and a host of others.

³⁴² Hatchard (n340) 178

and.....ability to work across both public and private sectors.³⁴³ In stating the preference for a separate anti-corruption body, Hatchard noted the OECD's position that 'developing countries often establish specialised anti-corruption bodies due to the high level of corruption in existing agencies.'³⁴⁴ The reality is that in most agencies of government, public sector officials are more likely to be opportunistic in their attitude of 'grabbing it now before the time is no more'.

In Nigeria, The Economic and Financial Crimes Commission Act 2004 established the Economic and Financial Crimes Commission; The Corrupt Practices and other Related Offences Act 2000, established the Independent Corrupt Practices and Other Related Offences Commission (ICPC). Besides the EFCC and the ICPC, which forms the arrowhead agencies, there is the Code of Conduct Bureau/Tribunal for public office holders, Director of Public Prosecutor, the Attorney General, the Financial Intelligence Unit, Police and other law enforcement agencies.

In South Africa: the Prevention and Combating of Corrupt Activities Act No 12 of 2004 as amended, and Financial Intelligence Centre Act No. 38 of 2001 are the primary piece of legislation regulating the fight against money laundering and corruption. Examined also is the state capture report of the Public Protector 2016,³⁴⁵ observations and remedial actions aimed at preventing corruption and state capture.

³⁴³ Rick Staphenurst and Shahrzad Sedigh, 'An Overview of the Costs of Corruption and Strategies to Deal with It' in Staphenurst R, Kpundeh S. J (eds.) *Curbing Corruption: Toward a Model for Building National Integrity* (The World Bank 1999) 27

³⁴⁴ Hatchard (n340) 178

³⁴⁵ 'State of Capture - A Report of the Public Protector, 14 October 2016'

<<https://sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016>> accessed 19 October 2018

We begin with the relevant laws in Nigeria thereafter highlight the pertinent provisions of South Africa Legislations. Then make a comparative analysis with the AUCPCC and UNCAC for any areas of a gap and possible remediation.

4.1 The Economic and Financial Crimes Commission (Establishment) Act 2004

Nigeria signed the United Nations convention against corruption on December 9, 2003, and ratified it on October 24, 2004. The ratification instrument with the Secretary-General of the United Nations was deposited on December 14, 2004.³⁴⁶

The Constitution of Nigeria 1999, provides that ‘the state shall abolish all corrupt practices and abuse of power’³⁴⁷ this provides the basic framework for this fight against corruption.

In response to the provisions of the AUCPCC and UNCAC, the Economic and Financial Crimes commissions were established and represented the ‘designated Financial Intelligence Unit (FIU) in Nigeria,’³⁴⁸ it has the responsibility of coordinating the various institutions³⁴⁹ involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria.’ The EFCC is established as a law enforcement agency charged with

³⁴⁶ UNODC (Implementation Review Group), ‘Review of Implementation of the United Nations Convention against Corruption’ (4 June 2014) UN Doc CAC/COSP/irg/2014/crp.9 Vienna, 2

³⁴⁷ The Constitution of the Federal Republic of Nigeria. [Nigeria] Act No. 24, 5 May 1999, s 15(4)

³⁴⁸ EFCC Act 2004, s 1(2)(c)

³⁴⁹ Notable institutions involved in the fight against corruption in Nigeria includes the Economic and financial crimes commission, the code of conduct bureau, Independent Corrupt Practices and Other Related Offences Commission (ICPC), Bureau of Public Complaints, supreme audit institution, bureau of public procurement.

the responsibility to investigate economic and financial crimes and prosecute offenders. Specifically, S.7(2) confers the responsibility on the Commission to enforce the provisions of the following laws: the Money Laundering Act 2004 as amended, the advance fee fraud and other related offences Act, 1995; the failed banks (recovery of debts) and financial malpractices in banks Act 1994, the banks and other financial institutions act 1990 as amended, Miscellaneous Offences Act and any other law or regulations relating to economic and financial crimes, including the criminal and penal code.³⁵⁰

The Act defines economic and financial crimes to mean the 'non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organised manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic waste and prohibited goods'.³⁵¹

4.1.1 Functions of the Commission

S.6 provides the functions of the commission which includes: the enforcement and the due administration of the provisions of the Act;³⁵² the investigation of all financial

³⁵⁰ EFCC Act 2004, s 7(2)(a-f)

³⁵¹ S. 46 in the interpretation.

³⁵² EFCC Act 2004, s 6(a)

crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam;³⁵³ the coordination and enforcement of all economic and financial crimes law and enforcement functions conferred on any other person or authority;³⁵⁴ the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crime related offences or the properties, the value of which corresponds to such proceeds; the adoption of measures to eradicate the commission of economic and financial crimes; the adoption of measures which include coordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes; the facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes; the examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved; the determination of the extent of financial loss and such other losses by government, private individuals or organisations; and collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous with those of the Commission.

³⁵³ EFCC Act 2004, s 6(b)

³⁵⁴ EFCC Act 2004, s 6(c)

4.1.2 Offences

The following offences are provided in the Act about economic and financial crimes: 'A person who, without lawful authority:

- Engages in the acquisition, possession or use of property knowing at the time of its acquisition, possession or use that such property was derived from an offence under this act;³⁵⁵ or
- Engages in the management, organisation or financing of any offences under this act;³⁵⁶ or
- Engages in the conversion or transfer of property knowing that such property is derived from any offence under this act;³⁵⁷ or
- Engages in the concealment or disguise of the true nature, source, location, disposition, movement, rights, concerning or ownership of property knowing such property is derived from any offence referred under the act,³⁵⁸ commits and shall be liable on conviction to imprisonment for a term not less than two years and not exceeding three years.³⁵⁹

The Act also criminalises the retention of proceeds of economic and financial crimes. Retention of proceeds could be perpetrated through concealment, removal from jurisdiction, transfer to nominees, or otherwise retention of the control of the proceeds of a criminal conduct or an illegal act on behalf of another person knowing that the proceeds are as a result of criminal conduct by the principal; or knowing that the property in question represents another person's proceeds of a criminal

³⁵⁵ EFCC Act 2004, s 18(1)(a)

³⁵⁶ EFCC Act 2004, s 18(1)(b)

³⁵⁷ EFCC Act 2004, s 18(1)(C)

³⁵⁸ EFCC Act 2004, s 1(1)8(d)

³⁵⁹ EFCC Act 2004, s 18(2)

conduct, acquires or uses that property or has possession of it. Such action is liable on conviction to a prison term of five years or a fine equivalent to five times the value of the proceeds of the property or both such imprisonment and fine.³⁶⁰

Other offences include:

- i. Giving of false information to the commission, the penalty is imprisonment for a term not less than two years and not exceeding three years and for a public officer for a term not less than three years and not exceeding five years.³⁶¹
- ii. Any person who, without due authorisation by the commission, deals with, sells or otherwise disposes of any property or assets which is the subject of an attachment, interim order or final order commits an offence and is liable on conviction to imprisonment for five years without the option of fine.³⁶²
- iii. Offences relating to terrorism. This takes a life imprisonment sentence on conviction and includes a person who willfully provides or collects by any means, either directly or indirectly, any money with the intent that the funds shall be used for any act of terrorism;³⁶³ any person who commits or attempts to commit a terrorist act, or participates in or facilitates the commission of a terrorist act;³⁶⁴ and any person who makes funds, financial assets or economic resources or financial or other related services for use....., in the commission of a terrorist act.³⁶⁵

³⁶⁰ EFCC Act 2004, s 17(a)(b)

³⁶¹ EFCC Act 2004, s 16(1) & (2)

³⁶² EFCC Act 2004, s 32(1)

³⁶³ EFCC Act 2004, s 15(1)

³⁶⁴ EFCC Act 2004, s 15(2)

³⁶⁵ EFCC Act 2004, s 15(3)

- iv. An individual who fails, neglects or refuses to make a declaration or furnishes any information required in the asset declaration form, *for persons arrested for an offence under the Act*, commits an offence and is liable on conviction to imprisonment for a term of five years.³⁶⁶
- v. Offences relating to financial malpractices. Where an officer of a bank or financial institution or designated non-financial institution:
 - a. fails or neglects to secure compliance with the provisions of the act;
or
 - b. fails or neglects to secure the authenticity of any statement submitted under the provisions of the Act, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or to a fine of Five Hundred thousand Naira (N500, 000) or both such imprisonment and fine.³⁶⁷

4.1.3 Seizure and forfeiture of assets

The Act makes some extensive provisions relating to forfeiture of assets. Upon arrest, it requires full disclosure of assets and property from the individual by filling out the appropriate declaration of assets form. As indicated earlier, it is an offence to give false information in the asset declaration form and on the basis of the form, the EFCC is required to trace and attach all the assets and properties of the person which he acquired as a result of such economic and financial crime to obtain an interim attachment order from the court. The act authorises the EFCC to:

³⁶⁶ EFCC Act 2004, s 27(3)

³⁶⁷ EFCC Act 2004, s 14(1)(a)&(b)

- Freeze the bank account(s)³⁶⁸ of the individual, seize the asset,³⁶⁹ place it under seal³⁷⁰ or remove the property to a place designated by the commission.³⁷¹ Where the individual is convicted, confiscate the asset or property and forfeit to the government.

Assets or property to be forfeited will include:

- assets and properties which are the subject of an interim order granted by the court as contained in the asset declaration form;³⁷²
- any asset or property confiscated, or derived from the proceeds of an offence not disclosed in the asset declaration form;³⁷³
- any of the person's property or instrumentalities used in a manner to commit or facilitate the commission of such offence;³⁷⁴
- assets or properties in a foreign country acquired as a result of the criminal activity, such assets subject to any treaty or arrangement shall be forfeited;
- the passport of any convicted person of an offence under the act.
- any property, whether real or personal, which represents the gross receipts a person obtains directly as a result of the violation of the Act or which is traceable to such gross receipts³⁷⁵; and within Nigeria which represents the proceeds of an offence under the laws of a foreign country within whose jurisdiction such offence ...would be punishable by imprisonment for a term

³⁶⁸ EFCC Act 2004, s 34

³⁶⁹ EFCC Act 2004, s 26

³⁷⁰ EFCC Act 2004, s 26(2)(a)

³⁷¹ EFCC Act 2004, s 26(2)(b)

³⁷² EFCC Act 2004, s 20(1)(a)

³⁷³ EFCC Act 2004, s 20(1)(b)

³⁷⁴ EFCC Act 2004, s 20(1)(c)

³⁷⁵ EFCC Act 2004, s 24(a)

exceeding one year and which would be punishable under this act, is subject to forfeiture.³⁷⁶

The Economic and Financial Crimes Commission has achieved great strides in its determined fight against corruption and money laundering. One way it has achieved this is by creating formal relationships with other agencies such as the police and the office of the Attorney General of the Federation. Specifically, under Section 8(3), the act requires the 'commission ...to appoint such other staff or second officers from government security or law enforcement agencies or such other private or public services as it may deem fit' for the purpose of performing the functions of the Act. A staff of the commission for the purpose of enforcing or carrying out the provisions of the act are given 'same powers, authorities, privileges (including the power to bear arms) as are given to members of the Nigerian Police'.³⁷⁷

Secondly, in assessing the success of the proceedings of the Alamiyeseigha case, the following factors were evident about the EFCC, namely: thorough investigation work performed by the team, efficient and quick execution of requests for mutual legal assistance including the use of a criminal restraint order to secure assets, close cooperation between countries and civil lawyers, and sheer professionalism.³⁷⁸ However, one major problem affecting its effectiveness is the domination of the executive arm of government in its operations. It has been argued that due to its nature of activities, the anti-corruption agency 'may well come into conflict with powerful political and economic interest which make it particularly

³⁷⁶ EFCC Act 2004, s 24(b)

³⁷⁷ EFCC Act 2004, s 8(5)

³⁷⁸ Nicholls (n111) 6

vulnerable to external pressure and control.’ The research has come to this view because the EFCC by its operations has not been seen to be independent but has been used by the government in power to witch-hunt those in opposition, perceived enemies of the president and those no longer in the good books of the existing administration. For the commission to be effective, it must be independent and be seen to be so. The provision of the EFCC in respect of the appointment of the Chairman of the commission has some loopholes since it allows some executive interference. Section 2(3) states that the chairman and members of the commission shall ‘be appointed by the President...subject to the confirmation of the Senate’³⁷⁹ In comparison with other jurisdictions in SSA the appointment process is somewhat inadequate because the choice of the chairman is very much at the discretion of the President and where the legislature is a rubber stamp as is most probably is in Nigeria, then the chairman would be one who would only act on the prodding of the President otherwise serious conflict will ensue between both parties. Similarly, the Agency is expected to investigate corrupt government officials including those in the legislative arm of government. In Nigeria where corruption sweeps across all arms of government, the candidate to be ratified by the legislature must undoubtedly be seen to be loyal otherwise his appointment would be jeopardised. The case of executive interference stalling the independence of the EFCC is well illustrated in the case of Nuru Ribadu, a one-time chairman of the EFCC. According to Stuart S. Yeh (2013), Nuru Ribadu the then Chairman of the Economic and Financial Crimes Commission ‘had done everything to institutionalise the EFCC. He obtained a \$5 million grant from the World Bank, permitting the EFCC to target political corruption at the highest level

³⁷⁹ EFCC Act 2004, s 2(3)

without fear of financial consequences to his agency', but when the fight against corruption affected some of the supporters of the then existing president, President Yar' Adua, the government announced that 'the independent prosecutorial powers granted to the EFCC were unconstitutional' and all future prosecutions would be vetted by the office of the Attorney General of the Federation. In addition to removing or subjecting the prosecutorial powers to the office of the Attorney General of the Federation, relying on Section 3(3), which provides that '*a member of the commission may at any time be removed by the President for inability to discharge the functions of his office.....or if the president is satisfied that it is not in the interest of the commission or the interest of the public that the member should continue in office*' the government removed the chairman and sent him for training in an institute. In so doing, the government blocked the EFCC's prosecution of some notable governors such as Joshua Dariye, Orji Uzor Kalu and James Ibori, the latter being tried in a London court for money laundering charges and sentenced to imprisonment. This also suggests that while the tenure of the anti-graft agency's Chairman is specified in the act for five years and renewal for yet another term, it is not guaranteed since at the discretion of the president he could be removed for one flimsy excuse or the other or as the president deems fit. A more recent example of perceived interference of the executive in the affairs of the anti-corruption agency is the Dasuki scandal, in which the anti-corruption body has been accused of being biased and one-sided in prosecuting perceived looters of the nation's treasury. Granted, a case of corruption could be established against the former National Security Adviser to President Goodluck Jonathan, nevertheless, the mode of operation suggests that the body language of the incumbent president dictates the manner of activities of the EFCC. This leaves the

Commission with reports of violation of court procedures and infringement of the rights of the accused, all to serve the expectations of the executive.

Another notable setback of the commission is the lack of operational independence regarding funding of the anti-corruption agencies. As Hatchard noted, 'adequate funding is a prerequisite for an ACB. It must enjoy financial autonomy and access to adequate and secure funding to develop and retain appropriate staffing levels, resources and the like.'³⁸⁰ The commission does not have an independent funding arrangement but relies on 'such monies as may be approved by the federal government for the commission.'³⁸¹ To gain financial autonomy in the Nigerian context the anti-graft agency ought to have a first line charge on the consolidated revenue fund, and also with the capacity to source its fund for proper administration of its affairs without much recourse to the president. In the case of the EFCC, this is completely lacking. Since it cannot present its budget and approval from the national assembly, there is a very high over-dependence on the executive arm thereby making it susceptible to the wishes and directions of the president.

In a similar context, a change in the political disposition or will of the president may alter the smooth functioning of the anti-corruption body. For example, the EFCC was set up by President Olusegun Obasanjo and given all the executive support to fight money laundering and corruption in the country. Within the eight-year tenure of the president, the anti-graft agency was able to arrest and prosecute high ranking government officials who illicitly enriched themselves such as the then Inspector General of the Nigerian Police Force, Tarfa Balogun who was imprisoned

³⁸⁰ Hatchard (n111) 197

³⁸¹ EFCC Act 2004, s 35(2),

for embezzlement and corruption. Also, some notable fraudsters engaged in advanced fee fraud and cyber-crimes were arrested, prosecuted and jailed and assets seized and returned to their victims.

Independence can be achieved if the creation of the anti-corruption agency is enshrined in the constitution of the respective countries to build confidence among the citizenry otherwise it would be subjected to the wimps and caprices of the powerful few in society. Furthermore, the constitutional amendment procedures are far more cumbersome than the ordinary acts of parliament so that efforts to weaken the effectiveness of the agency could be put into check. In the same vein, as Hatchard suggest, the security of tenure of the office holder (in this case the chairman of the commission and crucial other office holders) should be guaranteed by the constitution and not subjected to the preference of the president. It is suggested that the same constitutional provision for the removal of judges be adopted for crucial office holders of the anti-graft agency because leaving it in the hands of the president or the legislature could undermine public confidence and trust.

Another critical factor militating against the operations of the EFCC is the dependency on cash related transaction in the economy and the failure of the government to enforce the applicable laws since it is the primary defaulter of the law. The prescribed limit for cash handling is five and ten million naira for individuals and corporate organisations respectively. Ridiculously, government agencies and departments withdraw from the Central Bank of Nigeria (CBN) amounts more than the stipulated amounts in the cover of the night and under full

security protection to carry out their activities. Many of these withdrawals were authorisations for national security matters for which the national security adviser or an individual authorised by him are meant to withdraw the cash from the CBN in whichever currency (local or foreign). Both the executive and legislative arm of the Nigerian government have been found in the passion for cash withdrawal. For instance, it has been alleged that at several occasions, both houses of the national assembly made cash withdrawals of more than Two hundred and Fifty Million Naira (\$1.25Million) in a single day through a commercial bank in clear violation of the act.³⁸² The question therefore is, how does CBN allow and facilitate the withdrawal of these large cash transactions? After the withdrawals are made and for whatever 'security' reasons they allude, it is not accounted. Are such huge withdrawals reported to the financial intelligence unit? Why does the EFCC not initiate the action until perhaps a friendly president comes into power with a hunch for anti-corruption? Why is the compliance unit of the central bank (if any) unable to enforce standards relating to cash withdrawals, or rather, why are government departments excluded from the operation of the money laundering act which stipulates prescribed limits? Similar questions can be posed to the commercial banks as well as some of the substantial chunk of cash are also dispensed through it. Surprisingly as it would be, in the case of the commercial banks, the senior executives are complicit to the crime since they have failed to enforce rules applicable to all merely to curry favour from legislators or to solicit deposits.

³⁸² Festus Owete, Richard Akinwumi and Joshua Olufemi, 'Fresh Facts Expose How Ekweremadu, Others Withdrew N8billion, Laundered Funds in Failed Constitutional Amendment' Premium Times (Lagos, 17 December 2015) <<http://www.premiumtimesng.com/news/headlines/195297-fresh-facts-expose-how-ekweremadu-others-withdrew-n8-billion-laundered-funds-in-failed-constitution-amendment.html>> accessed 15 February 2016

4.2 The Independent Corrupt Practices and Other Related Offences Commission (ICPC)

The Commission came into existence through the Corrupt Practices and Other Related Offences Act of 2000 with the sole aim to '*prohibit and prescribe punishment for corrupt practices and other related offences.*'³⁸³ The act seeks to establish the agency necessary for the prosecution of corruption-related offences and to protect whistle-blowers who give valuable information to the commission to stem the tide of corruption.

4.2.1 Membership of the Commission

The ICPC Act establishes the office of the Chairman and twelve (12) other members who shall be of proven integrity and shall be appointed by the President, upon confirmation by the Senate. The tenure of office of the chairman is five years and may be reappointed for another five years but will not be eligible for reappointed after that. Other members of the commission will have a four (4) years tenure and could be reappointed for another four years. While the act provides for the qualification of the members of the commission, it is silent about the selection process, which in the research opinion could be subject to manipulation, and influence by the executive arm since the president is primarily responsible for their appointment. However, to cater for the diverse nature of the country, the act requires that the twelve members so appointed to the commission two shall come

³⁸³ Explanatory memorandum to the corrupt practices and other related offences act 2000. Italics added.

from each geopolitical zone of the country,³⁸⁴ but the unanswered question remains: who recommends these two representatives of the geopolitical zones for the appointment? No doubt because of the nature and purpose of the Commission a rigorous internal methodology should be used in the selection but this is shrouded in secrecy and devoid of any sense of transparency. This legislation is weak as it essentially allows the President to pick a candidate of his choice subject to confirmation by the Senate. In contrast, Kenya has a different and more transparent selection process. The selection panel, though appointed by the president³⁸⁵ would comprise of a person from the office of the president,³⁸⁶ the office of the prime minister,³⁸⁷ the ministry responsible for ethics and integrity,³⁸⁸ the judicial service commission,³⁸⁹ the commission responsible for matters relating to human rights,³⁹⁰ the commission responsible for matters relating to gender,³⁹¹ the media council of Kenya,³⁹² the joint forum of religious organisations,³⁹³ and the association of professional societies of East Africa.³⁹⁴ The selection panel, when constituted, is required to place advertisement³⁹⁵ in at least two daily newspapers of national circulation inviting applications from persons who possess the requisite qualification³⁹⁶ as defined by the Act for the position of chairperson and members of the commission. Among other provisions to ensure transparency are the

³⁸⁴ Nigeria has six geopolitical zones

³⁸⁵ Kenyan Ethics and Anti-Corruption Commission Act, No 22 of 2011, revised s 6(1)

³⁸⁶ EACC Act 2011, s 6(1)(a)

³⁸⁷ EACC Act 2011, s 6(1)(b)

³⁸⁸ EACC Act 2011, s 6(1)(c)

³⁸⁹ EACC Act 2011, s 6(1)(d)

³⁹⁰ EACC Act 2011, s 6(1)(e)

³⁹¹ EACC Act 2011, s 6(1)(f)

³⁹² EACC Act 2011, s 6(1)(g)

³⁹³ EACC Act 2011, s 6(1)(h)

³⁹⁴ EACC Act 2011, s 6(1)(i)

³⁹⁵ EACC Act 2011, s 6(4)

³⁹⁶ Section 5(1) and 5(2) of the EACC Act specifies the qualification for the chairperson and members of the commission respectively.

publishing of the names of shortlisted candidates in at least two national dailies with national circulation,³⁹⁷ conducting the interview in the open³⁹⁸ and the dissolution of the panel upon the appointment of the chairperson and members of the commission.³⁹⁹ Selected candidates are forwarded to the President who then picks the chairperson and members and forwards such names to the National Assembly for approval. While the selection process in this instance seems more transparent than the Nigerian scenario, a major setback has been the involvement of the legislature and executive members who in most cases are the one to be investigated for corruption-related offences. As Hatchard noted which agrees with the research opinion, ‘by involving ministers and other parliamentarians in the process, *those who may well be subject to investigation are responsible for vetting the proposed appointees*’ poses the challenge of compromised judgement as the tendency may exist for the ‘vetters’ to harbour bias in the final choice of the candidate to be selected given their pedigree and track record in the denouncing corruption.

4.2.2 The range of offences

The ICPC Act defines corruption to include bribery, fraud and other related offences which notably agrees with the anti-corruption convention of the African Union and well as the United Nations Convention on Corruption, both require all states to adopt a wide range of offences by legislative and other measures.

³⁹⁷ EACC Act 2011, s 5(c)

³⁹⁸ EACC Act 2011, s 5(d)

³⁹⁹ EACC Act 2011, s 16

Offences related to Gratification

Gratification, as defined by the Act, means a) money, donation, gift, loan , fee, reward, valuable security, property of any description whether movable or immovable, or any other similar advantage, given or promised to any person with the intent to influence such person in the performance or non-performance of his duties; b) any office, dignity, employment, contract empowerment or service and any agreement to give employment or render services in any capacity; c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; d) any valuable consideration of any kind, any discount, commission, rebate, bonus deduction or percentage; e) any forbearance to demand any money or money's worth or valuable thing; f) any other service or favour of any description, such as protection from penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or forbearance from the exercise of any rights or any official power or duty; and g) any offer, undertaking or promises, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f).⁴⁰⁰

Under section 8, it is an offence for an official to corruptly ask, receive, obtain, property or cash for himself or for any other person;⁴⁰¹ agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,⁴⁰² on account of anything already done or omitted to be done of favour or disfavour shown by himself in the discharge of his official function is punishable at conviction to a prison term of 7 years. In the same vein where a person corruptly gives,

⁴⁰⁰ ICPC Act 2000, S. 2

⁴⁰¹ ICPC Act 2000, s 8(1)(a)

⁴⁰² ICPC Act 2000, s 8(1)(b)

confers or procures any benefit of any kind to, on or for a public officer or promises or offer to give or attempts to procure any property or benefit of any kind shall on conviction be liable to imprisonment for seven (7) years. Notwithstanding sections 8 and 9 mentioned above which debars officials from requesting for or obtaining gratification of any form either in cash or property of any kind, the act also prohibits corrupt demands by persons for anything already done or omitted to be done or any favour or disfavour shown to any person; or anything to be afterwards done or omitted or any favour or disfavour to be afterwards shown to any person by a public officer in the discharge of his duties is also guilty of an offence punishable on conviction to a prison term of seven years.⁴⁰³ The Act also prohibits the asking, obtaining and receiving gratifications through an agent.⁴⁰⁴ Furthermore, gratification offered to or solicited by a public officer in respect of voting or abstaining from voting at a general meeting to showing favour or disfavour against any measure, resolution or question submitted to the public body is outlawed and constitutes an offence. Similarly, gratification as an inducement or reward for aiding in procuring or preventing the passing of any vote or the granting of any contract, award, recognition or advantage in favour of any person; performing or abstaining from performing or preventing the performance of any official act; or showing or forbearing to show any favour or disfavour is deemed unlawful and punishable upon conviction to a prison term of five (5) years.⁴⁰⁵

It is worth noting that AUCPCC and UNCAC highlighted in chapter three required state parties to adopt a wide range of offences by legislative and other measures which include offences relating to bribery, abuse of office, trading in influence,

⁴⁰³ ICPC Act 2000, s 10

⁴⁰⁴ ICPC Act 2000, s 17

⁴⁰⁵ ICPC Act 2000, s 18

diversion of public funds, extortion, illicit enrichment, laundering of the proceeds of corruption and other related offences. To a considerable extent, the ICPC Act have met these expectations of the conventions. However, a significant setback for the agency as widely publicised is its inability to operate independently without direct influence from the executive. Besides, high profile cases, which involve top government officials and legislators, are handled with kid gloves, therefore, lacking the transparency and effectiveness that is expected of such agency.

Offences related to Bribery

UNCAC request all states to address the criminalization of bribery of officials of public international organisations⁴⁰⁶ and as well adopt 'such legislative and other measures to establish as criminal offence when committed intentionally: a) the promise, offering, or giving, to a public official, directly or indirectly, of an undue advantage, for himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her duties; b) the solicitation or acceptance by a public official....in order that the official act or refrain from acting in the exercise of his or her official duties.⁴⁰⁷ In a similar fashion the AUCPCC although not expressly mentions bribery but in its scope of application defines acts of corruption to 'include the solicitation or acceptance directly or indirectly by a public official or any other person, of any goods of monetary value or other benefit, such as gift, favour, promise or advantage for himselfin exchange for any act or omission in the performance of his or her public functions;

⁴⁰⁶ No. 6 requests the Conference of the State Parties to address the criminalization of bribery of officials of public international organizations, including the United Nations Convention Against Corruption

⁴⁰⁷ UNCAC 2004, art 15(a)(b)

the offering or granting ... to a public official or any other person, of any goods of monetary value....in exchange for any act or omission in the performance of his or her public functions.⁴⁰⁸ These conventions underscore the importance of state governments having legislations to curb the problems associated with bribery and corruption.

Under sections 19, 21, 22, 23 and 24 of the ICPC Act 2004, it provides offences about bribery of public officials, in auctions, in assisting primarily in the contract/procurement process and contains a clear directive on reporting occasions of bribery to the appropriate authority. Bribery is classified as a corrupt practice and involves using one's office or position to gratify or confer any corrupt or unfair advantage to oneself or associate.⁴⁰⁹ Corruption and collusion are strategic complements as they generate more illegal rents. We have noted separately in previous chapters that both private sector and public sector players are involved in one form of bribery or the other. For example, reports from Stolen Asset Recovery noted that from late 2003 through March 2005, Willbros made corrupt payments totalling more than \$6.3 million to Nigerian government officials to assist in obtaining and retaining a \$387 million contract for work on a major engineering, procurement and construction of gas pipeline project. In exchange for the EGGS project, the conspirators corruptly paid officials of the Nigerian National Petroleum Corporation (NNPC), NNPC's subsidiary, the National Petroleum Investment Management Services (NAPIMS); a senior official in the executive branch of the Nigerian federal government; officials of a multinational oil company serving as the operator of the EGGS joint venture; and a political party.⁴¹⁰

⁴⁰⁸ AUCCPC 2006, art 4(a)(b)

⁴⁰⁹ ICPC Act 2000, s 19

⁴¹⁰ <<http://star.worldbank.org/corruption-cases/node/18634>> assessed 1 September 2015

Paradoxically no notable case of bribery has been successfully prosecuted in Nigeria, many of such cases have been muddled up in one form of judicial rascality or the other, of which injunctions and permanent injunctions have become the order of the day. However, many of the bribery cases have gained success outside the shores of the country, perhaps due to stringent international measures adopted by such nations compared with the pervasive internal political influence and corruption that have permeated the Nigerian judiciary thereby obstructing the course of justice. In the filing by the Noble Corporation with the US Securities and Exchange Commission, Noble-Swiss reached a settlement with the U.S. Department of Justice and the Securities and Exchange Commission in connection with their investigation under the United States Foreign Corrupt Practices Act of certain reimbursement payments made by its Nigerian affiliate to customs agents in Nigeria. In January 2011, the Nigerian Economic and Financial Crimes Commission and the Nigerian Attorney General Office initiated an investigation into these same activities. Through the execution of a non-prosecution agreement dated January 28, 2011, it was resolved that Noble subsidiary will pay \$2.5 million to settle all charges and claims of the Nigerian government.⁴¹¹

4.3 Anti-corruption agencies in South Africa

Unlike Nigeria where two independent anti-graft agencies are created by law to tackle corruption and money laundering, namely: the EFCC and ICPC, it is not the

⁴¹¹ U.S Department of Justice 'Noble Corporation, Non-prosecution Agreement and Statement of Facts, dated November 4, 2010 <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10noble-corp-npa.pdf>> accessed 8 July 2015; Nate Raymond, 'CORRECTED-Noble Corp execs to pay nothing in U.S. SEC bribery settlement' *Reuters* (New York, 3 July 2014)

sa1me with South Africa as the country given its complex political economy does not resort to the creation of distinct agencies but have vested such powers within existing government agencies and bodies. Some of these institutions are the creation of the Constitution, such as the office of the Auditor-General, Office of the Public Prosecutor, the Public Service Commission and The Independent Complaints Directorate (ICD). Others are agencies associated with the criminal justice system: the South African Police Services Anti-corruption Unit (SAPS ACU), the South African Police Services Commercial Crime Unit (SAPS CCU), National Prosecuting Authority, Directorate of Serious Operations, Asset Forfeiture Unit and Special Investigating Unit. The other key players include the Department of Public Service and Administration, National Intelligence Agency, South African Revenue Services and National Anticorruption Forum. The primary law enforcement body in South Africa is the South African Police Services (SAPS), which is the first port of call for any person wanting to report a suspected act of corruption and open a criminal case. Within the SAPS is the Directorate for Priority Crime Investigations (colloquially known as the Hawks). While the SAPs has carried out investigations leading to the prosecution of some notable political figures in South Africa, report indicates that there is widespread corruption particularly in the police and Department of Home Affairs with shallow public perception. Significantly corrupt behaviour has been uncovered at the highest levels of the SAPS.⁴¹² For instance, it was reported that a former National Commissioner Jackie Selebi, under whose direction the Anti-Corruption Unit (ACU) operated before it was shut down in 2006 was accused of involvement in criminal affairs, this matter was investigated by the

⁴¹² Gareth Newham and Andrew Faull, *Protector or Predator? Tackling Police Corruption in South Africa* (Institute for Security Studies 2011) 23

National Prosecuting Authority ('the Scorpions'), charged with corruption, defeating the ends of justice in 2008 but convicted in 2010.⁴¹³ Whereas a single agency vested with the fight against corruption and money laundering would have specialised training as well as enjoy some degree political independence, the SAPS has been found to compromise independence, especially in some high profile political cases. It has been argued that 'the provisions of the South African Police Service Act which creates the Hawks is inconsistent with the constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Hawks.'⁴¹⁴ There have also been allegations of the SAPS senior management irregularly interfering with the tender process for political reasons.⁴¹⁵

Research indicates that the country has the necessary legislative tools to fight corruption and money laundering but requires renewed and sustained enforcement and broader engagement by government, business and the private sector. There are, however, issues regarding the overlapping of functions associated with the agencies, budgetary constraint on the part of the public protector's mandate to investigate, make adequate recommendations to the state and create confidence in the citizenry by being accessible to all.

4.4 Laws on Money Laundering

The principal laws on combating of money laundering and corruption in Nigeria are the Money Laundering Act of 2011 as amended in 2012, Miscellaneous Offences

⁴¹³ Ibid 23

⁴¹⁴ Bowman Gilfillan, 'Legal Review: Anti-Corruption Tools in South Africa' <https://c.ymcdn.com/sites/www.membership.bmfonline.co.za/resource/collection/45D694FA-1174-489B-89D2-A8F23479442B/MATTHEW_PURCHASE.pdf> accessed 13 May 2016

⁴¹⁵ Newham (n412) 23

Act, the Cybercrime Act 2015. In addition to the constitution, other relevant public service Acts and regulations such as the Public Procurement Bureau Act, Code of Conduct Bureau and Tribunal Act and the Financial Regulation are viable legal tools. In South Africa, the Prevention of Organised Crime Act, the Financial Intelligence Centre Act and the Protection of Constitutional Democracy against Terrorism and Related Activities Act are the primary anti-money laundering statutes. Others include the Bank Act No. 94 of 1990 and Public Finance and Management Act of 1999.

Below we examine the relevant provisions as they affect the fight against money laundering and corruption. We first consider statutes applicable to Nigeria, and after that, we look at South African legislation.

4.4.1 The Money Laundering (Prohibition) Act 2012 as Amended - Nigeria

There are mandatory provisions obliging state parties to adopt legislative measures to criminalise laundering of the proceeds of corruption and other crimes in both the AUCC and UNCAC. The UNCAC seeks to prohibit the laundering of the proceeds of crime, while the AUCC's focus is the laundering of the proceeds of corruption or related offences perhaps in the realisation that the principal proceeds of crime that are being laundered in Africa is that of corruption.

The act makes general provisions to prohibit the financing of terrorism, the laundering of the proceeds of a crime or an illegal act, provides appropriate penalties and expands the scope of supervisory and regulatory authorities to address the challenges faced in the anti-money laundering regime in Nigeria. This

work stems from the need to respond to international initiatives on the measure to curb money laundering and terrorist financing and perhaps the realisation of the negative consequences of money laundering to the national economy.

There is an outright prohibition of money laundering in Nigeria.⁴¹⁶ The MLA provides that where ‘any person or body corporate, in or outside Nigeria, who directly or indirectly: conceals or disguise the origin of; converts or transfers; removes from the jurisdiction; or acquires, uses, retains or takes possession or control of; any fund or property, knowingly or reasonably ought to have known that such fund or property is, or forms part of the proceeds of an unlawful act, commits a money laundering offence.’⁴¹⁷ S.15(6) defines unlawful acts to include ‘participation in organised criminal group, racketeering, terrorism, terrorist financing, trafficking in persons, smuggling of migrants, sexual exploitation, sexual exploitation of children, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, illicit trafficking in stolen goods, corruption, bribery, fraud, currency counterfeiting, counterfeiting and piracy of products.....tax crimes, insider trading and market manipulation or any other criminal act specified in this act or any other law in Nigeria.’⁴¹⁸ To deter money laundering in the country stiffer penalties have been introduced in the Act ranging from prison terms of between seven (7) and fourteen (14) years for individuals⁴¹⁹ and fine on conviction in the case of a body corporate⁴²⁰ of not less than one

⁴¹⁶ Money Laundering (Prohibition) Act 2011 as amended, s 15(1)

⁴¹⁷ Money Laundering (Prohibition) Act 2011 as amended, s 15(2)(a,b,c & d)

⁴¹⁸ Money Laundering (Prohibition) Act 2011 as amended, s 15(6)

⁴¹⁹ Money Laundering (Prohibition) Act 2011 as amended, s 15(3)

⁴²⁰ Money Laundering (Prohibition) Act 2011 as amended, s 15(4)

hundred percent of the funds and properties acquired as a result of the offence committed,⁴²¹ withdrawal of licence and or withdrawal⁴²² or revocation of the certificate or licence of the body corporate.⁴²³ In the sections to follow, an attempt will be made to highlight the specific provision of the act about crimes related to the opening of bank accounts and customer identity, limits on volumes of payments, reporting on suspicious transactions, the scope of persons and institutions covered and other checks and offences.

4.4.1.1 Account Opening and Specific Prohibitions

Depending on the scale of financial inclusion, transactions performed world over require some level of intermediation by a bank or other financial intermediary requiring their customers to open an account to facilitate the operations. It is therefore imperative that the institutions obtain the minimum information necessary from their clients to promote the account opening and this can also help to reduce the risk of the intermediary becoming a vehicle for or a victim of financial crime and suffer reputational damage. In the same vein, the customer due diligence requirement has become the standard best practice measure recommended by the Basel Committee as well as the Financial Action Taskforce. In particular, banks and other financial institutions are required to ensure that they 'have adequate policies and practices and procedures that promote high ethical and professional standards and prevent the bank from being used, intentionally or unintentionally by

⁴²¹ Money Laundering (Prohibition) Act 2011 as amended, s 15(4)(a)

⁴²² Money Laundering (Prohibition) Act 2011 as amended, s 15(4)(b)

⁴²³ Money Laundering (Prohibition) Act 2011 as amended, s 15(5)

criminal elements.⁴²⁴ Also, they must ensure that critical elements such as customer acceptance policy, customer identification, ongoing monitoring of high-risk account and risk management are included in the design of the know-your-customer programmes. One cannot overemphasise the need for this requirement because those with criminal tendency to launder the proceeds of crime will try to obscure their identity perhaps through sometimes legal channels. Admittedly, there are situations where the bank is challenged by its operating environment to provide sufficient information about the customer's identity,⁴²⁵ in such a case, the bank if it has reasonable grounds to conclude that the individual is not able to produce a detailed evidence and cannot be reasonably expected to do, may accept instead a statement from a person in position of responsibility as to the new customer's identity.⁴²⁶ Still, there are other instances where the bank may be unsure as to who precisely is the customer,⁴²⁷ an example is where a bank is dealing with a fund manager, corporate vehicle, nominee and fiduciary accounts. Though there are money-laundering controls applicable to such entities, the bank would carry out reasonable care appropriate to high-risk investors to prevent the risk of money laundering or using the bank to launder proceeds of criminal acts.

In keeping with the need to ensure that adequate preventive measures are in place, the MLA requires all financial and designated financial institution to identify a customer, whether permanent or occasional, natural or legal person, or any form

⁴²⁴ Bank for International Settlement, 'Basel Committee on Banking Supervision: Core Principles for Effective Bank Supervision' <<https://www.bis.org/publ/bcbs230.pdf>> accessed 14 July 2016

⁴²⁵ In some parts of Northern Nigeria where streets are not numbered, either landmarks (notable mosque, wards, church or government institution) are the basis for account opening. Other complexities abound such as individuals in the same locality answering same names, except for biometric information, now widely used, only passport photos help to differentiate such individuals.

⁴²⁶ Ross Cranston, *Principles of Banking Law* (2nd Edition, Oxford University Press 2008) 134

⁴²⁷ *Ibid* 134

of legal arrangement, using identification documents as may be prescribed in any relevant regulation.⁴²⁸ It further requires the institution responsible for using reliable, independent source document and information to verify the identity of the customer⁴²⁹. This is very important because the customer due diligence requirement also mandated by the Financial Action Taskforce is the minimum best standard for the combating of money laundering activities. More recently in Nigeria, The Bank Verification Number (BVN) has been introduced in the country as a means of bringing together the multiplicity of accounts maintained by individuals and corporate organisation to map customer identities and their related transactions. The MLA has also taken reasonable measure to ensure that beneficial owners are identified by compelling institutions to 'take reasonable measures to identify the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution or designated financial institution is satisfied that it knows who the beneficial owner is.'⁴³⁰ A beneficial owner as defined by S. 25 is 'a natural person who ultimately owns or controls a customer; or the natural person on whose behalf a transaction is conducted; and a person who exercises ultimate control over a legal person or arrangement.'⁴³¹ Also, the MLA has broadened the definition of a financial and designated non-financial institution to cover the full ambit of money laundering activities. A financial institution means, 'banks, body association or group of persons, whether corporate or incorporate, which carries on business of investment and securities, a discount house, insurance institution, debt

⁴²⁸ Money Laundering (Prohibition) Act 2011 as amended, s 3(1)(a)

⁴²⁹ Money Laundering (Prohibition) Act 2011 as amended, s 3(1)(b)

⁴³⁰ Money Laundering (Prohibition) Act 2011 as amended, s 3(1)(b)

⁴³¹ Money Laundering (Prohibition) Act 2011 as amended, s 25

factorisation and conversion firms, bureau de change, finance company, money brokerage firm whose principal business includes factoring, project financing, equipment leasing, debt administration, fund management, local purchase order, financing export finance, project consultancy, financial consultancy, pensions funds management and such other business as the Central Bank or other appropriate authorities may from time to time designate,⁴³² while a Designated Non-Financial Institution means ‘dealers in Jewellery, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, supermarkets or such other businesses as the Federal Ministry of Commerce or appropriate regulatory authorities may from time to time designate.’⁴³³

Under section 3 (2) institutions are also required to perform adequate due diligence measures⁴³⁴ when: establishing business relationships;⁴³⁵ carrying out occasional transactions above the applicable designated threshold prescribed by the relevant regulation.⁴³⁶ Notably, Section 10 provides that lodgements exceeding N5,000,000.00 and N10,000,000.00 for individuals and corporate organisations respectively are to be reported to the Economic and Financial Crimes Commission/the Nigerian Financial Intelligence Unit;⁴³⁷ carrying out occasional transaction that is wire transfers;⁴³⁸ there is a suspicion of money laundering or terrorist financing, regardless of the threshold;⁴³⁹ or the financial or designated non-

⁴³² Money Laundering (Prohibition) Act 2011 as amended, s 25

⁴³³ Money Laundering (Prohibition) Act 2011 as amended, s 25

⁴³⁴ Money Laundering (Prohibition) Act 2011 as amended, s 3(1)

⁴³⁵ Money Laundering (Prohibition) Act 2011 as amended, s 3(2)(a)

⁴³⁶ Money Laundering (Prohibition) Act 2011 as amended, s 3(2)(b)

⁴³⁷ Money Laundering (Prohibition) Act 2011 as amended, s 10(1)

⁴³⁸ Money Laundering (Prohibition) Act 2011 as amended, s 3(2)(c)

⁴³⁹ Money Laundering (Prohibition) Act 2011 as amended, s 3(2)(d)

financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.⁴⁴⁰

As earlier cited, there are some practical difficulties in performing customer due diligence or obtaining information about the identity of a potential customer in some areas in Nigeria. For instance, in the northern part of the country where there are no street numbers other than wards or notable locations like schools and wards, verification of client's address will substantially be linked to those wards and prominent locations.

4.4.1.2 The Prevention and Combating of Corrupt Activities Act No 12 of 2004 – South Africa

The legal framework for bribery of public officials in South Africa is provided by the Prevention and Combating of Corrupt Activities Act, 2004 (PCCAA). The law criminalises corruption and bribery. In the preamble to the act, it is recognised that corruption and related corrupt activities undermines the rights of all people, endangers the stability and security of society, undermines the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments and provides the breeding ground for organised crime.⁴⁴¹ Furthermore, the following stark realities of corruption were acknowledged, namely:

⁴⁴⁰ Money Laundering (Prohibition) Act 2011 as amended, s 3(2)(f)

⁴⁴¹ Republic of South Africa, Prevention and Combating of Corrupt Activities Act 2004, Preamble, par. 3

- that illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;
- that there are linkages between corruption and other forms of organised crime and economic crime, including money laundering;
- that corruption is a transnational phenomenon, is cross-border in nature and affects all societies and economies which is equally destructive and reprehensible in both the private and public spheres of life.

Given the adverse effect of corruption and its attendant problems, the act seeks to strengthen measures to prevent and combat corruption and related corrupt activities, provide necessary offences of corruption and related corrupt activities. Also, the Act provides investigative measures, establishes a register of offenders with specific restrictions on persons and enterprises convicted of corruption and associated activities and places a duty of care on persons holding a position of authority to report corrupt transactions.⁴⁴² The scope also includes the provision of extra-territorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities and to provide for matters connected therewith.⁴⁴³

Section 3 of the Act defined the general offence of corruption. Any person who accepts or agrees to take any gratification from any other person, whether for the benefit of himself or for the benefit of another person; or gives or agrees or offers to provide to any other person any gratification, whether for the benefit of that other

⁴⁴² Ibid,

⁴⁴³ ibid

person or for the benefit of another person in order to act, personally or by influencing another person so as to act in a manner:

- i. that amounts to the:
 - illegal, dishonest, unauthorised, incomplete, or biased; or
 - misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or other legal obligation;
- ii. that amounts to:
 - the abuse of a position of authority;
 - a breach of trust; or
 - the violation of a legal duty or a set of rules;
- iii. designed to achieve an unjustified result; or
- iv. Amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of an offence of corrupt activities relating to a public officer.⁴⁴⁴

Gratification is also extremely broadly defined and includes, but is not limited to, money, donations and gifts, employment, avoidance of loss or liability and any other valuable consideration, or benefit of any kind.

Chapter two of the Act defines in a robust sense what constitutes corrupt activities and covers corruption-related activities in virtually all sectors of public life⁴⁴⁵ and

⁴⁴⁴ Ibid, ch 2, pt 1, s 3

⁴⁴⁵ Ibid, ch 2, pt 2, s 4

includes: foreign public official,⁴⁴⁶ activities related to agents,⁴⁴⁷ the legislature,⁴⁴⁸ judicial officials,⁴⁴⁹ prosecuting authority.⁴⁵⁰ Other specific matters covered in the act classified as offences include: corrupt activities relating to witnesses and evidential material during certain proceedings;⁴⁵¹ offences relating to corrupt activities relating to contracts,⁴⁵² procuring and withdrawal of tenders,⁴⁵³ corrupt activities relating to auctions,⁴⁵⁴ corrupt activities relating to sporting events,⁴⁵⁵ gambling games and games of chance.⁴⁵⁶ In the same vein, miscellaneous offences relating to possible conflict of interest and other unacceptable behavioural conduct such as the acquisition of private interest in contract, agreement or investment of public body;⁴⁵⁷ unacceptable behaviour relating to witnesses which among others include intimidation, coercion, use of outright force or improper persuasion with the intent to prevent, influence or delay the testimony of a witness in a trial or cause or induce the individual to testify in a way or fashion in an untruthful manner in a trial, withhold evidence or record, alter, destroy or mutilate, or conceal a record with the intent to impair the availability of such record;⁴⁵⁸ and intentional interference with, hindering or obstruction of investigation of offence.⁴⁵⁹ Additionally, other offences relating to corrupt activities defined in the act include:

⁴⁴⁶ Ibid, ch 2, pt 2, s 5

⁴⁴⁷ Ibid, ch 2, pt 2, s 6

⁴⁴⁸ Ibid, ch 2, pt 2, s 7

⁴⁴⁹ Ibid, ch 2, pt 2, s 8

⁴⁵⁰ Ibid, ch 2, pt 2, s 9

⁴⁵¹ Ibid, ch 2, pt 4, s 11

⁴⁵² Ibid, ch 2, pt 4, s 12

⁴⁵³ Ibid, ch 2, pt 4, s 13

⁴⁵⁴ Ibid, ch 2, pt 4, s 14

⁴⁵⁵ Ibid, ch 2, pt 4, s 15

⁴⁵⁶ Ibid, ch 2, pt 4, s 16

⁴⁵⁷ Ibid, ch 2, pt 5, s 17

⁴⁵⁸ Ibid, ch 2, pt 5, s 18

⁴⁵⁹ Ibid, ch 2, pt 5, s 19

accessory to or after offence;⁴⁶⁰ and attempt or conspiracy and inducing another person to commit offence.⁴⁶¹

It is interesting to observe that the Act specifies stiff penalties for corruption offenders prescribing sentences up to a maximum of three, five, eighteen and life imprisonment depending on the court of competent jurisdiction handling the matter.⁴⁶² Specifically, cases involving general corruption, corrupt activities relating to specific persons, the offering and giving of unauthorised gratification and corruption activities relating to particular matters identified above, incur a prison sentence of up to life imprisonment.⁴⁶³ For the individuals involved, the penalty provisions in the Act differentiate between certain categories of offences. The penalties in relation to the majority of the offences (including the general offence of corruption) are the following: in the case of a sentence to be imposed by a High Court, a fine or imprisonment up to a period in prison for life; in the case of a sentence to be imposed by a regional court, a fine or imprisonment up to a period not exceeding 18 years; and in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment up to a period not exceeding five years. Corruption offences bordering on witness intimidation, the concealment of the offence of corruption and being an accessory to or after the offence of corruption carry lesser penalties and incurs a maximum prison sentence of ten years. Thus, in the case of a sentence to be imposed by a High Court or regional court, a fine or imprisonment up to a period not exceeding 10 years; and, in the

⁴⁶⁰ Ibid, ch 2, p 6, s 20

⁴⁶¹ Ibid, ch 2, pt 6, s 21

⁴⁶² Ibid, ch 5, s 26

⁴⁶³ Ibid, ch 5, s 26(1)(a)

case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment up to a period not exceeding three years.

It is noteworthy that in cases of award of fine, the value to be determined by the trial judge would have a maximum of five times the amount of the gratification involved in the offence.⁴⁶⁴ Furthermore, the Act provides for a register of entities and individuals convicted of acts of corruption relating to contracts and the procurement and withdrawal of tenders, with the consequence being that the National Treasury may terminate any agreement and prevent such persons from doing business with the government for ten years. The National Treasury may also recover from the person or enterprise any damages incurred or sustained by the State as a result of the tender process or the conclusion of the agreement, or that the State may suffer by having to make less favourable arrangements afterwards. In spite of its well-developed ant-corruption laws, there is widespread corruption reported in South Africa.⁴⁶⁵ And while the law behoves on any person holding position of authority and who knows or ought to reasonably know or suspected that another person has committed the general offence of corruption or other offences specified above to report to the appropriate authority, it is still unclear why corruption-related offences are less likely reported with the agility and speed.

⁴⁶⁴ Ibid, ch 5, s 26(3)

⁴⁶⁵ Francois van Schalkwyk, *Open Data and the Fight Against Corruption in South Africa* (Transparency International 2017) 11

4.4.1.3 The Financial Intelligence Centre Act, No. 30 of 2001 (FICA), Act No. 33 of 2004, No. 11 of 2008, No 11 of 2013 and No. 1 of 2017 – South Africa

The Financial Intelligence Centre Act 2001 establishes a Financial Intelligence Centre as an institution outside the public service but within the public administration as envisaged in Section 195 of the Constitution⁴⁶⁶. The centre is a juristic person⁴⁶⁷. The principal objectives of the Centre is to assist in⁴⁶⁸:

- the identification of the proceeds of unlawful activities;
- the combating of money laundering activities and the financing of terrorist and related activities;
- implementation of financial sanctions pursuant to resolutions adopted by the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations.

The other objectives of the Centre are⁴⁶⁹:

- i. to make for information collected by it available to investigating authorities, supervisory bodies, the intelligence services and the South Africa Revenue Services to facilitate the administration and enforcement of laws of the Republic;
- ii. to administer measures requiring accountable institutions to freeze property and transactions pursuant to financial sanctions that may arise from resolutions adopted by the Security Council of the United Nations referred to in a notice contemplated in section 26A.

⁴⁶⁶ FICA 2001 as amended by Act NO. 1 2017 s 2(1)

⁴⁶⁷ FICA 2001 as amended by Act NO. 1 2017 s 2(2)

⁴⁶⁸ FICA 2001 as amended by Act No. 1 2017, s 3(1)

⁴⁶⁹ FICA 2001 as amended by Act No. 1 2017, s 3(2)

- iii. to exchange information with similar bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities and other similar activities;⁴⁷⁰ and
- iv. to supervise and enforce compliance with FICA or any directive made in terms of FICA and to facilitate effective supervision and enforcement by supervisory bodies⁴⁷¹.

The 2017 Amendment Act expands the list of institutions to which the Centre will make information it collects available. Under the 2001 FICA, one of the objectives of the Centre was to make such information available to “investigating authorities, the National prosecuting Authority, the intelligence services and the South African Revenue Services.” The list now includes the Independent Police Investigative Directorate, the Intelligence Division of the National Defence Force, a Special Investigating Unit, the office of the Public Protector, an investigative division in an organ of state, and a supervisory body.

The Act provides for the strengthening of customer due diligence measures on beneficial ownership, anonymous and persons in prominent positions; the obligation to keep identity and verification and transaction records, and an on-going due diligence of the customer’s transaction records and sets out the procedure in respect of financial sanction control measures pursuant to the notification of persons and entities identified by the Security Council of the United Nations. Below are relevant sections that relates to customer due diligence which forms the fulcrum of this research.

⁴⁷⁰ FICA 2001 as amended by Act NO. 1 2017 s 3(2)(b)

⁴⁷¹ FICA 2001 as amended by NO. 1 2017 s 3(2)(c)

Schedule 3A and 3B classified prominent official to domestic and foreign. It defined a domestic influential person as, “an individual who holds, including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic:

- i. a prominent public function including that of: the President or Deputy President; a government minister or deputy minister; the Premier of the province; a member of the Executive Council of a province; an executive mayor of a municipality elected in terms of the Local Government: Municipal Structures Act, 1998; a leader of a political party registered in terms of the Electoral Act, 1996; a member of a royal family or senior traditional leader as defined in the Traditional leadership and Governance Framework Act, 2003; the head, accounting officer or chief financial officer of a national or provincial department or government component as defined in section 1 of the Public Service Act, 1994; the municipal manager of a municipality appointed in terms of section 54A of the Local Government: Municipal Systems Act, 2000; the chairperson of the controlling body, the chief executive officer, or a natural person who is the accounting authority, the chief financial officer or chief investment officer of a public entity listed in schedule 2 or 3 to the Public Finance Management Act, 1999; the chairperson of the controlling body, the chief executive officer, or a natural person who is the accounting authority, the chief financial officer or chief investment officer of a municipal entity as defined in section 1 of the Local Government:

Municipal Systems Act, 2000; a constitutional court judge or any other judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001; an ambassador or high commissioner or other senior representative of a foreign government based in the Republic; or an officer of the South African Defence Force above the rank of major-general.

- ii. the position of: chairperson of the board of directors; chairperson of audit committee; executive officer; or chief financial officer, of a company defined in the Companies Act 2008 (Act No. 71 of 2008), if the company provides goods and services to an organ of state and the annual transactional value of goods and services or both exceeds an amount determined by the Minister by notice in the Gazette; and,
- iii. the position of head, of an international organisation based in the Republic.”⁴⁷²

The risk-based approach for domestic prominent influential person requires the accountable institution to determine that the prospective client with whom it engages to establish a business relationship, or the beneficial owner of that prospective client, is a domestic prominent influential person and that, in accordance with its Risk Management and Compliance Programme, obtain senior management approval for establishing the business relationship, take reasonable measures to establish the source of wealth and source of funds of the client, and conduct enhanced ongoing monitoring of the business relationship.⁴⁷³

⁴⁷² FICA 2001 as amended by Act No. 1 2017 Schedule 3A.

⁴⁷³ FICA 2001 as amended by Act No. 1 2017 S 21G

A foreign prominent public official on the other hand is an individual who holds, or has held at any time in the preceding 12 months, in any foreign country a prominent public function including that of: Head of State or head of a country or government; member of a foreign royal family; government minister or equivalent senior politician or leader of a political party; senior judicial official; senior executive of a state owned corporation; or a high ranking member of the military.⁴⁷⁴ To establish a business relation with a foreign public official, the institution must obtain senior management approval for establishing the business relationship, take reasonable steps to establish the source of wealth and source of funds and conduct enhanced ongoing monitoring of the business relationship.⁴⁷⁵

Under section 21H of the Act, immediate family members and known close associates of the domestic and foreign prominent public officials (these include current or previous spouses, civil partners, or life partners; children, step-children, and their spouses or partners; parents; and close relatives by consanguinity or affinity) are as well be subjected to due diligence measures by the accountable institution.⁴⁷⁶

The Act introduced a risk-based approach to customer due diligence when contemplating the establishment of a business relationship with a potential client or when concluding a transaction on behalf of a potential or existing client⁴⁷⁷. This is in tandem with the Financial Action Task Force AML/CFT standard that introduced the implementation of a “risk-based” approach in the execution of AML

⁴⁷⁴ FICA 2001 as amended by Act No. 1 2017 Schedule 3A

⁴⁷⁵ FICA 2001 as amended by Act No. 1 2017 S 21F

⁴⁷⁶ FICA 2001 as amended by Act No. 1 2017 S 21H

⁴⁷⁷ Johan Henning, 'Fortifying a Risk-Based Approach in the South African AML/CFT Process' (2017) 24(4) JFC 520-528

and combating financing terrorism (CFT) measures. Under this approach, an accountable institution must identify, assess, and understand its AML/CFT risks which largely depends on the effective implementation of its risk and compliance programme. FICA places responsibility on the board of directors and senior management for complying with the relevant provisions and its risk management and compliance framework.

Some essential provisions set out in Chapter 3, Part 1 includes:

- i. that accountable institutions are required not to establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name;⁴⁷⁸
- ii. when an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its Risk Management and Compliance Programme: establish and verify the identity of the client; if the client is acting on behalf of another person, establish and verify that other person and the client's authority to establish the business relationship or to conclude the single transaction on behalf of the other person; and, if another person is acting on behalf of the client, establish and verify the identity of that other person and that other person's authority to act on behalf of the client;⁴⁷⁹
- iii. where an accountable institution engages to establish a business relationship with a prospective client, the institution must obtain information

⁴⁷⁸ FICA 2001 as amended by Act No. 1 2017 s 20A

⁴⁷⁹ FICA 2001 as amended by Act No. 1 2017 S 21(1)

about the nature of the business relationship, intended purpose of the business relationship concerned and the source of funds that the prospective client expects to use in concluding the transactions; and the institution to ensure that the information will assist to reasonably enable it determine whether future transactions are consistent with the knowledge of the prospective client;⁴⁸⁰

- iv. in relation to legal persons, trusts and partnerships or similar arrangement between natural persons, additional customer due diligence are introduced by the ACT⁴⁸¹. Accountable institution must establish the nature of the client's business and the ownership structure⁴⁸².

Under section 21B(2), if a client contemplated is a legal person, the accountable institution must:

- a. establish the identity of the beneficial owner of the client by:
 - i. determining the identity of each natural person who, independently or together with another natural person, has a controlling ownership interest in the legal person;
 - ii. if in doubt whether a natural person contemplated is the beneficial owner of the legal person or no natural person has controlling interest in the legal person, determining the identity of each natural person who exercises control of that legal person through other means; or
 - iii. if a natural person is not identified, determining the identity of each natural person who exercises control over the

⁴⁸⁰ FICA 2001 as amended by Act No. 1 2017 S 21A

⁴⁸¹ FICA 2001 as amended by Act No. 1 2017 S 21B(1)

⁴⁸² FICA 2001 as amended by Act No. 1 2017 S 21B(1)(a)(b)

management of the legal person, including his or her capacity as executive officer, non-executive director, independent non-executive director, director or manager; and

iv. take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows the beneficial owner.⁴⁸³

b. take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows who the beneficial owner is.

Where the client is acting on behalf of a partnership between the natural person, section 21B(3) requires the accountable institution to take further steps in addition to sections 21 and 21A to:

- i. identify of the name of the partnership (if applicable);
- ii. identify every partner including every member of a partnership en *commandite*, an anonymous partnership or any similar partnership;
- iii. establish the identity of the person who exercises executive control over the partnership; establish the identity of each natural person who purports to be authorised to enter into a single transaction or establish a business relationship with the accountable institution on behalf of the partnership;
- iv. take reasonable steps to identify the particulars of the partnership; and,
- v. take reasonable steps to identify the natural persons involved in the partnership so that the accountable institution will be satisfied that it knows the identities of the natural persons concerned.

⁴⁸³FICA 2001 as amended by Act No. 1 2017 S 21B(2)

Additional due diligence on the part of the accountable institution is also required when a business relationship for trust agreements and natural persons. In addition to the section 21 and 21A respectively, the accountable institution must establish the identifying name and number of the trust, the address of the Master of the High Court where the trust is registered, establish the identity of the founder, establish the identity of each trustee or the natural person who purports to be authorised to enter into a single transaction, establish the identify of each beneficiary referred to in the trust agreement by name or the particulars of how the beneficiaries are to be determined, verify the particular of the trust, and take reasonable steps to verify the identities of the natural persons concerned in order to satisfy the accountable institution that it knows the natural persons concerned.⁴⁸⁴

A significant part of its risk-based approach is the need for continuous or on-going customer due diligence. The Act requires the accountable institution to conduct on-going due diligence through regular monitoring of transactions (including complex and unusually large transactions, unusual patterns of transactions that have no apparent business or lawful purpose) undertaken throughout the course of the business relationship, and in particular focus on the client's source of fund.⁴⁸⁵

Where the accountable institution is unable to conduct customer due diligence as specified in the relevant sections of the Act in relation to any particular business relationship, the institution may not establish a business relationship or conclude a single transaction with the client. In addition, the institution must terminate in accordance with its Risk Management and Compliance Programme, an existing

⁴⁸⁴ FICA 2001 as amended by Act No. 1 2017 S 21B(5)

⁴⁸⁵ FICA 2001 as amended by Act No. 1 2017 S 21C

business relationship with a client as the case may be and consider making a report under section 29 of the Act.⁴⁸⁶

There is an obligation on the accountable institution to keep customer due diligence records that must include copies of or references to information provided or obtained to verify the customer's identity, and in the case of a business relationship, information obtained concerning the nature, intended purpose and the source of funds which the prospective client is expected to use in concluding transactions in the course of the business relationship.⁴⁸⁷ Furthermore, the accountable institution, must keep transaction records⁴⁸⁸ whether of a single transaction which record must reflect the amount and currency in which the transaction was denominated, the date of the transaction, the parties involved, the nature of the transaction, business correspondence and if an account facility was provided to the client, the particulars of the account and files related to such transactions. Such records either in electronic form and by third parties⁴⁸⁹ must be kept by the accountable institution for:

- the establishment of a business relationship, at least five years after the termination of the business relationship;
- a transaction as contemplated in section 22A which is concluded for at least five years from the date on which the transaction is concluded; and
- a transaction or activity which gave rise to the contemplation of a report under section 29, for at least five years from the date on which the report was submitted to the Centre.⁴⁹⁰

⁴⁸⁶ FICA 2001 as amended by Act No. 1 2017 S 21E

⁴⁸⁷ FICA 2001 as amended by Act No. 1 2017 S 22(1)&(2)

⁴⁸⁸ FICA 2001 as amended by Act No. 1 2017 S 22A

⁴⁸⁹ FICA 2001 as amended by Act No. 1 2017 S 24

⁴⁹⁰ FICA 2001 as amended by Act No. 1 2017 S 23

4.4.1.4 Public Protector Report on State Capture

There is a great deal of challenge on how firms influence the state or collude with public officials to extract advantages. Media reports as well as widespread allegation of private companies' undue influence on the policies, regulations and appointment of public office holders in South Africa is commonplace. State capture is the extent to which firms make illicit and non-transparent private payments to public officials in order to influence the formation of laws, rules, regulations or decrees by state institutions. In discussing state capture, the state and the economy are not perceived as two separate entities but is seen as a fusion of economic and political power. Martins and Solomon observes state capture as having several forms: (1) it can occur in terms of an individual or family that exerts control over both the state and the economy; (2) the development of oligarchies with a quasi-feudal structure of dependants; (3) a complex range of networks with more equal reciprocal relations.⁴⁹¹

Based on complaints of alleged improper and unethical conduct by the president and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of State Owned Entities (SOEs) resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family, the Public Protector by virtue of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 3(1) of the Executive Members Ethics Act and section 8(1) of the Public

⁴⁹¹ Michaela Elsbeth Martin and Hussein Solomon, 'Understanding the Phenomenon of "State Capture" in South Africa' (2016) 5(1) Southern African Peace and Security Studies

Protector Act, 1994, undertook an investigation into the alleged complaints. The investigation emanates from complaints lodged against the President by Father S. Mayebe on behalf of the Dominican Order; Mr. Mmusi Maimane, the leader of the Democratic Alliance and leader of the Opposition in Parliament; and a member of the public. Complaints followed media reports of Gupta's family influence in the appointment and removal of government ministers, directors of state owned companies and influence in the procurement processes of government. The findings include: that President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, Duduzane Zuma, to be involved in the process of removal and appointment of the Minister of Finance in December 2015; Deputy Minister Jonas was offered a job by the Gupta family in exchange for extending favours to their family business; Minister Van Rooyen – who replaced Minister Nene – can be placed at the Saxonwold area on at least seven occasions including on the day before he was announced as Minister; that between the period 2 August 2015 and 22 March 2016, Eskom CEO Brian Molefe has called Mr Ajay Gupta a total of 44 times and Mr Ajay Gupta has called Mr Molefe a total of 14 times; the Eskom board was improperly appointed; Zuma and the Executive failed to take action to verify Ms Mentor's allegations, as well as Mr Maseka's allegations, as well as regarding the alleged cosy relationship between Brian Molefe and the Guptas; President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies; President Zuma improperly and in violation of the Executive Ethics Code used his position or information entrusted to him to enrich himself and businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences;

the South African people were prejudiced by the conduct of President Zuma, in not following up on Jonas's allegations; Minister Zwane's trip to Switzerland was irregular; Eskom's awarding of the coal contract to Tegeta was irregular; that government advertising was deliberately channelled to the Gupta's newspaper, the New Age; that the President may have been in breach of his legal duties in failing to investigate these matters or put act against them.

The report recommended that government should address the systemic procurement deficiencies and as well:

- i. appoint a judicial commission of enquiry to investigate the findings of the Public Protector, with powers of evidence collection that are not less than that of the Public protector;
- ii. the National treasury to adequately fund the commission of inquiry in order that it is adequately resourced;
- iii. commission of inquiry to submit report not later than 180 days from the commencement of the investigation to the President, who shall submit a copy with an indication of his/her intentions regarding the implementation to Parliament within 14 days of the releasing of the report;
- iv. Parliament to review within 180 days the Executive Members' Act to provide better guidance regarding integrity, including avoidance and management of conflict of interest;
- v. The president to ensure that Executive Ethics code is updated in line with the review of the Executive Members' Act; and,
- vi. The Public Protector, in terms of section 6 (4) (c) (i) of the Public Protector Act, brings to the notice of the National Prosecuting Authority

and the DPCI those matters identified in this report where it appears crimes have been committed.⁴⁹²

It is noteworthy that the president and his family are personally implicated and due to a conflict of interests, the public protector limited both his choice of a commissioner to conduct the inquiry and the power to specify certain terms of reference. President Zuma challenged the remedial action on the basis that it is the sole prerogative of the head of state under section 84(2)(f) of the Constitution of the Republic of South Africa, 1996, to appoint commissions of inquiry and that it is an unfettered discretionary power, which may not be limited. It was held amongst others, that the remedial action taken by the Public Protector against President Jacob Zuma in terms of section 182(1)(c) is binding; that the failure by the president to comply with the remedial action taken against him is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid; that the resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) is inconsistent with relevant sections of the Constitution, is invalid and is set aside.⁴⁹³

⁴⁹² Public Protector of South Africa, 'State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' (Report No. 6 of 2016/17)

⁴⁹³ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

CONCLUSION

Chapter III of the United Nations Convention on Corruption requires member states to be legislative and other measures to establish as criminal offences about bribery of national public officials, foreign public officials and officials of international public organisations. Local legislations exist in their most robust form to address the issues of corruption and money laundering in the two jurisdictions covered in this chapter being Nigeria and South Africa. There are also apparatus of government aimed at enforcing these laws to preventing corruption. The efficacy of the anti-money laundering laws is noticeable in the level of deterrence and awareness it has created over time as many now fear that the proceed of their illicit wealth can be traced and seized given that anti-corruption agencies would work. What is not adequate is the executive will and the political acceptance of the fight against corruption. As noted by Rider,⁴⁹⁴ in considering economic crimes, it is important to recognize the practical realities. The ability of those in position of influence who may already have disproportionate authority as a result of their scant regard for the law and good governance, to discourage criticism let alone effective investigation within their society, is a reality. The case of former President Jacob Zuma of South Africa and state capture is a typical example, with similar routines in Nigeria as well. *Those who have, in this context, amassed power and wealth for themselves, are unlikely to play by the rules.*⁴⁹⁵ They over time almost institutionalise this protection through further patronage and domination presents an almost insurmountable barrier to effective action within their society or state⁴⁹⁶. When the

⁴⁹⁴ Barry A. K. Rider, 'New and not so new strategies in promoting integrity with particular reference to Africa' a private paper

⁴⁹⁵ *ibid*

⁴⁹⁶ *ibid*

gatekeepers and the highly privileged are the ones complicit in corruption, it more or less ridicules the process.⁴⁹⁷ In the same vein, the powerful tend to undermine the very values that they are asked to protect by either underfunding the very institutions established to combat money laundering⁴⁹⁸ or deter them from implementing the rules especially when their cronies or party members are involved. Corruption becomes a politicised affair so much so that the anti-graft agencies only prosecute members of the opposition who are disloyal to those in the ruling party. The Implementation Review Group in its assessment of Nigeria identified areas of improvements which includes;⁴⁹⁹

- It has not comprehensively criminalised trading in influence but has adopted relevant measures in section 17, 19, 21 and 22 in the ICPC Act.
- It has partially criminalised bribery in the private sector through the application of Sections 8, to some extent section 9 and 17 of the ICPC Act.
- It is yet to adopt measures for the protection of witnesses, experts and victims, including their physical protection and related evidentiary rules or relocation agreements with other states.
- It is yet to establish whistleblowing protection measures
- There is no comprehensive legislation on international cooperation.

In respect of South Africa the initial review to update FICA Act to be risked based has been completed, however, there are still ongoing reviews on the domestication of other relevant articles of UNCAC as applicable.

⁴⁹⁷ Jacob Sello Selebi v The State in [2011] ZASCA 249

⁴⁹⁸ The Scorpions in South Africa, the Public Conduct Inspectorate in Ghana and the Bureau of Investigation and Intelligence are but a few examples of budget cuts leading to under performance of these agencies.

⁴⁹⁹ UNODC (n345)

An attitudinal change and a review of procedures are fundamental for the working of these institutions. Similarly, it is necessary to streamline crime fighting, not to share aspects with different agencies of government and thereby losing the focus. The ICPC and the EFCC, for example, can be integrated into one body with the sole responsibility of enforcing financial crimes and comically, the Nigerian police is vested with the responsibility to fight serious fraud and financial crimes.

CHAPTER FIVE

INTERNET BANKING AND MONEY LAUNDERING RISK

In recent times the traditional banking method in which customers and bank employees meet face to face using paper-based instructions and settlement process for individual transactions have now been taken over by computers, telecommunications and internet technologies making communication links more flexible, seamless and at the comfort of one's private home. Internet banking aims to assist customers in accessing accounts and general information on a bank's products and services through a personal computer or other intelligent devices. Currently, banks use their virtual existence to perform an actual transaction using their website. Electronic finance via the internet provides a new dynamic platform for cross-border communication and interaction among issuers, investors, financial institutions and public authorities thereby opening the way for commercial transactions in an open and competitive market. The internet has provided access to unlimited sources of capital and financial services even in areas where markets and efficient financial institutions are lacking. Similarly, electronic finance has contributed positively to growth and development, providing access to overseas financial markets, and has facilitated secure payments for goods and services across several jurisdictions. Also, new providers are emerging within and across countries, including brokerages and companies that allow consumers to compare financial services such as mortgage loans, insurance policies and trust services; and non-financial entities including telecommunication and utility companies offer payment and other services, trading systems for equities, fixed income and foreign exchange.

The entire banking process relies on the smooth functioning of sophisticated computer applications and network systems, which brings to fore the concerns of security of systems and network and availability of service. Banks may become vulnerable to malicious action from outsiders and any weakness in the implementation of security standards will likely result in disruption of operations and losses to both customer and the bank. An example of a security risk is when an unauthorised individual gains access to account data and personal information of a customer causing a breach to privacy, or the individual maliciously manipulates the data leading to fraud, corruption, duplication or alteration, theft and misuse of critical information and repudiation of valid transactions. The ease of internet access, the impersonal and remote nature of the contract between the financial institution and the customer and the rapidity of electronic transactions underscores why electronic banking activities are particularly vulnerable to money laundering activities. Difficulties may also arise if the procedures for opening an internet banking account take place without face-to-face contact or a link to an existing account. There is a wide range of legal risks (that is, the possibility of losses due to the violation or non-compliance with laws, rules, regulations or prescribed practices or when the rights of parties are not well established) associated with banks providing services over the internet. In most national jurisdictions, the leading regulatory authority assumes the pivotal role of regulating entities and enforcing general and specific anti-money laundering provisions tailored for banking institutions. The Financial Intelligence Unit/Centre serves as a stand-alone agency domiciled within the nation's Treasury with the aim of collecting financial intelligence necessary to support law enforcement as well enforcing rules on reporting of activities of politically exposed persons (PEPS) and suspicious

activities. This chapter examines the link between corruption and money laundering through the banking system with particular emphasis on electronic banking and other online non-bank payment mechanisms owing to their lack of face-to-face contact with customers, and the extra vigilance required to monitor online transactions. First part sought to consider internet-banking security and other security infrastructure geared toward the safety and soundness of the financial system. Next, we examine the underlying principles of privacy and confidentiality in internet banking and its relationship with anti-money laundering legislation. These international regulatory and prudential requirements on electronic finance/banking examined with local initiatives to determine the appropriateness or otherwise of the controls. Then we examined the fight against money laundering and politically exposed persons. We conclude with recommendations on tightening institutional and regulatory framework as well as international cooperation to prevent the laundering of the proceeds of corruption.

5.1 Electronic Banking

The electronic funds transfer is any transfer of funds initiated or processed using automated techniques. The United States Electronic Fund Transfer Act defines electronic funds transfer as: 'the transfer of funds, other than a transaction initiated by cheque or similar paper instruments, made through an electronic terminal or computer or by means of magnetic tape so as to order, instruct, or authorise a participating financial institution to credit or debit an account.' Internet banking, on the other hand, refers to the provision of electronic banking services via the internet, commonly through a personal computer or additional access devices with installed internet capabilities. The three elements of making payments: the

payment message; movements on accounts; and settlement also exist in internet banking. Admittedly, internet banking still maintains the banker-customer relationship because opening an internet banking account is parallel to the traditional way of opening a regular bank account. The relationship between the online bank and the customer is one of contract and this consist of the general contract, which comes into being upon the establishment of the banker-customer relationship; and special contracts that arise by specific agreements entered into between the bank and the customer. The bank account is the anchor in the banker-customer relationship since upon opening the bank account; the bank agrees to accept the customer's deposit and to repay sums of equivalent value on demand or at a specified date on the customer's orders. Using the appropriate technology the honours the customer's mandate with reasonable care and skill in order not to facilitate fraud or allow unauthorised access to the client's account. The electronically transmitted instruction to the originator's bank is a mandate from the customer to his bank and lies within the framework of the banker-customer relationship. The authority to transfer funds to bank accounts held with the same or another bank, the other bank is impliedly authorised to accept credit by its customer and beneficiary of the transfer by their relationship.⁵⁰⁰ Electronic Banking is the term used to describe the use of electronic delivery channels for banking products and services. Electronic delivery channels include the internet, wireless communication networks, automatic teller machines (ATM) and telephone/mobile banking. Electronic banking products and services now commonly used include:

⁵⁰⁰ Apostolos Gkoutzinis, *Internet Banking and the Law in Europe: Regulation, Financial Integration and Electronic Commerce* (Cambridge University Press 2006) 33

- Mobile/telephone banking: This targets consumers without a computer as an alternative to transacting their business over the telephone. Banks can create a computer-controlled system that allows customers to dial through a phone to access their accounts and perform routine banking functions such as obtaining account balances information, payment to customers, pay other bills and as well do cheque clearance operations. A mobile money product connects to prepaid accounts with a financial institution and in some cases even with non-bank entities. The financial institutions that facilitate mobile payments can be a traditional payment service provider (banks or depository institutions) or a non-bank payment service provider (designated as money or value transfer services – MVTs).
- Smart/prepaid card services. These are prepaid cards, which store a specified value in itself with a computer chip; this enables the customer to use it as a substitute for cash. Prepaid cards come in a variety of forms. So-called 'open loop' cards carry credit card company logos and are reloadable. Gift cards used at specific outlets, are 'closed loop' cards. As the FATF noted, 'the functionality of prepaid cards varies as they have evolved from a replacement for store gift certificates and limited purpose closed loop applications to, in some cases, embody all the functionalities of a payment instrument tied to a payment account.'⁵⁰¹ There is a money laundering risk associated with payment network-branded cards⁵⁰² or open-loop cards that

⁵⁰¹ Financial Action Task Force, 'Guidance for a Risk-Based Approach: Prepaid Cards, Mobile Payments and Internet-Based Payment Systems' <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf>> accessed 23 May 2017

⁵⁰² The Wolfsberg Group, 'Guidance on Prepaid and Stored value cards' <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/11.%20Wolfsberg_Guidance_on_Prepaid_and_Stored_Value_Cards_Oct_14%2C_2011.pdf> accessed 3 June 2017. Defines prepaid and stored value cards as 'the physical card is either the token access value recorded remotely and linked to the card, or the value is 'stored on' and accessible from the physical

allow transactions with any merchant or service provider participating in the payment network since customers use the prepaid cards to access the related funds held in an associated payment account.⁵⁰³ Since there is associated money laundering risk involved in the use of prepaid card, the FATF recommends a risk-based approach to regulation by individual countries.⁵⁰⁴ As the FATF observes, ‘the level of AML/CFT measures required should be in proportion to the risk posed by the NPPS.....the closer the functionality of an NPPS is to a bank account, the greater the need to apply comparable regulation, including the application of full CDD measures.’⁵⁰⁵ The following one or more features could make a NPPS functionally similar to that of a bank account;

- i. The NPPS is capable of been reloaded an unlimited number of times;
- ii. No or very high funding, loading or spending limits are envisaged;
- iii. It is possible to make and receive funds transfer cross-border, and within the country where product is issued;
- iv. The NPPS can be funded through cash, and cash can be withdrawn through the ATM network; or

card's chip. It means that all stored value cards are prepaid cards, but not all prepaid cards are stored valued cards.’ The general characteristics of prepaid and stored valued cards which increases money laundering risk include:

- a. ability to transfer funds (domestically/internationally);
- b. Speed of transfer of funds; ability to move unloaded inactivated cards across borders;
- c. Lack of, or difficulty in providing, an audit trail;
- d. Lack of, or difficulty in compiling, an aggregated view of multiple transactions;
- e. lack of face-to-face contact;
- f. identification material either not taken or taken and not validated;
- g. High negotiability through wide acceptance; ability to reload;
- h. Ability to load/reload card with cash; and,
- i. Ability to withdraw cash.

⁵⁰³ *ibid*

⁵⁰⁴ The essential elements of a risk-based approach includes: countries should identify, assess and understand the risks of money laundering and terrorist financing that they face in the use of prepaid cards, in addition, countries and financial institutions

⁵⁰⁵ *Ibid* 33

- v. The ability to add or withdraw funds to the account, using cash or cash equivalents, whether directly or through another provider or intermediary.⁵⁰⁶

5.2 Controls Over Wire Transfer and Correspondence Banking Operations

The term wire transfer or funds transfer refers to any communication carried out on behalf of an originator person (both natural and legal) through a financial institution by electronic means to making an amount of money available to a beneficiary person at another financial institution. The originator and beneficiary may be the same person.⁵⁰⁷ Wire transfers can be domestic or cross-border. Domestic wire transfer refers to wire transfers where the originator and beneficiary institutions are located in the same country whereas cross-border transfers mean where the originator and beneficiary reside in different countries. There are a variety of computer-based networks used for effecting international transactions and settlements, but CHIPS and SWIFT have dominated the global financial sector. The primary distinction among the systems is whether they are for secure communication or actual transfer and settlement.⁵⁰⁸ According to Gkoutzinis,⁵⁰⁹ cross border internet banking upsets the international legal framework in two ways:

⁵⁰⁶ FATF (Mobile Payments n496) 35

⁵⁰⁷ Ibid 35

⁵⁰⁸ Arthur I. Stonehill, David K. Eiteman and Michael H Moffett, *Multinational Business Finance* (11th ed., Pearson Education 2007) 728

⁵⁰⁹ Gkoutzinis (n495) 33

- online banking as a form of global trade in financial services is inherently different from traditional mode of entering foreign markets by way of establishment of commercial presence locally and therefore it is not entirely compatible with the prevailing principle of territoriality which determines the application of national law to cross border transactions and activities; and,
- as a form of banking service, online banking relies upon a delivery channel that presents a new range of risks.⁵¹⁰

5.2.1 CHIPS and SWIFTS

The New York Clearinghouse Systems operates the Clearing House Interbank Payment Systems (CHIPS). CHIPS, is a computerised network that connects major banks globally, owned and run by its member banks being the single largest privately operated and final-payment system in the world.⁵¹¹ Business to business and intra business transfers globally use banks for effecting payments and the banks in turn utilise CHIPS. A developed payment infrastructure has four key components:

- an interbank communications network for the on-line electronic transmission of large-value payment orders and associated message;
- a clearing house for the physical exchange of paper-based payment order and the netting of matured payment obligations;

⁵¹⁰ Eric Helleiner, 'Sovereignty, Territoriality and The Globalization of Finance' in David A. Smith, Dorothy J. Solinger and Steven C. Topik (eds), *States and Sovereignty in the Global Economy*, (Routledge 1999) p.140.

⁵¹¹ Ibid, p.728

- an automated clearing house for the batch processing of large-volume off-line, mainly low-value payment orders stored in magnetic form on tapes and diskettes; and,
- the involvement of the Central Bank as the vehicle for settlement of dealings between the banks participating in the clearing (settlement banks) by means of transfers in the books of the central bank, where all settlement banks hold account.⁵¹²

The Society for Worldwide Interbank Financial Telecommunications (SWIFT) is an international message service by banks and other financial institutions worldwide, which sends messages that initiate fund transfers. The SWIFT network provides user banks with a private international communications link among themselves and security of the messages is assured by encryption of all data. Other security features include log-on and log-off controls, message sequence controls and highly structured format for text messages. SWIFT in addition to customer and bank funds transfer transmit foreign exchange confirmations, statements, collections and documentary credits.

5.2.2 Correspondent Banking

Correspondent payment occurs because of payment between those in different jurisdictions. With a credit transfer, the payor's bank will send a payment message to its correspondent in the jurisdiction of the payee's bank. The correspondent, in turn, sends a payment message to the payee's bank. Both banks (the payor and payee) will settle payment under the correspondent arrangements between and

⁵¹² Ewan McKendrick, *Goode on Commercial Law* (4th Edition, Penguin Group 2010) 502

will probably settle their accounts with the central bank in that jurisdiction.⁵¹³ The Wolfsberg group defined correspondent banking as ‘the provision of a current or other liability accounts, and related services, to another financial institution, including affiliates, used for the execution of third party payments and trade finance, as well as its cash clearing, liquidity management and short-term borrowing or investment needs in a particular currency.’⁵¹⁴ Correspondent payment can also involve payment between two banks in the same jurisdiction if the payment involves a foreign currency, in this case, the banks will use their correspondents in that foreign country, since settlement facilities need to be available in that currency.⁵¹⁵ Where payment is in a foreign currency, and it involves a string of banks, an intermediary bank is required because, in some situations, the payor's bank may not have a correspondent bank in the jurisdiction of payment currency.⁵¹⁶ The CHIPS system mentioned above helps to cater for this complex payment system as it helps to provide settlement between correspondent banks interfacing with the New York Federal Reserve Bank. Correspondence banking services are offered in three forms: First, the most traditional way of correspondence banking involves a respondent bank agreeing with a correspondent bank to execute payments on its behalf and behalf of its customers. Second, nested correspondent banking refers to the use of correspondent banking relationships by a respondent bank's intermediate customers, which could then use the links for their clients. Third, payable-through accounts where the respondent

⁵¹³ Cranston (n425) 237

⁵¹⁴ The Wolfsberg Group, ‘Wolfsberg Anti-Money Laundering Principles for Correspondent Banking’ <www.wolfsbergprinciples.com/pdf/home/Wolfsberg-Correspondent-Banking-Principles-2014.pdf> accessed 6 January 2017

⁵¹⁵ Cranston (n425) 237

⁵¹⁶ Cranston (n425) 237

bank allows its intermediate customers to access the correspondent account directly to conduct business on their behalf.⁵¹⁷

In relation to correspondence banking, the FATF provides that 'in addition to performing normal customer due diligence measures' financial institutions should be required to:

- a. Gather sufficient information about a respondent institution to understand the nature of the respondent's business fully and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action;⁵¹⁸
- b. Assess the respondent institution's AML/CFT controls;
- c. Obtain approval from senior management before establishing new correspondent relationships;⁵¹⁹
- d. Understand the respective responsibilities of each Institution;⁵²⁰ and
- e. Concerning 'payable-through accounts', be satisfied that the respondent bank has conducted CDD on the customers having direct access to accounts of correspondent bank, and that it can provide relevant CDD information upon request to the correspondent bank.⁵²¹

⁵¹⁷ International Monetary Fund, 'Recent Trends in Correspondent Banking Relationships - Further Considerations' (21 April 2017) Policy Paper.

⁵¹⁸ FATF2012, recommendation 13

⁵¹⁹ FATF 2012, recommendation 13

⁵²⁰ FATF 2012, recommendation 13

⁵²¹ FATF 2012, recommendation 13

The standard specifically provides that financial institutions should 'be prohibited from entering into, or continuing, a correspondent banking relationship with shell banks.'⁵²²

The BIS committee on payments and markets infrastructure in respect on correspondent banking provides potential measures to facilitate correspondent banking activities which includes: (i) Know-your-Customer (KYC) utilities (ii) increased use of legal entities identifiers (iii) information sharing initiatives; (iv) payment messages; and (v) use of legal entities identifiers as additional information in payment messages.⁵²³

Since wire transfers begin with a request by the customer to transfer funds and banks examine the amounts involved before initiating a transfer thoroughly, FATF Recommendation 16 establishes the requirements for countries concerning transfers. It provides that states must ensure financial institutions include relevant originator and beneficiary information on wire transfers and the information remains with the wire transfer throughout the payment chain as set out in the interpretative note to recommendation 16. Recommendation 16 developed with the objective of preventing terrorists and other criminals from having unfettered access to wire transfers for moving their funds, and for detecting such misuse when it occurs.⁵²⁴ It aims to ensure that necessary information about the originator and beneficiary of wire transfers is immediately available:

⁵²² FATF 2012, recommendation 13. A shell bank is one in which criminals or their associates holds or are the beneficial owners of significant or controlling interest, or holding a management function in, a financial institution.

⁵²³ Bank for International Settlement, 'Committee on Payments and Market Infrastructure: Correspondent Banking' <<http://www.bis.org/cpmi/publ/d147.pdf>> accessed 4 February 2017

⁵²⁴ *ibid*

- a. To appropriate law enforcement and prosecutorial authorities to assist them in detecting, investigating and prosecuting terrorists or other criminals and tracing their assets;
- b. To financial intelligence units for analysing suspicious or unusual activity, and disseminating it as necessary; and
- c. To order, intermediary and beneficial financial institutions to facilitate the identifications and reporting of suspicious transactions, and to implement the requirements to freezing action and comply with prohibitions from conducting transactions with designated persons and entities...'

Information accompanying all cross-border wire transfer will include:

- a. Name of the originator
- b. The originator account number where such an account where such an account is used to process the transaction;
- c. The originator's address, or national identity number, or customer identification number, or date and place of birth;
- d. The name of the beneficiary; and
- e. The beneficiary account number, where such an account processes the transaction.

In addition, the standard requires countries to take adequate measures to ensure financial institutions include required and accurate originator information and beneficiary information, on wire transfers and related messages, and the

information remains with the wire transfer or related message throughout the chain of the payment.⁵²⁵

In recognition of its responsibility to adopt and continually improve its AML policies, procedures and controls that are reasonably designed to be operational and efficient, including methods for detecting and reporting payments that involve suspicious activity that could be related to money laundering or other financial crimes an updated procedure was published by the clearinghouse.⁵²⁶ In its introductory page, it was acknowledged that the traditional correspondence banking had fostered economic prosperity throughout the world by enabling business and remittance flow between countries and without having to maintain branches in every country, banks can utilise their relationships with other banks to serve their customers' global payment needs with essential attributes of confidence. The payment system is vulnerable to money laundering risk due to the volume of payments, the speed at which payments move, and the fungibility of payments. It is difficult to identify and intercept suspicious payments unless the originator, the beneficiary or the financial institution provides information in advance and stated in the payment order.⁵²⁷ It further acknowledged that 'once a person can inject funds into the payment system that are a product of a criminal act, are intended to finance a criminal act, or are tied to a party subject to U.S. sanctions, *it is challenging, and in many cases impossible*, to identify those funds

⁵²⁵ Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' < <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> > accessed 1 August 2017

⁵²⁶ The Clearing House, 'Guiding Principles for Anti-Money Laundering Policies and Procedures in Correspondent Banking' <<https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-tch-aml-correspondent-banking-guiding-principles-2016.pdf>> accessed 1 August 2017

⁵²⁷ Ibid, page 4

as they move from bank to banks'.⁵²⁸ Furthermore, 'the scope necessary for an effective payment system requires broad availability and thereby greatly limits the feasibility of blanket exclusions based on geography or origin'.⁵²⁹

Wire transfers are an integral part of many money laundering operations as it allows for quick delivery of cash, one can confirm receipt quickly and easily, the cost of the movement is low, there is a high degree of visibility throughout the payment flow, and the chances of detection among the myriads of messages is remote. An estimated \$21 to \$32 trillion⁵³⁰ of private financial wealth is located in secrecy jurisdictions around the world, facilitated by electronic fund transfer systems. Corrupt leaders and their cronies use legitimate business⁵³¹, trust companies,⁵³² or shell companies⁵³³ (corporations that exist only on paper) often incorporated in other countries to disguise the proceeds of corruption to transfer funds within the payment system. As financial secrecy index indicates, 'the world's most important providers of financial secrecy harbouring looted assets are mostly

⁵²⁸ Ibid 4, bold italics added

⁵²⁹ Ibid 4

⁵³⁰ Tax Justice Network, 'Financial Secrecy Index: Introduction' <<http://www.financialsecrecyindex.com/>> accessed 5 September 2017

⁵³¹ [2010]JRC116. In Attorney General v Raj Arjandas Bhojwani, the defendant, an Indian man made a criminal fortune of almost \$40 million selling vehicles to the Nigerian Government under two separate contracts in 1996 and 1997 through a Panamanian shelf company, named Tata Overseas Sales and Services, which was, in reality, a front for himself personally. The actual purchase price of the vehicles was inflated by between 400 and 500 percent at the behest of the then President of Nigeria, General Sani Abacha, and a second Nigerian figure, Colonel Mohammed Buba Marwa. The defendant charged the country \$184 million for vehicles which were worth \$38 million. The inflated cost of both contracts was paid by the defendant to company bank accounts in Switzerland and elsewhere which he knew were beneficially owned by Abacha family members and by Colonel Marwa.

⁵³² Former Governor of Bayelsa State, DSP Alamieyeseigha, registered the company Solomon & Peters Ltd in the UK. Four London Properties purchased for £6.39 million. The funds came from various sources including one which emanated from Triumph Bank Plc. In Nigeria. Some of the purchases were facilitated by Solicitors and other registered companies such as Austin and Jed, EBSCO Associates, a UK registered company solely owned by one Ebitare OtofanoWei, a former Commissioner of Finance in Bayelsa State between 2001 and 2003. See de Willebois and others, Puppet Masters (n233) 46

⁵³³ drbiggie, 'Exposed: shady & High Corruption in Nigeri's Oil Deals 44: Meet Nigeria's Crude Oil Gangsters' <<https://drbiggie.wordpress.com/2017/05/21/shady-and-highly-corruption-in-nigerias-oil-deals-44-meet-nigerias-crude-oil-gangsters/>> accessed 17 July 2017

not small, palm-fringed islands as many suppose, but some of the world's biggest and wealthiest countries. Rich OECD member countries and their satellites are the main recipients of or conduits for these illicit flows.⁵³⁴

To improve the payment process and reduce such risk: payment instructions must be transparent so banks can take preventive and cautionary measures;⁵³⁵ parties to the transactions should identify in the payment order received, the originator, beneficiary and other financial institutions involved;⁵³⁶ and, government cooperation in setting and enforcing international standards for anti-money laundering and transparency in the financial system⁵³⁷ for banks to detect and report potential money laundering transactions. In its due diligence recommendations, banks should develop and maintain enhanced due diligence policies, procedures and controls to be applied to high-risk foreign correspondent banking customers, and specifically in relation to foreign correspondent banking customers to utilize consistent, well documented risk rating methodologies in order to determine if the correspondent banking customer falls within the bank's risk tolerance.⁵³⁸

5.3 Internet Banking Risk

The objectives of regulation among others are: to ensure adequate market structure and competition; ensure the safety and soundness of the financial

⁵³⁴ Tax Justice Network, 'Financial Secrecy Index' <<http://www.financialsecrecyindex.com/>> accessed 5 September 2017

⁵³⁵ *ibid*

⁵³⁶ *ibid*

⁵³⁷ *ibid*

⁵³⁸ Clearing House (n521) 11

system; protect consumers of financial services; and provide equitable allocation of credit and appropriate monetary controls. In spite of these laudable objectives, various risks exist which prudential regulations seek to address. They can be classified into:⁵³⁹

1. Financial risk
2. Operational risk
3. Legal risk
4. Reputational risk
5. Other risks

Financial risk about service delivery over the internet is the probability of loss arising from the delivery of services that may impair its ability to provide adequate returns. The following are components of financial risk: credit risk, liquidity risk, market risk, foreign exchange risk. Much emphasis will be devoted to other forms of risk since the internet has had a relatively low impact on the profit of the core financial risks of financial institutions engaging in online activities.⁵⁴⁰

Operational Risk as defined by the Basel Committee refers to the 'risk of loss resulting from inadequate or failed internal processes, people and systems or external events.'⁵⁴¹ Operational risk embodies losses attributable to people; losses due to poor internal control systems, processes and corporate governance; poor performance and failure in the function of information technology; and

⁵³⁹ Bank for International Settlements, 'Basel Committee on Banking Supervision: Risk Management Principles for Electronic Banking' <<https://www.bis.org/publ/bcbs98.pdf>> accessed 20 August 2016 ;

⁵⁴⁰ Ibid, page 13. Also, Gkoutzinis (n495) 148 states that the impact of the internet on the essential elements and structure of banking services and products has mostly been manageable and less dramatic than its impact on operational and non-financial risks.

⁵⁴¹ Bank for International Settlements, 'Basel Committee on Banking Supervision: Principles for Sound Management of Operational Risk' <<https://www.bis.org/publ/bcbs195.pdf>> accessed 20 August 2016

uncontrollable events (Acts of God) such as fires and natural disasters.

Operational risk includes:

- ✚ Security is essential since there is a total virtual reliance on automated operations and information technology, the remote interaction with customers over publicly accessible computer networks, the constant innovation in internal systems and procedures and the concentration of sensitive data in interconnected and electronically administered databases.⁵⁴² Other issues involved in security includes threats of attack from outside or inside sources, confidentiality, protection and integrity of information, non-repudiation of properly authorised transactions, authentication of users, control and prevention of unauthorised access to the system.⁵⁴³
- ✚ System availability.⁵⁴⁴ Limited capacity to handle large volumes of transactions or frequent breakdown of IT infrastructure can cause substantial loss to the firms since it can undermine consumer confidence and the reputation of operators. The risk of malicious manipulation of data can lead to unauthorised and fraudulent transactions, corruption, duplication or alteration of data.
- ✚ Outsourcing if not properly supervised, can have a significant impact on the data and system integrity and availability. There is the risk that service providers may not have the requisite expertise to deliver services; fail to update their technology and the threat of losing sensitive documents to

⁵⁴² Gkoutzinis (n495) 149

⁵⁴³ Ibid 149

⁵⁴⁴ Andrea Schaechter, 'Issues in Electronic Banking: An overview' (2002) 2002(6) IMF Policy Discussion Paper 15

unauthorised users. The following measures can be adopted to mitigate against this risk:

- ✓ Conduct appropriate due diligence
- ✓ Ensure the adequacy of contracts concerning e-banking
- ✓ Develop appropriate contingency plans
- ✓ Monitor ongoing viability of third-party services especially when the firm has no track record.⁵⁴⁵

Legal Risk – This is the possibility that assets will turn out to be worthless, or liabilities will turn out to be higher than expected because of inadequate or incorrect legal advice or documentation. It arises from violations of, non-conformance with laws, rules, regulations, or prescribed practices, or when the legal rights and obligations of parties to a transaction are not well established.⁵⁴⁶ Legal risk can arise where:

- ✚ Due to expansion the bank fails to take appropriate care in familiarising itself with local laws and regulations before they offer services in a new jurisdiction
- ✚ There is uncertainty about legislation applicable (legislation of the jurisdiction to e-banking in the area of operation of a virtual bank or an institution providing services over the internet

⁵⁴⁵ Ibid 16

⁵⁴⁶ Bank for International Settlement, 'Basle Committee for Banking Supervision: Risk Management for Electronic Banking and Electronic Money Activities' < <https://www.bis.org/publ/bcbs98.pdf> > accessed 5 August 2017

- ✚ A risk exists in the enforcement of specific emerging areas of law; an example is the case of law relating to electronic contracts and digital signatures.⁵⁴⁷
- ✚ Banks choosing to enhance customer service by linking their internet sites to other related sites may face the risk of a hacker using the site to defraud the bank's customers, and the bank could face litigation from customers.⁵⁴⁸
- ✚ There is also the risk concerning customer disclosures and privacy protection.⁵⁴⁹
- ✚ It can become an easy means for money launderers to launder their funds.

Reputational Risk

This is the risk of significant negative public opinion that results in a critical loss of funding or customers. It can cause a lasting negative public image of overall bank's operation such that the bank's ability to establish and maintain customer relationships is significantly impaired.⁵⁵⁰ Reputational risk can arise:

- If actions by the bank cause a significant loss of public confidence,
- If systems or products do not work as expected and produce widespread adverse public reaction,
- Inability to timely resolve customers problems,
- failure to provide adequate information about product use and resolution procedures,

⁵⁴⁷ Ibid 17

⁵⁴⁸ Ibid 8

⁵⁴⁹ Ibid

⁵⁵⁰ Ibid

- where mistakes, malfeasance and fraud by third parties cause the bank to lack public confidence, and
- where there is a significant breach of security.⁵⁵¹

Banks operating on the internet due to its complexity are fraught with particular risk different from the traditional face to face system of operations, and worse still is offshore banking that has the potential of being less regulated than onshore banking and virtual banking which could increase the range of insufficiency regulated activities. Banks risk have been categorised into operational, reputational and legal risk. The Basel Committee for Banking Supervision (BCBS) provides fourteen (14) principles of risk management for e-banking that guides promote safe and sound banking activities.

5.4 Security in Internet Banking

The advantages of Internet banking such as the ease it offers irrespective of banking hours and holidays, convenience in performing banking transactions, the flexibility in making payments, and deterred by one's geographical location attracts customers to maintain an e-banking account. This comes with the fear of losing one's savings to cybercriminals, so of interest to banks is the security - both technical and legal - of transacting in cyberspace. The threats to the safety of Internet banking systems and the consequent losses could derive from many sources, such as intentional, external or internal attacks, malfunctions and technical problems of the system, customer misuse or inadequate design and improper implementation of electronic banking and control systems on the part of

⁵⁵¹ *ibid*

the banks. A financial institution can remain a crucial barrier to money laundering with the implementation of sound internal control mechanisms - know-your-customer and know-your-correspondent banks - and other external regulations but it is somehow impossible to prevent money laundering in the financial system entirely, though security is paramount. A financial institution viewed as a money laundering pipeline may face adverse consequences such as losing loyal and law-abiding customers, loss of reputation or face sanctions from regulatory authorities or having the customer account frozen or seized. According to Connolly and Berg, the increasing accessibility of databases in the public internet and private intranets requires a reanalysis and extension of the approaches for the general security mechanism for database systems. The BIS 1996 Report of the Taskforce on Security of Electronic Money, on the other hand, grouped security risks of the system and the proposed several measures mainly into three categories:

- (a) Preventive measures which includes: tamper-resistance of devices – electronic devices used in electronic money products which provides the first line defence against outside attacks; cryptography – techniques which contains the logical protection of electronic money by ensuring confidentiality, authenticity and integrity of devices used in data during transmission or while stored on a device; on-line authorization used in card-based system to ensure that the holder of the card is authorised to access funds in a particular account which in most instances would require a personal identification number. This is necessary to deter a user from copying a specific electronic note and spending it several times over, therefore, a central authority must verify each transaction sequentially, on the basis of information about notes that have previously been issued and

redeemed; and, additional verifications during operations to prevent frauds and malfunctions, supervision and monitoring by a central operator.

- (b) Detection measures, such as transaction traceability and tracking, interaction with a central system, limits on transferability of electronic money and statistical analysis of payment flows.
- (c) Containment measures, including among others, restrictions on the value stored, expiration dates on devices and value, registration of the identity of the users with the issuer or a central authority.⁵⁵²

5.5 Internet Banking Privacy

Internet websites collect a great deal of personal information through registration pages, survey forms, order forms and other means, and by using systems in ways not discernible to online consumers, website owners can gather information about consumers preferences and interests. Lack of privacy may result in the proliferation of customer information to unsuspecting users who may perpetuate fraud and other criminal activities hence the need for proper regulation of the internet space and more specifically internet banking opportunities to promote trust and confidentiality in the conduct of the banking business in accordance with internationally recognised norms and practices. Privacy protection laws provide series of rights for the individual. The OECD guidelines offer the following core principles on information privacy:

- The collection limitation principle provides there should be limits to the collection of personal data, and any such data should be obtained by lawful

⁵⁵² Basle Committee on International Settlement, 'Security of Electronic Money' <<https://www.bis.org/cpmi/publ/d18.htm>> accessed 7 August 2017

and fair means, and where appropriate, with the knowledge or consent of the data subject;

- Data quality principle entails that personal data should be relevant to the purpose for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up to date;
- The purpose specification principle ensures that the purpose for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those objectives or such others as are not incompatible with those purposes and are specified on each occasion of change of purpose;
- Use limitation principle: personal data should not be disclosed, made available or otherwise used for purposes other than those specified by the purpose specification principle, except: with the consent of the data subject, or, by the authority of law.
- Security safeguards principle. Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data;
- Openness principle ensures that there is a general policy of openness about development, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purpose of their use, as well as the identity and usual residence of the data controller;
- Individual participation rule. This principle ensures that an individual should have the right to:

- i. obtain from a data controller, or otherwise, confirmation as to whether or not the data controller has data relating to him;
 - ii. to have communicated to him, data relating to him with reasonable time; at a charge, if any, that is not excessive; reasonably; and a form that is readily intelligible to him;
 - iii. To be given reasons if a request made under subparagraphs (i) and (ii) is denied, and be able to challenge such denial; and
 - iv. To question data relating to him and, if challenge is successful to have the data erased, rectified, completed or amended; and
- Accountability principle. This principle ensures that a data controller be held accountable for complying with measures, which give effect to the principles stated above.

5.6 The Banker-Customer Relationship

Banks and non-bank financial institutions play a crucial role in intermediation. Beyond the process of mediation lies the bane of banking relationship, which is the bank-customer relationship.⁵⁵³ This relationship requires that deposits by customers kept by the bank with the added responsibility of payment of interest and the return of principal on demand. Technological innovations have also made it possible for banks and other financial institutions to render services over the internet thus reducing the physical interface between the various intermediaries

⁵⁵³ Customer in this context can refer to anyone who deals with a bank in relation to a banking service and they include but not limited to those with accounts with the bank, borrowers, those who use the bank for financial advice, fund management, securities and derivatives dealings, other banks and market counterparties, commercial customers and private customers. An account may be opened by any person or entity, natural persons, companies, partnerships may open accounts as determined by relevant legislation.

and their clients. Below we examine, the UK, Nigerian and South African Laws relating to the banker-customer relationship and in particular the duty of care and confidentiality to the customer compared with its obligation to report financial breaches (mainly money laundering laws) to designated regulatory authorities.

The bank-customer relationship is based on contract, and to refer to the 'special, overarching framework and legal relationship which is established from the opening of a bank account.' The opening of a bank account creates certain legal rights and obligations. Different opinions exist about the nature of the bank-customer relationship and include:

- i. The bank is the debtor and the customer the creditor. The customer's money in the bank does not represent the customer's money but a debt owed by the bank to the customer who is to be repaid to the customer at his demand by specified terms and conditions stipulated in the contract. The customer is not entitled to anything more than the repayment of an equivalent amount, and he or she is not entitled to inquire about the bank's use of the deposited funds. In the case of *Foley v Hill*,⁵⁵⁴ it was held that the banker-customer relationship was essentially that of the debtor-creditor relationship. Additionally, the deposit can only be said to be received by the bank when it has indicated its acceptance of the money,⁵⁵⁵
- ii. The obligation of the bank towards the customer is not simply a debt but debt for which demand has to be made by the customer at the branch where the account is kept and during normal business hours unless agreed otherwise. Unlike the general law relating to repayment of debts, the

554 (1848) 2 HLC 28, 9ER 1002

555 Balmoral supermarket Ltd v Bank of New Zealand. [1974] 2 Lloyd's Rep. 164

customer is the one to present him or herself in the branch or other contractually defined location to demand the repayment of deposit;

- iii. The bank is under a duty to obey the customer's authority and instruction (mandate) to transfer funds to bank accounts held by him with the same bank or another or to another beneficiary. The bank is to carry out the customer's mandate with reasonable care and skill. The duty of the customer is to exercise care and skill in transmitting their instructions so as not to mislead the bank or facilitate fraud and must notify the bank of unauthorised instructions that they know of. In the case of *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd*,⁵⁵⁶ it was held, that 'the business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out checks which are not his, they are acting outside his mandate.
- iv. The bank cannot debit the account of the customer in respect of forged cheques. Customers suspecting that their mandate is abused must notify the bank so it can take preventive action but a failure may stop the customer from denying that the cheque or wire transfer is proper and authentic⁵⁵⁷.

⁵⁵⁶ [1985] 3 W.L.R 317 (P.C)

⁵⁵⁷ *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] Q.B. 654 at P666. Also in *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep. 187 the bank was permitted to raise an estoppel and defeat the action of the plaintiff.

5.6.1 Banker's Duty of Care

The relationship that exists between the banker and the customer (any one providing a service) is based on contract, in tort,⁵⁵⁸ fiduciary law⁵⁵⁹ and is imposed as a matter of common law.⁵⁶⁰ The bank has a duty to carry out the mandate of the customer with reasonable care and skill. The required standard of skill is that expected from persons of that standing and competence. The bank cannot debit the customer where it has acted outside its mandate. Banks are generally liable to customers where the payment has not been authorised by the customer (unless the customer has acted with gross negligence). The courts have recognised the difficulties posed for banks of recognising when a customer may be at risk of being defrauded because of the vast number and speed of modern banking transactions and have therefore set a high threshold for this duty of care to arise. In relation to providing services over the internet, it must maintain reasonably efficient and reliable system of operations to ensure that hardware and software infrastructure operates properly, is secured, prevents the disclosure of customer information in breach of confidentiality and prevents unauthorised transactions. Banks are to adopt highly sophisticated encryption systems⁵⁶¹ to prevent hackers from gaining access to its own and its customers' data, and are under strict liability to employ

⁵⁵⁸ Barclays Bank Plc. v Quincecare Limited and Another [1992] 4 All ER 363. In the case of Singularis Holdings Limited (in official liquidation) v Daiwa Capital Markets Europe Limited [2017] EWHC 2579 (Ch), a bank was liable in negligence to a customer since it was on notice that its customer was at risk being defrauded by its directors but failed to stop payments made for purpose of misappropriating funds to the company.

⁵⁵⁹ As Cranston noted (n425), two situations in which common law courts have imposed fiduciary duties on banks outside trust and agency relationship includes: when the bank assumes the role of financial adviser as promoter of a particular scheme; and, where the banks have been held to a fiduciary standard.

⁵⁶⁰ Cranston (n425)

⁵⁶¹ Building Societies Association, 'Industry Guidance for FSA Banking Conduct of Business Sourcebook' <<https://www.bsa.org.uk/BSA/files/ce/ce2003b5-909e-46f1-9756-b2d2bd0dfc36.pdf>> accessed 2 September 2017

reasonable and secure software programs for executing its intended purposes and such liability does not depend on proof that the bank was negligent.⁵⁶²

5.6.2 Banker's Duty of Confidentiality

The banker's duty of confidentiality was identified in the *Tournier*⁵⁶³ case in which it was held that a legal relationship exist between the bank and its customer arising from the banker-customer relationship. In *Attorney General v. Guardian Newspapers Ltd*, Lord Goff stated the broad principle of confidentiality and identified three limiting concepts to this broad principle: namely, that the principle of confidentiality does not apply to information that is generally accessible; that the duty of confidence does not apply to information that is trivial or useless; and that in certain circumstances the public interest in maintaining trust may be outweighed by the public interest in disclosure. He stated thus:

*A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has noticed, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others...in the vast majority of cases... the duty of confidence will arise from a transaction or relationship between the parties...But it is well settled that a duty of confidence may arise in equity independently of such cases.*⁵⁶⁴

⁵⁶² *St. Alban's City and District Council v International Computers Ltd* [1996] All ER 481 (CA).

⁵⁶³ *Tournier v National Provincial and Union Bank of England* 1 KB 461 at 471-473

⁵⁶⁴ *Attorney General v Guardian Newspapers Ltd* [1990] 1 AC 109 at 281

A banker-customer relationship is an agency contract, and the element of privacy stems from this agreement. In this relationship, the bank as an agent is under a duty of care and confidentiality to his principal. The bank's duty of confidentiality is a facet of the principal's protection against unwarranted attempts by outsiders to inquire into his (or her) affairs.⁵⁶⁵ This duty of confidentiality includes information about the customers themselves,⁵⁶⁶ their accounts obtained by the bank, for as long as the banker-customer relationship exists. There reasons for obliging banks to keep customers' confidential data private before, during, and after their relationship. For one thing, information provided to the bank remains the same even after the execution of the transaction, the information could be of a commercially sensitive nature that may adversely affect his subsequent business if disclosed,⁵⁶⁷ and it falls under the common law obligation of the bank's duty of confidentiality. Even if such information per se may not be within the ambit of the bank's duty of confidentiality, the bank is expected to respect the customer's right of privacy as it is a person's right to keep his/her information private. In addition, there lies the possibility that disclosure of any confidential information after the termination of the banker-customer relationship may cause loss or damage to the person. The duty of confidentiality is linked to the maintenance of customer confidence in the banking system, which is a significant source of finance for businesses. A lack of confidence can trigger panic leading to bank runs, resulting

⁵⁶⁵ E. P Ellinger, Eva Lomnicka and Richard Hooley, *Ellinger's Modern Banking Law* (3rd ed, Oxford University Press 2002) 166

⁵⁶⁶ In the case of *GS Consultants and Investments Pty Ltd v Datasys Pty Ltd* (1988) SA 726 (W), 736 (Stegmann J), it was observed that bankers have access to a good deal of information about their customers business, which each customer would have reason to conceal from their commercial competitors.

⁵⁶⁷ Disclosure of details of a customer's financial affairs to the wrong person or at the wrong time could do the customer harm. See *Jackson v Royal Bank of Scotland plc*. [2005] 1 WLR 377

in widespread withdrawals that could ultimately lead to the collapse of the financial system.

Confidentiality, however, can act as a cloak for wrongdoing, often on a massive scale⁵⁶⁸ as political office holders who have exploited the state's resources, drug barons and other fraudsters can use the banking system to cart away their ill-gotten wealth under cover of bank's secrecy arrangements. Besides, to ensure profitability, the banks themselves woo customers to do business and confidentiality can act to as a barrier to bring these culprits to book as funds are moved to different jurisdictions and make recovery of this booty impossible. For instance, the Organised Crime and Corruption Reporting Project (OCCRP) an NGO, noted that the Panama 'documents make it clear that major banks are big drivers behind the creation of hard-to-trace companies in the British Virgin Islands, Panama and other offshore havens. The files list nearly 15,600 paper companies that banks set up for clients who want keep their finances under wraps, including thousands created by international giants UBS and HSBC.'⁵⁶⁹ As noted by Professor Barry Rider, contemporary money launderers are most probably rather more sophisticated in their concealments of proceeds of crime than, for instance, Al Capone and his accomplices in the 1920's so they innovate ways using the banking system as a conduit to confuse the onlooker and confound the inquirer.⁵⁷⁰ In describing the bank's quest for cash, a former Executive Director of the United Nations Office on Drugs and Crime (UNODC), Antonio Mario Costa, once said: '*the penetration of the financial sector by criminal money has been widespread that it*

⁵⁶⁸ Cranston (n425)

⁵⁶⁹ Organised Crime and Corruption Reporting Project, 'Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption' <<https://www.occrp.org/en/panamapapers/overview/intro/>> accessed 25 August 2017

⁵⁷⁰ Barry Rider, The Practical and Legal Aspects (n133) 234

*would probably be more to say that it was not the mafia trying to penetrate the banking system, but it was the banking sector which was actively looking for capital – including criminal money – not only as deposits but also as share acquisitions and in some cases, as a presence in the Boards of Directors’.*⁵⁷¹

Limitations to the duty of confidentiality

The duty of confidentiality to the customer according to Bankes LJ is not an absolute one as it is subject to qualifications. The qualification is characterised by four key categories: These are:

- i. **Where the bank is compelled by law to disclose the information.** This arises where the bank's officials are required to give evidence about a customer's affair in court. The law requires banks to provide specific information about a customer to regulatory/anti-money laundering authorities. For instance, following anti-money laundering laws, banks are required to report suspicious transactions to the appropriate financial intelligence units or currency transactions report to the central bank. Where disclosure is mandatory, a bank has no obligation to its customers to contest an apparently lawful and proper request for access.⁵⁷² As Cranston noted, it is neither part of the duty of confidentiality nor capable of being implied as a matter of necessity or efficacy in the bank-customer relationship.⁵⁷³ The compulsion by law qualification has facilitated cooperation by piercing the veil of bank's confidentiality thereby assisting in the prosecution of

⁵⁷¹ Andrew Spannaus, 'Former UNODC Head Talks About Drugs in the World Banking System' <http://www.larouchepub.com/eiw/public/2012/eirv39n17-20120427/09-15_3917.pdf> accessed 25 August 2017. Bold italics added

⁵⁷² Cranston (n425) 177

⁵⁷³ Ibid 177

transnational crimes.⁵⁷⁴ In the fight against money laundering in a global scale, the compulsion of law qualification has an apparent setback in the sense that disclosure of a bank's secret to a foreign authority is generally only permissible where this is ordered by a local court, or justified under local statutory enactment, or by cooperation through appropriate law enforcement agencies.⁵⁷⁵

The United Kingdom, Nigeria and South Africa as Commonwealth countries all apply this first qualification of confidentiality. For instance, in Nigeria, (The Independent Corrupt Practices and other related offences Act 2000, Money laundering and prohibition Act 2011) makes provision for a bank to disclose information to law enforcement agencies. The same is true of South Africa and the United Kingdom. For international cooperation, all but Nigeria is yet to have the Mutual Legal Assistance legislation in place even if the Lower House has passed the bill. As alluded by several scholars, it is essential to relax bank confidentiality to meet the needs of regulators and law enforcement to justify the rationale for proper investigation and prosecution of financial crimes with the aim of seizing the fruits of crimes. Interestingly, the FATF recommendation 21 provides that financial institutions, their directors, officers and employees should be:

- a. Protected by law from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by legislative, regulatory or administrative provision, if they report their

⁵⁷⁴ David Chaikin, 'Adapting the Qualifications to the Banker's Duty of Confidentiality to Fight Transnational Crime' [2011] 33(2) SydLawRw 12

⁵⁷⁵ The Mutual Legal Assistance provision under the United Nations Convention on Corruption has proved to be a reliable tool.

suspicion in good faith to the FIU, even if they did not know what the underlying criminal activity was, and regardless of whether illegal activity actually occurred; and

- b. Prohibited by law from disclosing (tipping-off) the fact that a suspicious transaction report (STR) or related information is being filed with the FIU.⁵⁷⁶

ii. If the bank has a public duty to disclose the information.

This is applicable when there is a danger to the state or when the public needs protection against crime. Bankes LJ stated that disclosure of confidential information is justified 'where there is a duty to the public to disclose. Disclosure of confidential information must be to the person who has a 'proper interest to receive that information.'⁵⁷⁷ Disclosure under the public interest is described as, 'the difficult and comprehensive meaning of the *Tournier* qualification.'⁵⁷⁸ These difficulties could be due to a lack of clarity regarding the circumstances, which would create exceptions in the public interest.

iii. If the bank's interests require disclosure

The exception to allow disclosure in the interests of the bank was illustrated in *Tournier's* case by an example of a bank issuing a writ claiming payment of an overdraft stating its amount.⁵⁷⁹ Disclosure under this exception must be limited

⁵⁷⁶ Caribbean Financial Action Task Force, 'Recommendation 21 Tipping-off and confidentiality' <<https://cfatf-gafic.org/index.php/documents/fatf-40r/387-fatf-recommendation-21-tipping-off-and-confidentiality>> accessed 25 November 2017

⁵⁷⁷ *Tournier* (n563) 530

⁵⁷⁸ Mark Hapgood, *Paget's Law of Banking* (13th edn., LexisNexis Butterworths 2007) 159

⁵⁷⁹ Gwendoline Godfrey and others, 'Bank Confidentiality – A Dying Duty but Not Dead Yet?' [2016] 17(3) *Business Law International*

strictly to information necessary to protect the bank's interests, for example, if there is litigation between the bank and its customer or if the bank brings an action against a guarantor.

iv. Where the customer agreed to the information being disclosed.

If a bank notifies a customer that it intends or is entitled to provide a reference for a specified information to a third party and the reason for the reference, and actually receives consent in writing from the customer,⁵⁸⁰ there will be no breach of duty.⁵⁸¹ If notice is given to a customer by the bank and the customer does not reply, the bank will not necessarily be entitled to assume implied consent. Express provisions consenting to the disclosure of information can be important in documentation for loans where lenders may wish to transfer their interests in the future and in inter-creditor deeds where banks with separate relationships may want to share information on customers.

The legal analysis of the bank's duty of confidentiality have become more complex as a result of tipping off offences⁵⁸² and the requirements for suspicious reporting.⁵⁸³ In implementing their regulatory requirements on money laundering

⁵⁸⁰ *Playboy Club London Limited and Others v. Banca Nazionale del Lavoro SPA* [2016] EWCA Civ 457.

⁵⁸¹ [1999] 2 All ER (Comm) 664 in *Turner v. Royal Bank of Scotland plc* it was held that a bank could not rely on banking practice to imply its customer's consent to the use by the bank of confidential information in order to give other banks references about his creditworthiness; and, *Bank of Scotland v A Ltd, B and C* [2001] 3 All ER 58. See Richard Hooley, 'Bankers' References and the Bank's Duty of Confidentiality: When Practice does not Make Perfect' [2000] 59 *The Cambridge Law Journal* 21–23.

⁵⁸² A bank (its directors, officers and employees) that knows or suspects that a report is required to be made shall not make any disclosure 'that is likely to prejudice an investigation that may be conducted following the making of the report', thus, a bank is required to inform on its customer without alerting its customer to the fact of its disclosure. See *Squirrel v. National Westminster Bank Plc and HM Customs and Excise* [2005] EWHC 664. In the case of *C v S*, the court of appeal gave guidance on tipping offences reporting. *JMLC* 3(4), 373 - 376

⁵⁸³ *Shah v. HSBC Private Bank* [2009] EWHC 78 where it was held that banks will not be liable for losses suffered by customers (who are the subject of notifications) due to a delay in implementing their instructions as long as a genuine and honest suspicion of money laundering is held by the relevant bank officer.

standards, banks could inadvertently alert suspected culprits of ongoing money-laundering investigations. This inadvertent disclosure could invidiously render the bank liable for having committed an offence of tipping off.⁵⁸⁴ The only defence available to the bank is when it does not know or suspect that the disclosure was likely to be prejudicial.

5.7 Prudential Regulation

Prudential regulation defined as 'the imposition by government of controls over the decisions of individuals or firms concerning the 'safety and soundness' of the financial institutions under their administrative supervision'.⁵⁸⁵ Defined also as 'the regulation of deposit-taking institutions and supervision of the conduct of these institutions and set down requirements that limit their risk-taking. The prudential regulation aims to ensure the safety of depositors' funds and keep the stability of the financial system'.⁵⁸⁶

Regulations arise most times from bitter historical experiences.⁵⁸⁷ The primary economic argument for prudential regulation includes:

- **Externality - bank runs.** Positive externalities arise from the acceptance of deposits as a medium of exchange and a store of value, but these could be eroded by bank failures.⁵⁸⁸ The default of by one institution can spread to

⁵⁸⁴ *The Bank of Scotland v A Ltd* [2001] 1 WLR 751. See also *C v S* [1991] 1 WLR 1551

⁵⁸⁵ Vincent P. Polizzato, 'Prudential Regulation and Banking Supervision: Building an Institutional Framework for Banks' (Background Paper for the 1989 World Development Report, WPS 340, The World Bank January 1990)

⁵⁸⁶ *Ibid* 2

⁵⁸⁷ Cranston (n425) 65

⁵⁸⁸ Warren P Hogan and Ian G. Sharpe, 'Prudential Regulation of Financial System: A Functional Approach' [1997] 4(1) *Agenda* 2

undermine other institutions. This risk derives from the interbank linkages, the linkages between banks in the payment system and the public perception that other banks are in the same position as suspect or failed banks.⁵⁸⁹

- To ensure safety and soundness of the financial system. The courts have recognised that the solvency and soundness of financial institutions are in the interest of consumers and a valid ground for restricting the free movement of services.⁵⁹⁰
- Market power – monopoly institutions can exploit its market power.
- Information asymmetry – difficulty or cost of obtaining information, giving rise to vulnerability to exploitation to uninformed depositors.⁵⁹¹
- To ensure the protection of consumers of financial services, depositors, borrowers and investors. Regulation aimed at protecting consumers so they can obtain adequate information to understand financial services and markets as well as products offered before making investment decisions.⁵⁹²
- Transparency and adequate disclosure. The courts have favoured the disclosure of information which aimed at protecting the general interest of consumers;⁵⁹³ it also confirmed the consumer's right to information and education as a central tenet of the EU consumer protection policy.⁵⁹⁴

⁵⁸⁹ Cranston (n425) 67

⁵⁹⁰ Gkoutzinis (n495) 141. See German Insurance case C-205/84 between Commission v Germany [1986] ECR 3755, para 39. In the case of Societe Parodi v. Banque H. Albert de Bary et Cie [1997] ECR I-3899., prudential and consumer protection standards such as deposit guarantee schemes were considered to be legitimate grounds for national measures because they increased the stability of the banking system and the protection of savers.

⁵⁹¹ (n583) 15

⁵⁹² Gkoutzinis (n495) 142

⁵⁹³ Ibid 143

⁵⁹⁴ Ibid 143

- To forestall honesty, integrity and accountability. It is a matter of public interest to implant and enhance investor confidence and trustworthiness of the financial intermediaries on whom investors are reliant.⁵⁹⁵
- The prevention of fraud, money laundering and terrorism. Fraud can be perpetrated by insiders in the form of loans to phoney borrowers or borrowers that are nominees of an insider and by outsiders who may involve fraudsters using banks and the banking system to facilitate their schemes or to secrete their gains.⁵⁹⁶

Most national authorities have legislation governing the conduct of banks and non-bank financial institutions. In the same way, the supervisory agencies empowered to regulate the activities of banks are entirely different from non-bank financial institutions. Preference in most cases given to banks due to the nature and scale of their operations and the effect they have on the economy. In Nigeria, for example, the Banks and other financial Institutions Act (Bofia 1990) regulates the activities of banks and other financial institutions. However, there still other specific legislation such as the Trustee Investment Act, Securities and Exchange Act and the Insurance Act regulates other non-bank financial institutions.

The experience of our time shows that non-bank financial institutions can also significantly affect the financial system where a failure occurs. They experience same fundamental 'nightmares' as banks. Examples: 2008 – the collapse of Bear Stearns, Lehman Brothers (investment banks), and AIG (insurance company). The financial industry has witnessed significant changes owing to factors such as globalisation, deregulation and consolidation. The result is fierce competition

⁵⁹⁵ Ibid 143

⁵⁹⁶ Cranston (n425) 68,69

between banks and non-bank financial intermediaries and banks resorted to the use of information technology, computer networks and internet to deliver services to improve profitability.

Banking regulators have recognised that the mechanical use of traditional regulatory techniques is not able to address the challenges posed by using the internet and have therefore resorted to assessing the overall financial position and soundness of the supervised institutions and their specific risks related to the nature and scale of operations.⁵⁹⁷ The concept of technological neutrality is the regulatory approach adopted for services delivered over the internet.⁵⁹⁸ The theory holds that in enforcing applicable laws, regulatory authorities shall make no distinction between the different channels of delivering financial services except in cases where the medium generates particular risks that justify special regulatory treatment.⁵⁹⁹ This approach does not seek to discard the traditional restrictions. However, it helps to enforce their application in parallel with the establishment of a risk-based monitoring process. The risk-based process brings within the ambit of the regulatory authorities the overall evaluation of the competence of the bank's internal systems to identify, monitor and control risks in all aspects of the production and delivery of their services.⁶⁰⁰ Also, there is a full framework of statutory and regulatory requirement which reflect the best practices on internal

⁵⁹⁷ Bank for International Settlement (BIS), 'Basel Committee for Banking Supervision: Management and Supervision of Cross-Border Electronic Banking Activities' <<https://www.bis.org/publ/bcbs99.pdf>> accessed 23 May 2016

⁵⁹⁸ Gkoutzinis (n495) 148

⁵⁹⁹ Ibid 148

⁶⁰⁰ BIS (n597) 6

organisation ensuring financial soundness, solvency and liquidity and adequate resources; and the protection of the clients' proprietary interests in their assets.⁶⁰¹

5.7.1 Sources of Prudential Regulations

Regulations primarily derive their origin from the following:

- National Legislations. For example, the FISMA 2000 is the statutory framework regulating electronic commerce and financial services in the UK;
- Directives issued by supervisory/regulatory authorities whose existence has been enabled by law;
- The central bank of the country publishes guidelines on the capital adequacy requirements and other requirements to forestall the soundness and stability of the financial system;
- The Basel Committee on Banking Supervision develops standards of banking regulation which are adopted by national regulators;
- Regional regulatory bodies, for example, the European Union Directives put forward by the European committee of Banking Standards;
- International bodies such as the International Organisation of Securities Commissioners (IOSCO) also play significant roles in their formulation.

5.7.2 Prudential banking regulation techniques.

Two basic techniques employed in prudential regulation: Protective and Preventive Regulation. Preventive regulation involves those techniques which are designed

⁶⁰¹ BIS Electronic Banking and Electronic Money Activities (n546) 10

to forestall crises by reducing the risks facing banks.⁶⁰² Critical tools employed to forestall crises includes:

1. Initial entry requirements and capitalisation.
2. Minimum level of capital directly linked to the size and quality of their asset portfolio.
3. Liquidity controls. Banks are to invest their funds that sufficient liquid assets meet immediate obligations. A recent development suggests that financial institutions must understand their liquidity needs at an enterprise-wide level.⁶⁰³ Weak liquidity risk controls is a familiar source of failure especially when the firm's treasury function lacks information from business lines about expected liquidity needs or contingency fund planning.⁶⁰⁴ For example, many contingency funding plans did not adequately prepare for the possibility that individual off-balance sheet exposures can substantially affect the existence of the institutions in the wake of the global financial crises.⁶⁰⁵
4. Diversification of loan portfolios to achieve government objectives.
5. An assessment of the quality of management practices, the value of the asset portfolio, the enforcement of regulatory standards and the determination of the adequacy of capital through the submission of timely reports to the regulators for assessment.

The protective technique provides support to banks once they are crisis threatened or crisis has materialised. This method aimed at providing financial assistance to

⁶⁰² Cranston (n425) 82

⁶⁰³ *ibid*

⁶⁰⁴ *ibid*

⁶⁰⁵ *ibid*

distressed institutions and aggrieved consumers. The following tools depending on the circumstance assist banks when they face crises:

- Lender of last resort facilities.
- The safety net of deposit insurance. Deposit insurance can take the form of state guarantee; depositors conferred with priority over other creditors in the advent of insolvency, a deposit insurance or guarantee scheme.
- Rescue operations (bailout). A bailout usually justified on the ground of preventing contagion in the banking sector. If a solvent yet illiquid bank is not rescued, there may be a bank run on other banks.⁶⁰⁶ Rescue can take the form of an acquisition or the injecting of fresh capital as a loan or guarantee to ensure the survival of the institution.
- Short-term deposits taxation. The imposition of taxes (or penalties) on early withdrawals aimed at indirectly preventing bank panics by increasing the cost of rapid consumption.⁶⁰⁷

5.8 The Significance of Politically Exposed Persons

There exists some evidence that the international banking community is complicit in assisting corrupt government officials world over, either wittingly or unwittingly, to transfer, deposit and host monies stolen from their countries. These corrupt officials use agents, companies and other legal entities to control or hold assets on their behalf, family members and their cronies, officers of government agencies or the military, bribe payers – individuals and corporate entities, third-party intermediaries as the means to syphon their illicit wealth to perceived safe

⁶⁰⁶ *ibid* 94

⁶⁰⁷ H. Zhu, 'Bank Runs: Welfare and Policy Implications' [2005] 1(3) *Journal of Financial Stability* 279

territories. These large cases of grand corruption are in a newly released ‘Grand Corruption Database.’ The online database is a project of the Stolen Asset Recovery (StAR) Initiative of the World Bank and the United Nations Office on Drugs and Crime.⁶⁰⁸ The database revealed how significant amounts of illicit wealth have been amassed by politically exposed persons and also how these funds have been hosted in foreign jurisdictions and hidden in trusts companies, private companies, and foundations or the name of family members and their associates.

PEPS are high net-worth and prestigious individuals and are highly sought for by financial institutions. PEPS are financial clients who occupy a position within a government or similar public structure or their association with political office holders. The FATF defined PEP as ‘an individual entrusted with a prominent public function.’ The guidance paper further identifies the following:

- a. Foreign PEPs are ‘individuals who are or have been entrusted with prominent public functions by a foreign country, for example, Heads of State or government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials;’
- b. Domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example, Head of state or government, senior politicians, senior government judicial or military officials, top executives of state-owned corporations, important political party officials;

⁶⁰⁸ Stolen Asset Initiative, ‘StAR Corruption Database: Asset Recovery Watch & Settlements Database’ <<http://star.worldbank.org/corruption-cases/?db=All>> accessed 23 May 2017

- c. International organisation PEPs are persons who are or have been entrusted with a prominent function by a global organisation refers to members of senior management or individuals assigned with equivalent features, i.e. directors, deputy directors and members of the board or equivalent functions;
- d. Family members are individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil0 forms of partnership; and
- e. Close associates – individuals who are intimately connected to a PEP, either socially or professionally.

It is the objective of this standard to identify the various forms of PEPS and help to map their activities for financial institutions to detect and report suspicious transactions. PEPs constitute the leading class of high-risk customers of banks. What is intriguing is the fact that most FIUs world over has a private list of these PEPs yet money gets laundered daily. It's unlikely if the list gets updated regularly or companies fail to disclose PEPs who are disguised beneficial owners or that the governments' published list is inadequate. It is not that PEPs are predisposed to committing financial crimes, but instead that their position, about state funds and other opportunities, significantly heightens the risk that they may do something corrupt, fraudulent or otherwise illegal. According to the Wolfsburg group guidance on politically exposed persons, relationships with PEPs may represent increased risks due to the possibility that individuals holding such positions may

misuse their power and influence for personal gain or advantage, or for own gain or benefit for close family members and close associates.⁶⁰⁹

PEPs pose an increased reputational risk to financial and non-bank financial institutions. Corrupt PEPs circumvents AML/CFT and anti-corruption safeguard by deliberately disguising the nature of transactions through shell companies, corporate entities or professional intermediaries.

As noted by Michael Levi, 'public corruption cases typically involve either a legal or natural person outside the government who pays a person inside the government in exchange for a government benefit or PEP who embezzles public funds.'⁶¹⁰ In the second case mentioned above, the corruptor may 'set up corporate or other non-transparent vehicles and act as bankers or other types of value transfer advisors.'⁶¹¹ In some recent high-profile cases, it has been non-family members, including highly respected 'advisors' and lawyers, accountants and diplomats who have, in most cases unwittingly, assisted in camouflaging and laundering dirty money. One of the most prominent examples of this trend is the case of former Zambian President Frederick Chiluba, where Meer Care & Desai, the law firm representing him, was implicated as well. In Peru, a former Head of the Intelligence Service, Vladimiro Montesinos was used by President Alberto Fujimori, during his reign in office to steal from the state more than US\$2 billion, a figure equal to nearly 9 percent of Peru's current stock of external debt. A total of US\$ 1billion is believed to have been sent overseas, while Montesinos alone is

⁶⁰⁹ The Wolfsberg Group, 'Wolfsberg Guidance on Politically Exposed Persons,' < <http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg-Guidance-on-PEPs-May-2017.pdf>> accessed 8 June 2017

⁶¹⁰ Michael Levi, 'How Well Do Anti-Money Laundering Controls Work In Developing Countries' in Peter Reuter (eds.) *Draining Development? Controlling Flows of Illicit Funds from Developing Countries* (World Bank, 2012) 388

⁶¹¹ Ibid 388

suspected to have amassed a fortune of worth US\$ 800million.⁶¹² Loopholes in the domestic legislation were employed to facilitate the repatriation of illegal funds. Following the argument of Gordon, Levi posit that in almost all grand corruption cases ‘the proceeds of corruption are already within the financial system at the time of their generation. And ‘if before or after the award of a contract, depending on the level of trust and other factors, the corrupt government contractor withdraws or transfers it to a corrupt PEP, this would break the chain of banks records connecting the two.’⁶¹³

The FATF guidance on PEPs require financial institutions and designated non-financial businesses and professions,⁶¹⁴ (DNFBP) to identify customers (and beneficial owners. If these are different, establish and maintain up-to-date customer profiles, monitor transactions to determine if they match customer profiles, if they do not match, examine the transactions to determine if these might represent the proceeds of crimes, including by reviewing the sources of fund and if they appear to represent the proceeds of crime, report the transactions to the FIU. FATF recommendation 12⁶¹⁵ on foreign PEPs (whether a customer or beneficial owner), provides that in addition to performing regular customer due diligence, adopt the following measures:

- Have appropriate risk management systems to determine whether the customer or the beneficial owner is a politically exposed person;

⁶¹² Ibid 389

⁶¹³ Ibid 399

⁶¹⁴ These are non-financial institutions.

⁶¹⁵ Financial Action Task Force, ‘FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)’ <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>> accessed 13 June 2017

- Obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
- Take reasonable measures to determine the source of wealth and source of funds; and
- Conduct enhanced ongoing monitoring of the business relationship.

Customer due diligence and record keeping requirement apply to DNFBPs.

Arguably, the effectiveness of an international AML/CFT regime largely depends on the efficacy of its constituents. A review of compliance with recommendation 21 - politically exposed persons - based on a recent report,⁶¹⁶ on the overall compliance with FATF recommendations updated in September 2017, shows that of the 36 countries sampled 17% complied, 31% primarily complied, 44% partly complied and 8% were non-complaint. This only shows the difficulty associated with mapping PEPs as low levels of compliance portends problems in associating the actions of PEPS the payment system.

5.9 The Importance of Identifying Beneficial Owners

Corporate vehicles aid corrupt public office holders to conceal the proceeds of grand corruption. In many instances, these corrupt officials employ the services of financial institutions, lawyers, accountants and other professionals – generally known as trust and company services providers - to facilitate their schemes. In the

⁶¹⁶ Financial Action Task Force, 'Table of Ratings for Assessment Conducted against the 2012 FATF Recommendations, using the 2013 FATF Methodology' <<http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf>> accessed 13 September 2017.

same vein, some have used front companies, legal entities, legal arrangements⁶¹⁷ as well as non-governmental agencies as conduits to conceal illicit enrichment.

Because beneficial ownership information can be obscured through the use of shell companies, complex ownership structures, bearer shares and bearer share warrants, unrestricted use of legal persons as directors, informal nominee shareholders and directors, trust companies and other financial and non-financial intermediaries, it is imperative that appropriate controls are in place to detect officials who hide under these structures. Diepreye Alamiyeseigha, a former governor of Bayelsa State, Nigeria created five corporate vehicles that separated his name and beneficial interest from the legal ownership and control of various financial and real estate assets. The majority of these companies were private limited companies in a variety of jurisdictions acquired and managed through a variety of banking and administrative trust and company service providers.⁶¹⁸ From 2004 to 2008 Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, used lawyers, bankers, real estate agents, and escrow agents to move over \$110 million in suspect funds into the United States. Joseph Estrada, then president of the Philippines, set up the Erap Youth Foundation Inc. and with some collaborators, secretly deposited into the foundation's fund account \$4.3 Million collected from illegal 'junteng' gambling operations. Former President Omar Bongo of Gabon, employed the services of a U.S. lobbyist, Jeffrey Birrell, to help purchase U.S. built armoured vehicles, and obtained U.S. government authorization to purchase U.S. built C-130 aircraft in which over \$18 million of suspect funds were wire transferred from Gabon through an entity called Ariya into

⁶¹⁷ These are natural persons at the end of the chain, who ultimately controls or owns the legal arrangement.

⁶¹⁸ Nigeria v Santolina Inv. Corp., [2007] EWHC (Ch) 437,

U.S bank maintained by Birrell in the name of Grace Group LLC, a corporation formed by him and his wife.⁶¹⁹ Jennifer Douglas Abubakar, fourth wife of former Vice president of Nigeria Atiku Abubakar, between 2000 and 2008, using offshore companies brought in over \$40 million of suspect funds to the United States.⁶²⁰ It is obvious from the above that the beneficial owner's exercises control at arms-length basis not directly but indirectly and covertly quite invisible from the world. A basic reason for the misuse of these corporate vehicles is the lack of transparency involved in identifying the owner⁶²¹ and control of companies, legal arrangements and foundations. In response to ensure transparency and effective due diligence, the FATF recommendation states that:

‘Competent authorities should be able to obtain or have access in a timely fashion too, adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons (beneficial ownership information) that are created in the country.’⁶²²

Countries are enjoined to have proper mechanisms that identify and describes the different types, forms and essential features of legal persons in their countries; define the processes for the creation of those legal persons and obtain and record crucial and beneficial ownership information; make the information public; and access the money laundering and terrorist financing risks associated with different types of legal persons created in the country. Similarly, The FATF definition of

⁶¹⁹ Levin (n219) 170

⁶²⁰ Ibid 173

⁶²¹ The concept of beneficial ownership originated in the United Kingdom during the development of trust law where a distinction was made between two types of ownership: legal ownership and beneficial ownership.

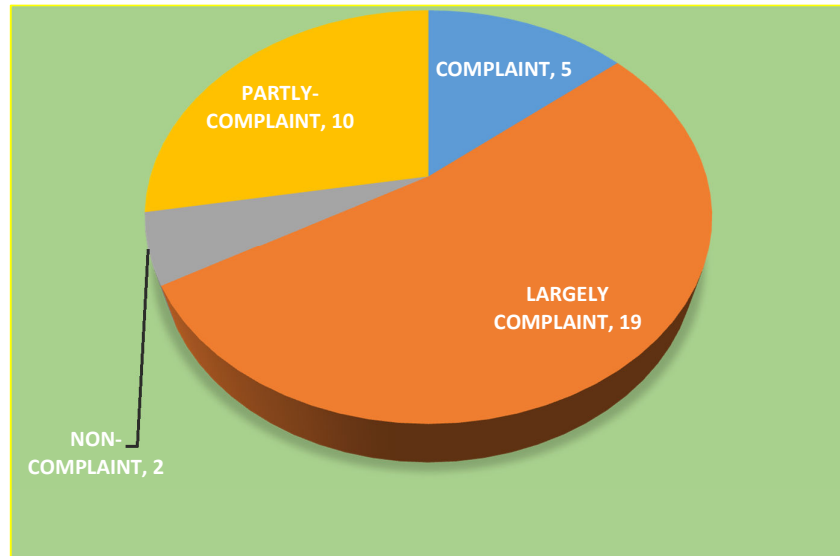
⁶²² Financial Action Task Force, ‘Recommendation 24: Transparency and Beneficial Ownership of Legal Persons’ <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>> accessed 13 September 2017

beneficial ownership extends beyond legal ownership and control to consider the notion of ultimate (actual) ownership and control. It defines a beneficial ownership as:

The natural person who ultimately owns or controls a customer and the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate control over a legal person arrangement.

FATF recommendation 24 on transparency and beneficial ownership of legal persons requires that countries that have legal persons that can issue bearer shares or bearer share warrants or which allow nominee shareholders or nominee directors should take effective measures to ensure that they are not misused for money laundering or terrorist financing. About legal arrangements, countries should ensure that there is accurate and timely information on express trusts, including information on settlors, trustees and beneficiary that can be obtained or accessed on a timely fashion by competent authorities.

There are practical differences in the implementation of the FATF recommendations and; this is evident in the recent compliance rating released for 36 countries selected from industrialised and developing countries in September 2017. Compliance with Recommendation R.33 and R.34 as indicated in the chart below shows that of the 36 countries assessed, 14% or 5 countries were compliant, 53% or 19 countries largely complaint, 28% partly complaint while 6% or countries were non-complaint.



Source: Own analysis of data obtained from [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)).

Corporate vehicles are the instruments through which investments are made in the economy and globally, so in the majority of cases businesses are conducted legitimately, but as it is with deviant behaviour, few companies may be used for unlawful purposes including the laundering of the proceeds of corruption. In one study of 150 cases of grand corruption, company's Financial institutions and law enforcement face vital challenge to identify cases involving offshore legal structures or corporate vehicles for international customers where in some cases the information is limited. Individual jurisdictions have their peculiar laws allowing different types of legal structures and various roles within each type of vehicle or structure. This certainly creates legal conflicts and informed corrupt public officials can take advantage of these legal loopholes.

Enhanced due diligence, internal control measures and beneficial owner risk management strategies adopted by financial institutions as well as control measures advised by Financial Intelligence Units including law enforcement

agencies have not stopped the tide since launderers are always one step ahead. This is primarily due to the profits associated with the business which caters to the interest of smart professionals who can devise schemes to outsmart controls. In the same vein, lack of political will in strengthening institutional capacity; lack of international cooperation regarding information sharing; and government policies about secrecy laws and investment drive help to foster illicit laundering of the proceeds of corruption.

5.10 International Initiatives on Prudential Regulation and Supervision of Internet Banking

An essential aspect of the electronic financial activity is the regulation and supervision of financial institutions engaging in electronic commerce in financial services. Prudential regulation of banks implies that the government imposes specific controls over the decisions of individuals and firms with the aim of maintaining the safety and soundness of the financial institutions prevent bank failures and ensure financial stability under its administrative supervision. These regulations seek to prescribe rules which either promote the prudent conduct of banking operations or regulate in a legally binding manner the financial position (balance sheet) of the financial institution for the bank to absorb losses where they materialise. Where they ultimately fail, the regulation seeks to protect depositors by ensuring compensation through deposit insurance schemes or by the provision of emergency financial assistance (bailout) to the financial institution to maintain public confidence and reduce the adverse effects of bank runs or economic crises.

Prudential regulatory intervention seeks to mitigate 'severe information asymmetries between consumers and institutions, providing an important service to the former through the imposition of sophisticated rules and the exercise of close monitoring on their behalf'.⁶²³ It has been recognised that given the changes in the financial industry with the advent of information technology and internet banking, that the emphasis on prudential approach should preferably be qualitative rather than quantitatively based on the specific risks related to the nature and scale of banking activities. Prudential regulation, therefore, entails the identification of risks that are likely to undermine the financial condition of banks, thus the development of regulatory and supervisory techniques capable of monitoring, managing, controlling or reducing the identified risks. Banks are faced with several forms of risk: credit risk, liquidity risk, market risk and foreign exchange risk. Additional non-financial risks arise due to the operational characteristics of electronic finance and internet banking. Among these are the high dependence on information technology; remote and distant interaction of over a publicly accessible telecommunications network; constant innovation in services and procedures; the unprecedented value of information acquisition; storage and processing; and, its cross-border character of operations. More so, internet banking is exposed to a wide range of legal risks arising from the possibility of losses due to the violation of or non-compliance with laws, rules, regulations or prescribed practices. No doubt, with the ease of access through the internet, the impersonal and remote nature of the contract between the financial institution and the customer and rapidity of electronic transactions, electronic financial activities is particularly

⁶²³ Hogan (n588) 16; Matthias Dewatripont and Jean Tirole *The Prudential Regulation of Banks* (MIT Press 1994)

vulnerable to money laundering activities. Laundering of money on the internet entails transferring money from one bank to the other, using different names and different locations repeatedly until the funds become clean or untraceable. In recognition of this vulnerability, leading regulatory authorities in each state assume the task of overseeing the conduct of banks by monitoring compliance with anti-money laundering legislation in addition to enforcing such law tailored to banking operations. More worrisome is the entry of non-bank financial institution whereby criminal elements opt to use electronic cash as a way of anonymously transferring funds. Corrupt public officials who desire to be unseen and unknown can use electronic forms of currency to move their illicit monies globally using the internet as the perfect tool.

The regulator of core banking activities varies from jurisdiction to jurisdiction as some jurisdictions hive off the prudential regulation of specified banks into separate regulatory bodies with their legislative regime⁶²⁴ while other jurisdictions entrust this function on central bank.⁶²⁵ Still, other jurisdictions prefer an integrated supervisor to reflect the reality of financial institutions and markets, whereby commercial banks, investment banks and insurance companies come under a single entity other than the Central Bank.⁶²⁶

Below we consider international and local initiatives geared towards regulating the internet banking and associated money-laundering risk. First is the Basle Committee's work on regulating internet banking and other e-commerce activities,

⁶²⁴ Cranston (n425) 83

⁶²⁵ Ibid 83

⁶²⁶ The case of the United Kingdom where the Financial Services Authority is responsible for prudential regulation. See Cranston (n425) 83

followed by the regulatory provisions of the Financial Action Task Force on beneficial ownership and then the local prudential regulatory activities.

5.11 The Basel Committee and electronic financial activities

In the midst of using internet for banking services, international regulators continue to evaluate their roles in managing and monitoring electronic commerce, money and electronic banking in particular. The Basle Committee is a creation of the G-10 with the aim of improving collaboration between bank supervisors. This committee provides a forum for discussion on the handling of specific banking supervision issues; coordinates the sharing of supervisory responsibilities; and seeks to enhance standards of supervision. A preliminary study on the risk management implications of electronic banking and its repercussion was conducted in 1998 with a full paper.⁶²⁷ The study demonstrated a clear need for more work in the area of e-banking risk management. The document among other things suggested, 'Operational risk, reputational risk and legal risk are the most important risk categories for electronic banking and electronic money'.⁶²⁸ As a follow up to the preliminary study, a working group comprised of bank supervisors and central banks, known as the Electronic Banking Group (EBG) formed in 1999. In 2000 the group released a report on risk management and supervisory issues which 'inventoried and assessed the major risk associated with e-banking, namely strategic risk, reputational risk, operational risk (including security and legal risks)

⁶²⁷ Bank for International Settlements, 'Risk Management for Electronic Banking and Electronic Money Activities (BS/97/122 March 1998) <<https://www.bis.org/publ/bcbs35.pdf>> accessed 14 September 2017

⁶²⁸ Bank for International Settlements, 'Basle Committee on Banking Supervision: Risk Management for Electronic and electronic Activities' <<https://www.bis.org/publ/bcbsc215.pdf>> accessed 14 September 2017

and credit, market and liquidity risks'.⁶²⁹ The risk management principles fall into three broad and often overlapping category of issues: board and management oversight⁶³⁰ encompassing adequate management oversight of e-banking activities,⁶³¹ establishment of a comprehensive security control process,⁶³² extensive due diligence and management oversight process for outsourcing relationships⁶³³ and other third-party dependencies;⁶³⁴ Security controls⁶³⁵ which includes authentication of e-banking customers,⁶³⁶ non-repudiation and accountability for e-banking transactions,⁶³⁷ appropriate measures to ensure segregation of duties,⁶³⁸ proper authorisation controls within e-banking transactions,⁶³⁹ records and information, establishment of clear audit trails for e-banking activities⁶⁴⁰ and confidentiality of crucial bank information;⁶⁴¹ and, Legal and reputational risk management.⁶⁴² This involves appropriate disclosures for e-banking services,⁶⁴³ privacy of customer information,⁶⁴⁴ capacity, business continuity and contingency planning to ensure availability of e-banking systems and services and incident response planning.⁶⁴⁵ The principles are not legal provisions in themselves but rather are guides to promote safe and sound internet related financial activities. This is because the committee believes that setting

⁶²⁹ Ibid 7

⁶³⁰ Ibid 7

⁶³¹ Ibid 7

⁶³² Ibid 7

⁶³³ Ibid 8

⁶³⁴ Ibid 8

⁶³⁵ Ibid 8

⁶³⁶ Ibid 8

⁶³⁷ Ibid 8

⁶³⁸ Ibid 8

⁶³⁹ Ibid 8

⁶⁴⁰ Ibid 8

⁶⁴¹ Ibid 8

⁶⁴² Ibid 8

⁶⁴³ Ibid 8

⁶⁴⁴ Ibid 8

⁶⁴⁵ Ibid 8

detailed risk management requirements in the area of internet banking might be counter-productive as these might become outdated due to the speed of change related to product and technological innovation.

5.11.1 Board and Management Oversight

The first broad category is that the board of directors have the primary responsibility of ensuring appropriate adequate controls are in place to safeguard e-banking activities including the establishment of specific accountability, policies and controls to manage these risks. The board should ensure that e-banking plans integrated within corporate strategic goals, establish transparent processes for the identification of specific threat posed by e-banking activities, establish appropriate procedures for mitigation and monitoring of identified risk, and conduct reviews to evaluate the results of e-banking activities against the business plans and objectives of the institution. The oversight function is summarised in three principles.

Principle 1: the board of directors and senior management should establish effective management oversight over the risks associated with e-banking activities, including the establishment of specific accountability, policies and controls to manage these risks. This principle supports the need for a vigilant management oversight required for the provision of adequate internal control mechanisms over e-banking activities. As part of management objective, there should be in place a defined organisation's risk appetite about electronic banking. Also, a determined delegation and reporting mechanisms, including necessary escalation procedures for incidents that impact the bank's safety, soundness or reputation to be

established. Tools in place to address any unique risk factors associated with the provision of e-banking products and services that is secure, available and maintains integrity; and that appropriate due diligence and risk analysis performed before the bank conducts cross-border e-banking activities.⁶⁴⁶

Principle 2: the board of directors and senior management should review and approve the critical aspects of the bank's security control processes at all times. The development and continued maintenance of security control infrastructure that adequately safeguard the e-banking systems and data from internal and external threats is a critical fiduciary duty of the board of directors and senior management. Given the security challenges e-banking brings especially operating over the public internet network, the board needs to ascertain that the bank has a comprehensive security process, including policies and procedures that address the challenges and threats. An efficient e-banking security processes would include: (i) assignment of explicit management/staff responsibility for overseeing the establishment and maintenance of corporate security policies; (ii) sufficient physical controls to prevent unauthorised access to the computing environment; (iii) enough logical controls and monitoring processes to avoid unauthorised internal and external access to e-banking applications and databases, and, (iv) regular review and testing of security controls, including the continuous tracking of current industry security development and installation of appropriate software upgrades, service packs and other required measures.⁶⁴⁷

Principle 3: The board of directors and senior management should establish a comprehensive and on-going due diligence and oversight process for managing

⁶⁴⁶ Ibid 10

⁶⁴⁷ Ibid 10

the bank's outsourcing relationships and other third-party dependencies supporting e-banking.⁶⁴⁸ Outsourcing critical e-banking functions lessens bank's management control. Hence the need to have a comprehensive process to manage third party dependence, explicitly focusing on ensuring that the bank fully understands the risk associated with entering into an outsourcing or partnership agreement for its e-banking systems and applications. Conduct an appropriate due diligence review of competency and financial viability of any third party service provider or partner prior to entering into any contract for e-banking services. Clearly define contractual accountability of all parties to the outsourcing partnership, all outsourcing systems and operations are subject to risk management, security and privacy policies that meet the bank's standard, periodic internal/external audits on the outsourced services and appropriate contingency plans exist for outsourced banking activities.⁶⁴⁹

5.11.2 Security Controls

The threats to the security of Internet banking systems and the consequent losses could derive from many sources such as intentional, external or internal attacks, mainly with the aim of financial gain, malfunctions and technical problems of the system, customer misuse or inadequate design and improper implementation of electronic banking and money systems on the part of the banks. In the short-term, bank customers might be attracted by all the advantages of Internet banking but in the long run what seems to interest them more is the security-both technical and

⁶⁴⁸ Ibid 11

⁶⁴⁹ Ibid 12

legal-of transacting in cyberspace. Due to the enhanced security challenges of electronic banking activities, the risk management framework ensures that the board of directors and senior management have measure specifically for authentication, non-repudiation, data and transaction integrity, segregation of duties, authorisation controls, and maintenance of audit trails and confidentiality of crucial banking information.

Principle 4: Banks should act appropriately to authenticate the identity and authorisation of customers whom it conducts business over the internet.⁶⁵⁰

Customer verification during account origination is vital in reducing the risk of identity theft, fraudulent account applications and money laundering. A customer is a person or entity that maintains an account with the bank or whose account are kept on its behalf (beneficial owners); the beneficiaries of transactions conducted by professional intermediaries; and any person or entity connected with a financial transaction who can pose a significant reputational or other risk to the bank.⁶⁵¹ The general guidelines on customer identification requires that for natural persons, banks should verify customer information⁶⁵² with documents most challenging to obtain illicitly and to counterfeit⁶⁵³ by at least one of the following methods:

- i. confirming the date of birth from an official document
- ii. confirming permanent address

⁶⁵⁰ Ibid 12

⁶⁵¹ Bank for International Settlement, 'Basel Committee on Banking Supervision: Customer Due Diligence for Banks' <<https://www.bis.org/publ/bcbs85.pdf>> accessed 7 April 2017

⁶⁵² This includes the legal name and other names used (such as maiden name), correct permanent address, telephone number and email address, date and place of birth, nationality, occupation, an official personal identification or other unique form of identification that bears a photograph of the customer, type and nature of banking relationship and signature.

⁶⁵³ Ibid 6

- iii. contacting the customer by telephone, by letter or by email to verify information supplied after the account has been opened
- iv. Establish the validity of the official documentation provided through certification by an authorised person.⁶⁵⁴

Customer verification could assist the bank to make an initial assessment of the risk profile of the customer. In addition, for those recognised as high-risk customers, additional information from independent sources to confirm among other things: the individual's source of wealth; verification of employment including any public position held; and, any prior bank reference and contact with the bank regarding the customer and evidence of permanent home address.

The general principles of customer identification for natural persons are also applicable to institutions⁶⁵⁵ with particular attention given to the different type of risks each institution poses. The specific institution includes trust, nominee and fiduciary accounts;⁶⁵⁶ corporate vehicles;⁶⁵⁷ introduced businesses;⁶⁵⁸ client

⁶⁵⁴ Bank for International Settlement, 'Basel Committee on Banking Supervision: Sound Management of Risks Related to Money Laundering and Financing of Terrorism' <<https://www.bis.org/bcbs/publ/d405.htm>> accessed 30 November 2017

⁶⁵⁵ The FATF defines Financial Institution as 'any natural or legal persons who conduct business one more of the following activities or operations for or on behalf of a customer: 1. Acceptance of deposits and other repayable funds from the public; 2. Lending; 3. Financial leasing; 4. Money or value transfer services; 5. Issuing and managing means of payment; 6. Financial guarantees and commitments; 7. Trading in: a. money market instruments, b. Foreign Exchange, c. Exchange, interest rate and index instruments, d. Transferable securities, e. commodity futures; 8. participation in securities and the provision of financial services related to such issues; 9. Individual and collective portfolio management; 10. Safekeeping and administration of cash or liquid securities on behalf of other persons; 11. Otherwise investing, administering or managing funds or money on behalf of other persons; 12. Underwriting and placement of life insurance and other investment related insurance; and 13. Money and currency are changing.'

⁶⁵⁶ BIS (CDD n649) 8

⁶⁵⁷ Ibid 8

⁶⁵⁸ Ibid 8

accounts opened by professional intermediaries;⁶⁵⁹ politically exposed persons;⁶⁶⁰ and non-face-to-face customers.⁶⁶¹

For instance, to circumvent customer identification procedures trust, nominee and fiduciary accounts can be used whereby the customer may be taking the name of another customer acting as a front or acting on behalf of another person or trustee, nominee or intermediary.⁶⁶² In other instances, natural persons as means of operating anonymous accounts can use corporate vehicles.⁶⁶³ This underscores the need for adequate customer verification to prevent the risk of money laundering and other criminal activities perpetrated through the financial institution. Identifying politically exposed persons who pose an increased risk of laundering corrupt funds is an essential function of a bank's anti-money laundering controls thus the need to ensure proper customer identification, and, more importantly at the account opening stage. Accepting funds from politically exposed persons can severely damage a bank's reputation and undermine the public confidence in the entire financial centre.⁶⁶⁴ This may not be said in instances where the banks themselves lobby to have accounts of PEPS - legislators as well as top government functionaries - in order to shore up their deposit base or to meet other essential marketing objectives by willingly compromising the bank's know your customer (KYC) policy. As observed by one commentator, 'In Nigeria, PEPS are untouchable and highly esteemed by financial institutions. This is not surprising

⁶⁵⁹ Ibid 8

⁶⁶⁰ Ibid 8

⁶⁶¹ Ibid 8

⁶⁶² Ibid 8

⁶⁶³ Ibid 10

⁶⁶⁴ Ibid 10

because government institutions and PEPS are the preferred clients of financial institutions operating in Nigeria.⁶⁶⁵

Customer due diligence for account opening requires verification of relevant documents and identification of those who have authority to operate the account, the nature and purpose of the business and its legitimacy, some form of official identification such as tax identification number.⁶⁶⁶ Principally, the aim of customer identification is to identify those who have control especially those with ultimate control or the principals.

Secondly, this principle (principle 4) requires financial institutions conducting e-banking activities to establish and authenticate an individual or corporate body's identity and authorisation to access banking systems in electronic environments. This can be a difficult task as hackers and other cyber criminals through the alteration of authentication databases can misrepresent legitimate users. For example, according to a Nigerian National Security Adviser, Nigeria losses over 127billion Naira annually to software piracy, intellectual property theft and malware attacks.⁶⁶⁷ The 2015 annual report of the Nigerian Deposit Insurance Corporation shows that 'actual loss sustained in respect of internet banking fraud was 857million Naira (*about 4Million USD*).⁶⁶⁸ In a related development, fraudsters through phishing and spoofing have defrauded many individuals. Scammers send

⁶⁶⁵ Ibrahim Yeku, 'Politically Exposed Persons: Issues and Matters Arising' Guardian Newspaper (Lagos, 11 May 2016) <<http://guardian.ng/opinion/politically-exposed-persons-issues-and-matters-arising/>> accessed 31 October 2016

⁶⁶⁶ *ibid*

⁶⁶⁷ Gabriel Ewepu, 'Nigeria loses N127bn annually to cyber-crime — NSA' The Vanguard (Lagos, 19 April 2016) accessed 31 October 2016

⁶⁶⁸ Nigerian Deposit Insurance Corporation, 'NDIC: Annual Report for the Year Ended December 31, 2015' <<http://ndic.gov.ng/wp-content/uploads/2016/01/Links/NDIC%202015%20Combined.pdf>> accessed 31 October 2016. Italics and USD equivalent added.

e-mails with fake letterheads and logo of banks, pension funds managers and similar organisations to unsuspecting members of the public seeking vital personal identification information, which may include user login details, pin and password with devastating effects to those who fall to their request. The emails purport to be from legitimate businesses and agencies, designed to lead customers to counterfeit websites that trick recipients into divulging financial data. The Anti-Phishing Working Group report notes that, between quarter 1 and quarter 3, 2015, computers around the world continue to be infected with malware at a high rate. The global infection rate was 36.51% in Q1, 32.31% in Q2 and 32.12% in Q3 of 2015.⁶⁶⁹ The report highlights that business email compromise became a significant problem in 2015, as attackers use spear-phishing techniques to fool companies into transferring large amounts of money to criminals.⁶⁷⁰

Customer authentication involves verifying the identity of a person or entity and is dependent upon customers providing a valid means of identification followed by one or more authentication credentials to prove their identity. An efficient authentication system is necessary to reduce the risk of doing business with an unauthorised or incorrectly identified person which can result in financial loss and reputational damage through fraud, the disclosure of customer information, corruption of data or unenforceable agreements. Methods for online customer authentication includes the customer passwords, personal identification numbers (PIN), digital certificates using a public essential infrastructure, physical devices such as smart cards, one-time passwords, tokens, transaction profile scripts, biometric identification and most recently in Nigeria the bank verification number

⁶⁶⁹ Anti-Phishing Working Group, 'Phishing Activity Trends Report: 1st – 3rd Quarters 2015'
<https://docs.apwg.org/reports/apwg_trends_report_q1-q3_2015.pdf> accessed 27 October 2016

⁶⁷⁰ ibid

(BVN). Banks, therefore, are required to have a formal policy in place and adequate procedure for the authentication of personal identification numbers and other

Principle 5: banks should use transaction authentication methods that promote non-repudiation and establish accountability for e-banking transactions.

5.12 Prudential Requirements in Nigeria

The Central Bank of Nigeria exercises prudential regulation over financial institutions by the provisions of the Central Banks Act 2004 as well as the Banks and other Financial Institutions Act 1991 as amended. S. 2(d) and 33(2) of the Central Bank Act confers on the bank power to 'issue guidelines to any person or institution under its direct supervision, this is further corroborated by S.57(2) of the Banks and other Financial Institution Act 2007 giving the central bank power to 'make rules and regulations for the operation and control of all institutions under the supervision of the bank'.⁶⁷¹ In keeping with this objective, the bank has sought to provide globally accepted risk management standards as regulation to direct internet banking activities in Nigeria. Licenced banks supervised, with a physical presence in country can offer electronic banking services,⁶⁷² whereas, virtual banks that exist only in cyberspace are not allowed.⁶⁷³ E-banking products and services are offered to designated classes of customers: Residents of Nigeria with a verifiable address within the geographic boundary of Nigeria;⁶⁷⁴ a person residing

⁶⁷¹ Banks and Other Financial Institutions Act (Act No. 25 of 1991) as amended.

⁶⁷² Central Bank of Nigeria, 'Guidelines on Operations of Electronic Payment Channels in Nigeria' <<https://www.cbn.gov.ng/Out/2016/BPSD/Approved%20Guidelines%20on%20Operations%20of%20Electronic%20Payment%20Channels%20in%20Nigeria.pdf>> accessed 5 May 2017

⁶⁷³ *ibid*

⁶⁷⁴ *ibid*

physically in Nigeria as a citizen under a resident permit or other legal residency designation,⁶⁷⁵ and a 'classified person' who is temporarily resident in the country may utilize e-banking services which are limited to acceptance services...or other acceptance services deployed by a regulated institution.⁶⁷⁶ The regulation also requires e-banking services to be offered only in the local currency (naira) and where such service is provided in foreign currency, be provided only to customers who own an ordinary domiciliary account and conform to all other foreign currency exchange regulations.⁶⁷⁷

About the risk management framework, the guideline stipulates that to mitigate all risks associated with all e-banking business, banks should have in place a comprehensive risk management process that assesses risk, controls risk exposure, and monitors risks. This global risk management framework should be integrated into the bank's overall risk management framework⁶⁷⁸ and the process supported by appropriate oversight by the board of directors and senior management and carried out by staff with the necessary skill and knowledge to deal with the technical complexities of new e-banking developments.⁶⁷⁹ To achieve this objective, the guideline provides among others that banks should:

- i. Establish effective management oversight over the risks associated with e-banking activities, including the establishment of specific accountability, policies and controls to manage these risk,⁶⁸⁰

⁶⁷⁵ *ibid*

⁶⁷⁶ *ibid*

⁶⁷⁷ *ibid*

⁶⁷⁸ *ibid*

⁶⁷⁹ *ibid*

⁶⁸⁰ *ibid*

- ii. Establish a comprehensive and on-going due diligence and oversight process for managing the bank's outsourcing relationships and third-party dependencies supporting e-banking⁶⁸¹
- iii. Ensure that appropriate measures are in place to promote adequate segregation of duties within e-banking systems, databases and applications;⁶⁸²
- iv. Ensure that clear audit trails exist for all e-banking transactions;⁶⁸³
- v. Develop appropriate incident response plans to manage, contain and minimise problems arising from unexpected events, including internal and external attacks that may hamper the provision of e-banking transactions.⁶⁸⁴

Additionally, financial institution's systems should be adequate to manage the risks associated with electronic banking customers including remote data capture activity, and each management can implement its monitoring and reporting systems effectively.⁶⁸⁵ E-banking systems, which provide electronic delivery products, include automated teller machine (ATM) transactions; online account opening; internet banking transactions; telephone banking. As a potentially high-risk area, management should develop adequate policies, procedures and processes for customer identification and monitoring of specific areas of banking.

⁶⁸¹ *ibid*

⁶⁸² *ibid*

⁶⁸³ *ibid*

⁶⁸⁴ *ibid*

⁶⁸⁵ Central Bank of Nigeria, 'Anti-money Laundering/Combating of the financing of terrorism (AML/CFT) risk-based supervision (RBS) Framework 2011'
<<https://www.cbn.gov.ng/Out/2012/CCD/CBN%20APPROVED%20FRAMEWORK.pdf>> accessed 3 May 2016

CONCLUSION

How do banks with such controls over its activities still become conduits for money laundering?⁶⁸⁶ Banks help to facilitate money laundering⁶⁸⁷ and profit is the motive. In its Thursday 16 October 2014 edition, the independent newspaper showed that at least 19 UK firms were under investigation for an alleged conspiracy to make \$20bn seem legitimate.⁶⁸⁸ The Nigerian Punch newspaper also lamented why banks being handlers of the proceeds of corruption fail to report infractions to regulatory authorities.⁶⁸⁹ Baker argued that the global structure to facilitate the movement of illicit money was built, since the 1960s.⁶⁹⁰ After the independence of some 48 countries from the European powers, many political office holders and wealthy people in business wanted to take money out of these newly independent nations, and that was a desire well serviced by western financial institutions. He contends that the driver for illicit financial flow is 'the shift of money from the bottom

⁶⁸⁶ Ed Vulliamy, 'How a big US bank laundered billions from Mexico's murderous drug gangs' The Guardian (International Edition, 3 April 2011) <<https://www.theguardian.com/world/2011/apr/03/us-bank-mexico-drug-gangs>> accessed 25 August 2017

⁶⁸⁷ Golem XIV, 'Money Laundering and the moral world of bankers' <<http://www.golemxiv.co.uk/2011/04/money-laundering-and-the-moral-world-of-bankers/>> accessed 25 August 2017; Rajeev Syal, 'Drug money saved banks in global crisis, claims UN advisor' The Guardian (International edition, 13 December 2009) <<https://www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-cfief-claims>> accessed 25 August 2017; Edward Spannaus, 'British Empire's No. 2 Drug Bank Charged with Money-Laundering' <http://www.larouchepub.com/eiw/public/2012/eirv39n32-20120817/36-38_3932.pdf> accessed 25 August 2017; Executive Intelligence Review, 'London is the World Center of Drug Money-laundering' <http://www.larouchepub.com/pr/2016/160527_london_money_launders.html> accessed 25 August 2017; Board of Governors of the Federal Reserve System, 'Cease and desist order against HSBC North America Holdings' <<https://www.federalreserve.gov/newsevents/pressreleases/enforcement20101007a.htm>> accessed 25 August 2017; and, Philip Mattera, 'HSBC: Corporate Rap Sheet' <<http://www.corp-research.org/HSBC>> accessed 25 August 2017

⁶⁸⁸ Jim Armitage, 'Dirty money: At least 19 UK firms under investigation for an alleged conspiracy to make \$20bn seem legitimate' Independent (UK, 16 October 2014) <<http://www.independent.co.uk/news/business/news/dirty-money-at-least-19-uk-firms-under-investigation-for-an-alleged-conspiracy-to-make-20bn-seem-a6728431.html>> accessed 25 August 2017

⁶⁸⁹ 'Editorial', 'Money laundering: Putting banks on the spot' Punch Newspaper (Lagos, 20 June 2017) <<http://punchng.com/money-laundering-putting-banks-on-the-spot/>> accessed August 25, 2017

⁶⁹⁰ Raymond W. Baker, 'The Ugliest Chapter in Global Economic Affairs since Slavery' <https://www.taxjustice.net/cms/upload/pdf/Baker_070628_Conference_speech.pdf> accessed 29 August 2017

to the top, from the poor to the rich and in particular from the hands of *80 percent to the hands of the 20 percent.*⁶⁹¹

Thirdly, within the African context the 'leadership' imposes itself on anti-corruption agencies, financial intermediaries and the rule of law is jettisoned to the background. This also affects the operations of banks and their reporting requirements. As Heilbrunn observed: 'Nigeria's efforts have been problematic due to powerful interests in federal, state, and local governments that oppose any anti-corruption efforts. Often these interests are members of the legislature, government, or otherwise powerful people, who shield them from investigations and prosecution'.⁶⁹² In other instances, the public official involved may intimidate bank officials using the apparatus of government so that reporting would have proved hazardous for the bankers, no successful action can be brought upon the individual. Governance has assumed the name, 'Cabalocracy' – rulership of the cabal, by the cabal and for the cabal.

Banks and their officials are 'errand boys' doing the bid of their masters-in-power, who are remarkably the owners of the banks, so they refuse to report the infractions. Concealments by the banks could be 'repayments' by the politicians to their sponsors of which some bank executives are notable.⁶⁹³ Where suspicious

⁶⁹¹ Ibid

⁶⁹² John R. Heilbrunn, 'Anti-corruption Commissions: Panacea or real Medicine to Fight Corruption?' (2004) World Bank Institute Working Paper 16.

⁶⁹³ Corrupt political funding undermines the democratic system. Together with other forms of political corruption, it leads to a compromising of democratic ideals, the growth of political apathy among voters and mistrust of the authorities. The financing of political parties is perceived by public opinion as corrupt, so when Chairmen of Banks donate huge sums of money for political party campaigns, the public is unable to separate the individual and the bank even if he has openly committed himself other than the bank. According to Dr Marcin Walecki, 'one of the motives for political contributions to a political party or candidate is the possibility of payoffs in the shape of licences and government contracts.' See Marcin Walecki, 'Political Money and Political Corruption: Considerations for Nigeria. International Foundation for Election Systems'

transaction report affects an official covered by immunity, law enforcement waits until the incumbent's tenure of office expires.⁶⁹⁴ EFCC investigator, involved in the investigation of money laundering by a former Nigerian Minister of Petroleum, stated how she held meeting with a Bank Chief and requested that the funds deposited to the bank '*must neither be credited into any known account and not captured in any transactional platforms of the bank*'.⁶⁹⁵ Interestingly, private residences⁶⁹⁶, secret vaults,⁶⁹⁷ locked up stores safe havens to secure proceeds of crime of corrupt public office holders. Attempts by the lower cadre of staff to report suspicious transactions of politically exposed persons are often turned down by senior management since they are complicit. Furthermore, anti-money laundering regulations require banks to adopt measures to ensure that these institutions are not used as conduits for money laundering operations. Results

<https://www.ifes.org/sites/default/files/nigeria_political_money_and_political_corruption.pdf> accessed 1 October 2017

'Nigeria 2015: Governors, Skye Bank Chairman, others donate N21 billion to PDP' <<http://www.premiumtimesng.com/news/top-news/173602-nigeria-2015-governors-skye-bank-chairman-others-donate-n21-billion-pdp.html>> accessed September 4, 2017. As Rufus Mmadu noted, although donations are made to political parties all over the world the all-important issue of ethics is not compromised,...this is one of those essential factors Nigeria's political parties lack and this tends to be contributing to the increasing rate of malpractices and corruption. Politicians placed in apparently compromising positions because of the need to solicit contributions for their campaign finance.

⁶⁹⁴ The Nigerian Constitution grants the President, Vice President and Governors immunity from prosecution – See Chapter 8. This is different in South Africa as there is no such provision.

⁶⁹⁵ Innocent Anaba, 'Court orders final forfeiture of N7.6bn recovered from Diezani' Vanguard Newspaper (Lagos, 29 August 2017)

<<https://www.vanguardngr.com/2017/08/court-orders-final-forfeiture-n7-6bn-recovered-diezani/>> accessed 4 September 2017

⁶⁹⁶ Yemisi Adegoke, 'Nigeria's anti-corruption unit finds \$43 million cash in Lagos Apartment' (CNN 14 April 2017) <<http://edition.cnn.com/2017/04/13/africa/efcc-recovers-funds-nigeria/index.html>> accessed 4 September 2017; Economic and Financial Crime Commission, 'EFCC uncovers another Cash Haul'

<<https://efccnigeria.org/efcc/news/2464-efcc-uncovers-another-cash-haul>> accessed 18 September 2017

⁶⁹⁷ Economic and Financial Crime Commission, 'Yakubu Loses Bid to upturn Forfeiture \$9.8m' <<https://efccnigeria.org/efcc/news/2523-yakubu-loses-bid-to-upturn-forfeiture-9-8m>> accessed 18 September 2017. In a particular operation conducted by operatives of the EFCC on 3rd February, 2017 a staggering sum of \$9,772,800 (Nine Million, Seven Hundred and Seven Two Thousand, Eight Hundred United States Dollars) and another sum of £74,000 (Seventy Four Thousand Pound Sterling) cash was found hidden in a fireproof safe. See Economic and Financial Crimes Commission, 'How EFCC Recovered \$9.8m from Yakubu, Ex-NNPC GMD' <<https://efccnigeria.org/efcc/news/2311-how-efcc-recovered-9-8million-from-yakubu-ex-nnpc-gmd>> accessed 8 September 2017

have proved otherwise as both local and foreign banks have come under heavy sanctions by regulators for failing to strengthen their controls partly due to costs, shortage of technical and qualified human resources, government influence when it turns a blind eye to certain 'sponsored' operations or due to the bank's negligence.

Another major setback is the lack of independence of anti-corruption agencies including the financial intelligence unit. In Nigeria, the Financial Intelligence Unit is an agency under the EFCC, accused as a tool by the government to tame the opposition. Since the anti-corruption agencies are dependent on executive action, certain matters brought to the front burner are whittled down in order not to either embarrass or discredit the purported anti-corruption effort of the government.

CHAPTER SIX

THE INFORMAL ECONOMY AND REMITTANCE SYSTEMS

The mention of the informal economy brings to mind the myriads of informal transactions operated outside the government regulated sphere of the economy, including the street vendors, illegal immigrants, home workers, private taxi cabs, unofficial labour and all other underground businesses which are illicit in nature such as trafficking in humans and arms, prostitution, racketeering, terrorism and money laundering. Alongside the domestic sector is the substantial proportion of cross-border trade, which is operated through informal channels. According to a Chatham House report, there are strong indications that ‘unrecorded flows through the key economic corridors between Nigeria and its neighbours are several times greater than the amount of trade that is officially recorded.’⁶⁹⁸ Yet another concern is the interplay in the area of illicit enrichment and financial flows from the formal to the informal sector. Corruption, illicit enrichment and white-collar crimes are criminal activities, which occur in the formal sector and proceeds of these criminal activities flow to and through the informal sector to legitimate activities in the formal sector. Interestingly, corruption and the informal (underground economy) share a common feature: they are both in general illegal. For example, a government official who derive financial gains from salaries of ‘ghost workers’ being a criminal activity, disguises the wealth to buy property or other tangible assets in the formal sector.

⁶⁹⁸ Leena Koni Hoffmann and Paul Melly, *Nigeria’s Booming Borders: The Drivers and Consequences of Unrecorded Trade* (Chatham House 2015) vii

Remittance systems include both formal and informal systems. The formal remittance system includes the use of banks and non-bank institutions, microfinance institutions, money transfer operators, credit unions and cooperatives, post offices, and technologies using mobile banking, Western Union and MoneyGram.⁶⁹⁹ The informal remittance systems on the other hand consist of all value transfer system outside the formal sector as coined by Professor Nikos Passas. He defined IVTS as any system, network, or mechanism used to transfer funds or value from place to place either without leaving a formal paper trail of the entire transaction or without going through regulated financial institution.⁷⁰⁰ The nexus between the informal economy and informal value transfer systems is explored excluding migrant remittance as this not the fulcrum but with emphasis on the proceeds of corruption and illicit enrichment. First, is an attempt to define the informal economy within the context of criminal conduct because evidence abounds that both legitimate and illegitimate economic actors engage in the informal practices, then, highlight features of a cash-based economy and its linkages with the informal economy. Thereafter, consideration is given to the linkages between official misconduct and the informal economy as it applies to cash-based economies typical of developing economies in the sub region. Next, we identify drivers of informality in the narrow sense of corruption and money laundering; identify various informal value transfer systems (domestic and cross-border) other than formal value transfer systems for money laundering; and justify the need for reforms. The chapter concludes with a discussion on possible policy

⁶⁹⁹ The World Bank, *Remittance in Africa: A Catalogue of Studies and Technical Assistance by the World Bank, Development Agencies and Government in Africa* (The World Bank 2011) 30

⁷⁰⁰ Nikos Passas, 'Informal Value Transfer Systems, Terrorism and Money Laundering' <<https://www.ncjrs.gov/pdffiles1/nij/grants/208301.pdf>> accessed 4 September 2018

options to stem the tide of money laundering arising from illicit enrichment through the informal economy.

6.1 The Informal Economy in Perspective

The formal economy of a nation generally refers to the totality of individual and corporate incomes, provided in the official GDP estimates. The informal economy on the other hand is that part of the economy of a state that is outside government regulation and tax laws. The informal economy has several names such as the unofficial economy, the hidden economy, the shadow economy, the parallel economy, the underground economy and the criminal economy. Several definitions abound on the subject of the informal economy.

From the economic perspective, informal economy is the sector that does not contribute to tax revenues and the economy. Three schools of thoughts⁷⁰¹ are:

- the dualist (ILO 1972) who contend that the informal economy is a separate marginal economy not directly linked to the formal economy but is aimed at providing income or safety net to the poor;⁷⁰²
- the structuralist posit that the informal economy is subordinated to the formal economy, with the aim to reduce costs whereby privileged capitalists seek to subordinate petty producers and trades;⁷⁰³ and,

⁷⁰¹ Martha Alter Chen, Renana Jhabvala and Frances Lund, *Supporting Workers in the Informal Economy: A Policy Framework* (Working paper, ILO 2002)

⁷⁰² Keith Hart, 'Informal Income Opportunities and Urban Employment in Ghana' (1973) 11(1) *The Journal of Modern African Studies*. See also, International Labour Office, 'Employment Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya' (1972)

⁷⁰³ Caroline O. N. Moser, 'Informal Sector or Petty Commodity Production: Dualism or Dependence in Urban Development' (1978) 6 *World Development*. See also, Manuel Castells and Alexandro Portes, 'World Underneath: The Origins, Dynamics, and Effects of the Informal Economy' in Alexandro Portes, Manuel

- the legalist (de Soto) whose position is that the informal arrangements are a rational response by micro-entrepreneurs to over-regulation by government bureaucracies.⁷⁰⁴

From the legal perspective, the informal economy is the black or forbidden economy⁷⁰⁵ penalised by the law.⁷⁰⁶ Black's law dictionary defines the informal or shadow economy as 'collectively, the unregistered economic activity that contributes to a country's gross national index. It may 'involve the legal and illegal production of goods and services including gambling, prostitution and drug dealings as well as barter transactions and unreported income.'⁷⁰⁷ Smith offers definition of the informal economy, as:

1. 'market-based production of goods and services whether legal or illegal, that escapes detection in the official estimates of GDP;
2. market-based production of goods and services whether legal or illegal, that escapes detection by tax authorities;
3. market and non-market based production of goods and services whether legal or illegal, that escapes detection

Castells, and Lauren A. Benson (eds), *The Informal Economy: Studies in Advanced and Less Developed Countries* (The John Hopkins University Press 1989)

⁷⁰⁴ Henando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000)

⁷⁰⁵ Dominique Boels, 'Prostitution and the Informal Economy' in Dominique Boels *The Informal Economy: Seasonal Work, Street Selling and Sex Work* (Palgrave Macmillan 2016)

⁷⁰⁶ Joana Shapland and Paul Ponsaers, 'Introduction' in Joana Shapland and Paul Ponsaers (eds), *The Informal Economy and Connections with Organised Crime: The Impact of National Studies and Economic Policies* (Bju Legal Publishers 2009) viii

⁷⁰⁷ Bryan A. Garner, *Black's Law Dictionary*, (10th Edition, Thomson Reuters 2014) 1585

4. market and non-market based production of goods and services, whether legal or illegal that escapes detection and is intentionally excluded from the official estimates of GDP'.⁷⁰⁸

As noted by Ponsaers et al,⁷⁰⁹ the various definitions fall mainly into the following groups:

1. Enterprise-based definition, that focuses on the organisation and links between different actors. Is this transnational criminality? How do goods travel across borders? Is it a form of exploitation?
2. Job-related definitions that highlight the potential of the informal economy to provide jobs for the marginalised groups; and,
3. Activity-based definition, that offers an examination of whether the activity itself is criminal.

The informal economy is characterised by either of the following: 'profits from legal activities but the workers, the scope of work, the product of work is in whole unregistered or concealed from the state' or 'profits from legal and illegal activities for which the whole profit is logically concealed from the state'. In both instances, the illegal profits still enter the legal or formal economy through everyday activities or complex money laundering schemes. Market liberalization has aided in some way in the criminalization of the process in an unintended way. As Andreas observed: 'efforts to open borders to legal trade can make it harder to keep borders closed to illegal trade, and efforts to secure borders and enforce prohibitions can

⁷⁰⁸ Philip Smith, 'Assessing the Size of the Underground Economy: the Statistics Canada Perspective' <<http://www.statcan.gc.ca/pub/13-604-m/13-604-m1994028-eng.pdf>> accessed 15 December 2016

⁷⁰⁹ Paul Ponsaers, Joana Shapland and C. C. Williams, 'Does the Informal Economy Link to Organised Crime?' (2008) 35(9) *International Journal of Social Economics* 644

interrupt the smooth flow of legitimate trade and cross border travels'.⁷¹⁰ Both licit and illicit economy functions through global transportation and communication networks, use safe financial system and stake their money in the same tax havens. Incidentally, in many cases, both economies even have same actors, that is, same companies or individuals engage in legal and illegal activities depending on the country of operation.⁷¹¹

The figure below provides a reasonable consensus definition of the legal and illegal underground economy.

Taxonomy of Types of underground economic activities				
Type of activity	Monetary transactions		Non-monetary transactions	
ILLEGAL ACTIVITIES	Trade in stolen goods; drug dealing and manufacturing, prostitution, gambling, arms and human trafficking, corruption, oil bunkering, illegal diamond and gold mining and fraud (including advance fee fraud) ⁷¹²		Barter: drugs, stolen goods, smuggling etc. produce or growing drugs for own use, theft for own use	
	Tax Evasion	Tax Avoidance	Tax Evasion	Tax Avoidance
LEGAL ACTIVITIES	Unreported income from self-employment. Wages and salaries and assets from unrelated work related to legal services and goods	Employee discounts, fringe benefits	Barter of legal services and goods	All do it yourself work and neighbour help

Figure 5 - Taxonomy of informal economy

Source: Schneider and Enste (wp/00/26, February 2000, p.5)

⁷¹⁰ Peter Andreas, 'Illicit International Political Economy: The Clandestine Side of Globalization' (2004)

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⁷¹¹ Arshi Aggarwai, *Illicit Economy and Globalization: The Paradoxical Bond* (GRIN 2013)

⁷¹² GIABA, 'Member States : Federal Republic of Nigeria' <<https://www.giaba.org/member-states/nigeria.html>> accessed 3 May 2016

Any illegal activity resulting in financial gain in which there is no official record of the money received thus relates to the informal economy since these are not open to scrutiny by the government and subsequently avoids taxation. Drawing from the work of Antinori, writing on the relationship of organised crime, the Mafia and white collar crime in Italy, he described a four-step process involved in the links between illegal activities and formal activities:

The Mafia Economic and financial ecosystem is characterised by a money-for-money cycle consisting of (1) accumulating money from illegal activities; (2) using money to pay bribes; (3) creating businesses in new economic sectors; (4) laundering money to produce capital.⁷¹³

Kratcoski explained the four step process to include⁷¹⁴:

- accumulation of money from illegal activities (predicate offences), any type of criminal activity that involves making money would apply (see figure 6 below)
- paying bribes, typically requires some type of corruption between the criminal element and legitimate businesses or government officials. The motivation for corrupt activities varies and may include to enhance an individual's prestige, power, or to receive/give favour to others.

⁷¹³ Arije Antinori, 'Organized Crime, the Mafia, White Collar Crime, and Corruption' in Maximilian Edelbacher, Peter C. Kratcoski, and Michael Theil (eds) *Financial Crimes: A Threat to Global Security* (CRC Press 2012)

⁷¹⁴ Peter C. Kratcoski, 'The Informal Economy: The Connection to Organized Crime, White Collar Crime, and Corruption' in Maximilian Edelbacher, Peter C. Kratcoski, and Bojan Dobovšek (eds) *Corruption, Fraud, Organized Crime, and the Shadow Economy* (CRC Press 2015)

- Investing money obtained through illegal means into businesses in new economic sectors. For instance, money gained from bribery and outright embezzlement, price-fixing, insider trading, making illegal contributions to political candidates (dirty money) can be joined with money obtained and invested in legitimate businesses (purchase of property, build hotels or supermarkets). Once the money obtained by illegal means are integrated into the flow of money, it is difficult to trace the source of the illegal money.⁷¹⁵
- Laundering money to produce capital requires transforming the illegally obtained into legitimate money or other assets such as property or business interest.

Figure 6 below shows predicate offences linked with cross border movement of cash which ends up in legitimate businesses undetected by law enforcement.

⁷¹⁵ Ibid 55

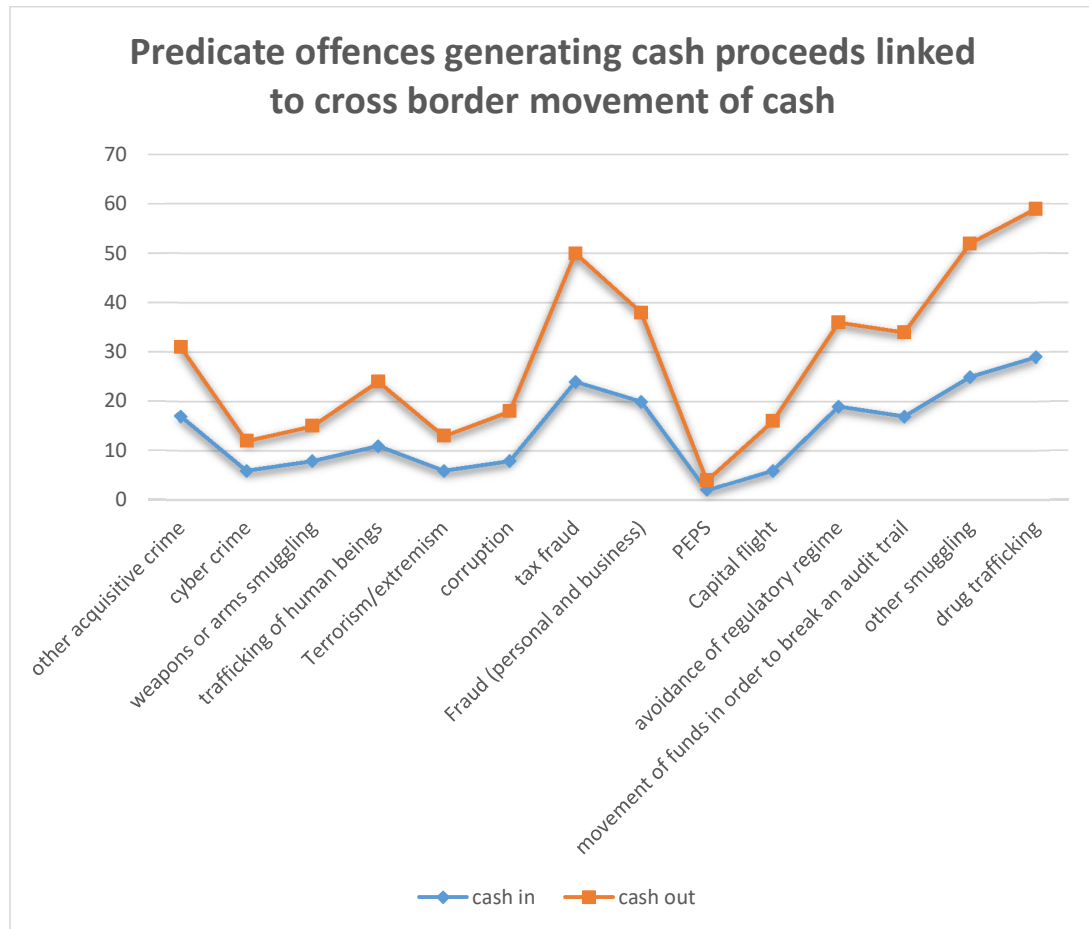


Figure 6 – Predicate offences linkages with the informal economy

Source: FATF Report on Money Laundering through the physical transportation of cash⁷¹⁶

Estimates suggest that Nigeria and Egypt have the largest shadow economies with 76 percent and 68 percent of GDP, the smallest is Mauritius with 20 percent. The unrecorded informal activity is high which underscores the level of unreported illegal activities.

⁷¹⁶ FATF and MENAFATF, 'Money Laundering Through the Physical Transportation of Cash' (October 2015) <<http://www.fatf-gafi.org/media/fatf/documents/reports/money-laundering-through-transportation-cash.pdf>> accessed 2 August 2016

6.2 Determinants of the Informal Economy

The informal economy has become an established phenomenon, grown over the years and has become relevant in the future of the global economy. The primary reason for informality is the demand for informal goods and services. Informal work done in Africa is estimated to have accounted for almost 80% of non-agricultural employment, 60 percent of urban jobs and over 90 percent of new jobs. For women in sub-Saharan Africa, the informal sector represents 92% of the total job opportunities outside of agriculture (against 71 percent for men).⁷¹⁷

The shadow economy are a complex phenomenon not only limited to developing economies⁷¹⁸ even highly developed economies can have a significant share of the informal economy⁷¹⁹. A sizeable informal sector is the nursery of future economic growth within the formal economy. Nonetheless, there are associated difficulties in which laundering of the proceeds of crime can take centre stage. There are many cause-effect interactions in both directions between the formal and informal economy. Among these factors are: the limited absorption of surplus labour, barriers of entrance to the formal economy, weak institutions,⁷²⁰ redundancies, increasing use of capital instead of labour, demand for low cost goods and services, uncommitted or unaware government, economic hardship and

⁷¹⁷ Martha Alter Chen, *The Informal Economy: Definitions, Theories and Policies* (WIEGO 2012) Working Paper No 1

⁷¹⁸ Friedrich Schneider, Andreas Buehn and Claudio E. Montenegro, 'Shadow Economies All over the World: New Estimates for 162 Countries from 1999 to 2007' (2010) 1 Policy Research Working Paper No. 5356

⁷¹⁹ Andreas Buehn and Friedrich Schneider, 'Shadow Economies and Corruption All Over the World: Revised Estimates for 120 Countries' (2007) 1(2) E-Journal

⁷²⁰ Anoop Singh, Sonali Jain-Chandra, and Adil Mohammad, 'Inclusive growth, Institutions, and the Underground Economy' (2010) IMF Working Paper WP/12/47; Friedrich Schneider and Dominik H. Enste, 'Shadow Economies: Size, Causes, and Consequences' (2000) 38(1) Journal of Economic Literature 77

poverty, more women entering the labour market;⁷²¹ macro- and microeconomic factors, burden of government regulation,⁷²² burden of taxation⁷²³ and social security contribution, state of public services,⁷²⁴ social transfer, and labour market regulations.⁷²⁵ Moshi argues that in developing countries informality is driven by the desire to earn a living other than tax evasion and an aversion to a higher cost of doing business regarding increased tax burden, greater government regulation and widespread distrust of government.

There are strong enough reasons to believe that government regulations are responsible for the expansion of the informal economy in some countries. For example, in the areas of on cross-border flows, studies indicates that due to the formal economic and governance framework within the west and central African regions, the vast majority of exporters and importers are accidentally and not by design compelled to informality. The following factors were highlighted in the report⁷²⁶ as basic drivers of informality:

⁷²¹ Kristina Flodman Becker, *The Informal Economy: SIDA Fact Find Study* (SIDA 2004)

⁷²² Frederich Schneider and Dominik Enste, 'Shadow Economies Around the World: Size, Causes, and Consequences' < <https://www.imf.org/external/pubs/ft/wp/2000/wp0026.pdf> accessed 5 July 2017. see also Frederich Schneider, A. Buehn and C. E. Montenegro, 'Shadow Economies All Over The World: New Estimates for 162 countries from 1999 to 2007' in Schneider F (eds.) *Handbook of Shadow Economy* (Edward Elgar Publishing Ltd 2011) p13; Frederich Schneider and Dominik Enste, 'Shadow Economies Around the World: Size, Causes, and Consequences' (2000) IMF working paper wp/00/26, p25; S.Johnson, D. Kaufmann and Zoido-Lobaton, 'Regulatory discretion and the unofficial economy' (1998) 88(2) *The American Economic Review* 387

⁷²³ Donghun Joo, 'Determinants of the Informal Sector and their Effects on the Economy: The Case of Korea' (2011) 40(1) *Global Economic Review* 21. See also Friedrich Schneider, 'Can the informal economy be reduced through tax reforms? An empirical investigation for Australia' (1994) 49 *Supplement to Public Finance/Finances Publiques* 137; and Thomas Lemieux, Bernard Fortin, and Pierre Frechette, 'The Effect of Taxes on Labour Supply in the Underground Economy' (1994) 88(1) *The American Economic Review* 231

⁷²⁴ Sher Verick, 'The Impact of Globalisation on the Informal Sector in Africa' <https://www.researchgate.net/publication/255606611_The_Impact_of_Globalization_on_the_Informal_Sector_in_Africa> accessed 3 February 2016

⁷²⁵ Norman V. Loayza, 'The Economics of the Informal Sector: A Simple Model and Some Empirical Evidence from Latin America' (1996) 45 *Carnegie-Rochester Conference Series on Public Policy* 129

⁷²⁶ Hoffmann (n693)

- i. Formal processes for clearing customs are slow, complex and expensive. For example, a typical Nigerian business is expected to produce at least nine documents in order to send an export shipment and at least 13 documents to bring in an import consignment. There are complex procedures and inadequate modern technical installations and equipment to facilitate the clearing process.
- ii. Foreign exchange and banking regulations are enforced in a manner that is so rigid and dysfunctional that it merely serves to push traders to the parallel market. More worrisome is the situation of unavailability of foreign exchange in the official market or restrictions imposed on certain items to be imported.
- iii. Corruption and unofficial taxation are a heavy burden on traders.

In conclusion, improvements in government regulations often facilitate the shrinking in size of the informal sector activities.

6.3 Cash-Based Payment System and the Informal Economy

Cash remains an essential means of settlement across the globe. It is estimated that about USD 4 trillion in cash is in circulation worldwide and between 46 percent and 82 percent of all transactions are being conducted in cash. Daily around the world, individuals and businesses transport cash according to their needs, perhaps for payment of goods and services, spending for a holiday in and outside of one's country or for other legitimate/illegitimate reasons. The same is true of banks and other financial institution who need cash for their day to day operations and in most cases also transport cash in different currencies across borders according to the demand of their businesses to satisfy their clientele. In the West Africa region

similar to the other areas in Africa (Central and Southern Africa), there is free movement of goods and services without much restrictions which gives individuals and business organisations the opportunity for easy trade.⁷²⁷ Developed economies rely less on the use of cash as against a credit-based system in which goods and services and even mortgages are paid, nonetheless, Europol Financial Intelligence Group found that in spite of growth in non-cash payment methods, the demand for high denomination notes, such as the EUR 500 note, has been sustained.⁷²⁸ The credit-based system is still alien to most developing economies in Africa as items are bought and paid for by cash immediately. It will not be surprising for an individual or company to buy a house worth millions of USD and paid in cash without going through a mortgage financier.

A cash-based economy is one in which the payment for goods and services are transacted with cash as a medium of exchange. A vast majority of the population are unbankable and the dominance of cash transactions cuts across formal and informal institutions and markets and has over 50 percent of the economic transactions in all sectors conducted in cash. The dominance of cash transaction according to a GIABA report is largely due to 'the legal tender status of banknotes as a medium of exchange, their ubiquitous nature, their convenience and the speed and certainty in settling financial obligations; the inadequacy of the availability of banking services especially in rural areas; the prevailing high level of illiteracy and

⁷²⁷ ESAAMLG, 'Report on Cash Courier-Based Money Laundering' ESSAMLG Working Group, Mobasa Kenya, 18 August 2008. The report noted that majority ESAAMLG member countries are predominantly cash based economies. Virtually all of ESAAMLG member countries have porous borders and generally lack regulatory framework in regard to money remittances.

⁷²⁸ OECD, *Shining Light on the Shadow Economy: Opportunities and Threats* (OECD 2017) 17

the large size and continued growth of the cash-oriented and unregulated informal sector in the regional economies.⁷²⁹

Recent statistics indicate that Sub Saharan Africa has 28.9% financial inclusion compared with the world average of 60.7%, OECD 94%, South Asia 45.5%, East Asia and Pacific of 68.8%, Latin America and the Caribbean of 51.1%. Regarding number of individuals who have used an account to receive wages, Sub Saharan Africa has 7.3 percent compared with the world average of 17.7 percentage and OECD of 44.3 percent. A central factor enabling criminal economies and illegal financial flows (IFFs) is the low level of financial inclusion and access to the formal banking system is out of reach to the vast majority of people.⁷³⁰

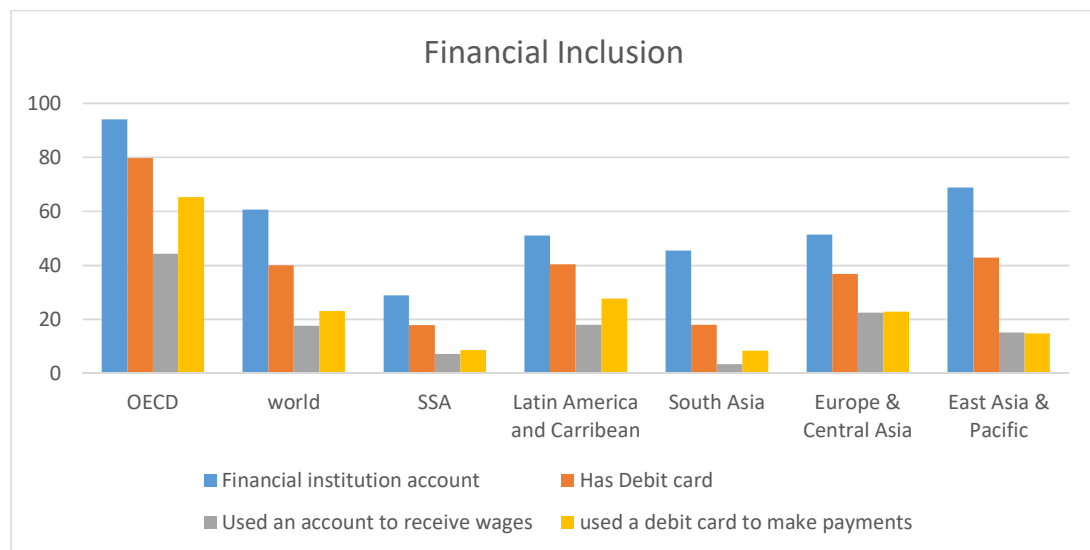


Figure 7 - Comparison of Financial inclusion

Source: Little Databook on financial inclusion 2013.

⁷²⁹ Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA), 'Typologies Report on Cash Transactions and Cash Couriers in West Africa'

<https://www.giaba.org/media/f/107_typologies-report-november-2007.pdf> accessed 16 April 2016

⁷³⁰ OECD, *Illegal Financial Flows: The Economy of Illicit Trade in West Africa* (OECD 2018) 110

Moshi identified some factors responsible for low levels of access to financial services:

- i. lower bank and ATM penetration both demographically and geographically,
- ii. Increase in cost of market exchange between agents in the economy and people,
- iii. Goods and services arising from disproportional population densities,
- iv. Macroeconomic instability due to economic and political crises,
- v. High minimum balances and monthly fees demanded by banks,
- vi. High levels of illiteracy discourage significant sections of the population from using services of formal institutions as documentation are not in the local languages.

Granted, in recent times, especially in Nigeria, as a result of the Vision 2020 strategy, there is a push to move to a cashless environment dominated by electronic and other modes of payment. In spite of this initiative, cash is still the preferred mode for payments. The FATF acknowledged the following factors among others responsible for the preference for cash payments:

- Cultural issues. Where the bulk of the population are inherently mistrustful of any form of officialdom, and they feel the need to conduct their routine financial activities with a minimum of official scrutiny.
- Cash is widely accepted. For low valued items even in well-developed financial systems, very few retail outlets in the world would sell day to day items such as food or clothing will refuse to accept cash.

- Cash is quicker: - The activity is conducted in real time, and payment is received immediately compared with transactions performed in the banking systems which may take longer duration.
- Cash reduces spending as individuals tend to spend less money as they are connected with the transactions they are undertaking which is much different when making payments via electronic means as one is detached from the real meaning of the purchase.

A notable feature of cash-based economies is that there is hardly any enforcement of regulations regarding how much cash one may physically carry or use. People walk around with big bags (popularly called Ghana must go) and suitcases or vehicle compartments filled with cash which is used for the purchase of houses, property of high value or anything whatsoever. Even within the regional economic blocks, the same attitude is maintained. GIABA reports that in West Africa, cash transactions remain dominant where 'payments for intraregional transactions are usually made in either local or foreign currencies, especially the US dollar, the British Pound and the Euro. Economic actors, especially in the informal sector, are engaged in the free exchange of currencies in the thriving parallel market to make cash payment for intraregional transactions.' In the same vein, cash dominance in the region is further aggravated by the cost and complexity of making international trade payments through officially approved channels and the impossibility of doing so in local currencies.⁷³¹ It is nevertheless easy to make cross-border naira or CFA franc payments informally or on the parallel market.⁷³²

⁷³¹ Hoffman (n693) 19

⁷³² Hoffman (n693) 19

Some work interchangeably links the informal economy with a cash-based economy. In one definition, the underground economy was referred to as 'those individuals and businesses that deal with cash and use other schemes to conceal their activities and their true liability from government licencing, regulatory and tax agencies.' This definition concentrates on the type of questionable business transactions and crimes that in their totality make up the informal economy. The definition associating cash transaction with the informal economy will perhaps hold true more in developed economies than developing countries because in most countries in sub-Saharan Africa the financial systems are shallow regarding the scope and the products offered. The mere fact that most activities are transacted by cash in these economies in no way make them illegal because of a lack of legal, institutional or administrative framework. For instance, the geographical spread of bank branches (financial inclusion) is highly limited to urban areas and few other towns leaving most of the population without access to an account in a financial or semi financial institution. As Moshi observed, 'factors that lead to the dominance of cash transactions in a developing country's economy are not necessarily the same set of factors that account for informality'. For example, except very recently where government has adopted the cashless policy in Nigeria, and its institutions have been mandated to transact using a recognised bank or other non-bank financial institution, salaries of workers were hitherto paid in cash, even to this day services provided by formal institutions (water, electricity) are paid in cash by beneficiaries of such transactions. Furthermore, it is not illegal for an individual to carry the equivalent of Twenty Five Thousand Dollars (Five Million Naira) in cash to transact business in a single day. Alluding to the prevalence of cash transaction in the Nigerian economy, a Secretary to the Economic and Financial Crimes

Commission (EFCC) blamed the nation's vulnerability to fraud, terrorism and crime on its operation of a cash-based economy. According to the Secretary as reported in the Nigerian Vanguard newspaper, 'it was difficult to track money as people carried huge sums of money in cash and did whatever business they liked without being tracked.'⁷³³ While cash-based economies and informal economy share one standard feature which is the dominance of cash transactions, it is noteworthy that in cash-based economies, cash transactions cuts across formal and informal institutions and markets.

About misconduct, a cash-based payment system has excellent potentials for misuse because cash has no trail. It will, therefore, be common for money launderers and corrupt government officials to make use of the unregulated informal sector to carry out criminal activities undetected. Because the formal and informal economy is ever dependent on cash, movements of cash between the two economies go seamlessly. Illicit funds arising from the abuse of office can be used to infiltrate the political landscape and influence governance. According to Otusanya 'corruption and money laundering are important not just for the volume of funds that are shifted out but also because of the damage they do to the integrity of judicial and political institutions.'⁷³⁴ For instance, to sustain his third term re-election bid by amending the constitution to his favour, it is alleged that former president Olusegun Obasanjo shared the sum of Thirty billion naira (250 Million US Dollars) to influence legislators to accept his proposal. According to a former Speaker of the Nigerian House of Representatives Ghali Umar Na'abba, 'some

⁷³³ 'Cash-based economy reason for fraud, terrorism in Nigeria' *Vanguard Newspaper* (Lagos, 30 September 2012) <<http://www.vanguardngr.com/2012/09/cash-based-economy-reason-for-fraud-terrorism-in-nigeria/>> accessed 18 November 2016

⁷³⁴ Olatunde Julius Otusanya and Sarah Lauwo, 'The Role of Offshore Financial Centres in Elite Money Laundering Practices: Evidence from Nigeria' (2012) 15(3) *JMLC* 336, 356

senators collected 50 million Naira each and some House of Representatives members collected 40 million Naira each to back his bid.⁷³⁵

Cash-based economies are prone to money laundering because of the dominance of cash transactions so moving cash from the formal to the informal sector is very easy even without the involvement of the financial system. For instance, proceeds arising from bribery, fraud, embezzlement or other unlawful activities in most situations denominated in cash can be used to buy property, jewellery, cars or other expensive items in either the formal or informal sector. This occurs without recourse to the financial system thus making the conventional three phases of money laundering (placement, layering and integration) inapplicable. Laundering money to produce capital requires transforming the illegally obtained money into legitimate use by disguising its origin and a cash-based system satisfies the requirement. Money laundering becomes easier when such illicit wealth is invested in legitimate businesses in the formal sector to generate income. Dishonest government officials have been linked to the formation of companies that have created substantial employment opportunities in the formal sector. Additionally, informal channels used by human traffickers and other criminal groups can be used to syphon huge amounts of cash across the border and converted to the desired currency which is subsequently lodged in the financial system as legitimate money. According to Edelbacher and Kratcoski 'many times the same trafficking routes that

⁷³⁵ Abdulgafar Alabelewe, 'Na'abba: Lawmakers got N50m each to Support Obasanjo's Third Term Bid' The Nation Newspaper (Abuja, 8 August 2016) <<http://thenationonlineng.net/naabba-lawmakers-got-n50m-support-obasanjos-third-term-bid/>> accessed 11 August 2016

are used to traffic drugs.....are used for trafficking arms, other military equipment, and money'.⁷³⁶

In developing countries like Africa, corruption has mainly infiltrated all the institutional frameworks thereby making them complicit with criminals. The detection and prosecution of suspicious money become very difficult because the medium of a financial institution is often absent and its effectiveness is sometimes compromised as a result of corruption. Alternatively, if a politically exposed person (PEP) has a substantial measure of control over the treasury, there is no need to bribe treasury staff rather he would use his position power to enrich himself illegally without recourse to bribe. Furthermore, in addition to the custom of obedience to superior officers, a threat to life, or to any relations of the officer could ultimately induce compliance. Bureaucratic controls are deliberately bypassed and approvals secured from the highest level of authority to authorise the withdrawal of funds. For instance, records from the central bank of Nigeria, reveals that a total of 2.25 billion US dollars was withdrawn from the bank with the approval of President Sani Abacha on the request of the Ismaila Gwarzo – the national security adviser – for urgent national issues. These sums were withdrawn in cash and deposited into other foreign bank accounts while others were used to buy for the acquisition of property and other assets. Their money laundering scheme included the depositing of a large amount of cash in their houses retained for personal use or passed on to associates to be laundered or concealed; cash shipments out of the country by private jet or other means. Notably, multiple accounts were opened

⁷³⁶ Maximilian Edelbacher and Peter C. Kratcoski, 'Protecting the Borders in a Global Society: An Austrian and American Perspective' in J. Winterdyk, K. Sundberg, and Boca Raton (eds) *Border Security in the Al Qaeda Era* (CRC Press 2010) 90

locally by which cash deposits were made and later transferred to other safe havens where shell companies were incorporated to receive the inflow of cash.

6.4 Links Between Corruption And Money Laundering in the Informal Economy

Global financial integrity defines illicit financial flows as 'money that is illegally earned, transferred or utilised. Somewhere at its origin, movement, or use, the money broke laws and hence it is considered illicit.' Admittedly, it is difficult to record and track illicit flows. Baker estimates that illicit flows specifically proceeds of crime from drug trafficking, looted money from embezzlement, bribery and corruption and commercial money amounts to between USD 1trillion and USD 1.6trillion yearly.⁷³⁷ Chaikin and Sharman argue that in developing countries corruption is often the major source of fund laundered.⁷³⁸

The proceeds of corruption have been criminalised by international and regional conventions as well as local legislation. There is a close relationship between corruption and illicit flows since corruption as a criminal activity result in illicit flows. Studies have identified that there is a link between corruption and the informal economy. Bird, Matinez-Vazquez and Torgler argues that if the government and the administration have significant discretionary power over the allocation resources, the level of corruption will be higher than if they do not. Cockcroft Lawrence identified organised crime and the prevalence of the informal economy

⁷³⁷ Raymond W. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free Market System* (Wiley 2005)

⁷³⁸ David A Chaikin and Jason C Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave Macmillan 2005) 1

among other things as significant obstacles to the anti-corruption effort.⁷³⁹ In an inefficient state where corruption is rampant, the citizens will have little trust in authority and thus a low incentive to cooperate. The relationship between corruption and the informal sector according to Buehn and Schneider is 'ambiguous from a theoretical point of view' and the two may either be complements or substitutes. In one case the shadow economy may reduce bribe giving especially when the government is not fair or responsive to the needs of the citizens, and they resort to moving their activities to the informal or shadow economy thereby restricting the ability of corrupt officials to request and receive bribes. On the other hand, according to Choi and Thum, the presence of the informal economy may be a complement to the formal economy, but a substitute for corruption and bribes. Reed Quentin and Fontana Alexander argues that corruption and illicit financial flows have a reciprocal causal relationship: Corruption facilitates money laundering, and money laundering enables corruption to reap large profits.⁷⁴⁰ They further contend that corruption is linked to money laundering in one or more of the following ways:

- 1) As the source of proceeds (for example, bribe) that constitute funds to be laundered. They assert that tackling illicit flows clearly has potential in dealing with high level of corruption,⁷⁴¹
- 2) As a means to facilitating the creation of illicit funds through bribery or through the corruption of tax administrations so that they ignore evasion of

⁷³⁹ Lawrence Cockcroft, *Global Corruption: Money, Power and Ethics in the Modern World* (University of Pennsylvania Press 2014)

⁷⁴⁰ Reed Quentin, and Fontana Alexander, 'Corruption and Illicit Financial Flows: The Limits and Possibilities of Current Approaches' <<https://www.u4.no/publications/corruption-and-illicit-financial-flows-the-limits-and-possibilities-of-current-approaches-2/>> accessed 3 December 2016

⁷⁴¹ Ibid 19

taxes or other obligations.⁷⁴² Bribes can be paid to officials of tax agencies as a means to get favourable interpretation of tax regulations thus lowering the for instance; and,

- 3) As a means for enabling illicit flow itself by the corruption of institutions with anti-money laundering obligations.⁷⁴³

While factors such as the need for survival in an impoverished economy and greed are vital determinants for the excessive rate of corruption in developing countries, a significant factor responsible for the influx of ill-gotten wealth into the informal economy is the desire by politicians to finance their political campaigns. Since money cannot be eliminated from politics and elections have to be financed, this financial pressure gives politicians an incentive to loot the treasury to secure their future re-election. The need for political finance according to Cockcroft is 'probably the single driver of large-scale corruption.'⁷⁴⁴ He noted that world over 'most of the high profile corruption cases of the last 20 years.....have had the ultimate objective of raising funding for a political party.'⁷⁴⁵ Specifically, the ill-gotten wealth is not only used to fund their political campaigns but to retain power and suppress any means of opposition. The case of President Sani Abacha and the fortunes of President Mobutu of Zaire have been cited in much academic literature. In these mentioned instances, these leaders amassed ill-gotten wealth as a political strategy to buy loyalists of local elites, bureaucrats, military leaders and would be politicians and businessmen who could not be compelled to accept their political ideology. Similarly, some leaders have funnelled resources to promoting militancy

⁷⁴² Ibid 19

⁷⁴³ Ibid 19

⁷⁴⁴ Cockcroft (n736)

⁷⁴⁵ Ibid

as a means of suppressing the discordant voices to perpetuating their stay in office. The main purpose of illicit enrichment is to infiltrate the political arena and influence governance. Otunsaya noted that ‘corruption and money laundering are important not just for the volume of funds that are shifted out but also because of the damage they do to the integrity of judicial and political institutions.’⁷⁴⁶ According to Rose-Ackerman ‘the problem of money in politics is not limited to pressures on politicians. On the one side of the equation are inducements given to voters’.⁷⁴⁷ It has been reported that several politicians have paid money to voters to buy their votes. A local newspaper reported that during the 2015 political campaigns, the People's Democratic Party (PDP) presidential candidate doled out ‘US dollars and local currencies in millions to market leaders, town unions, traditional rulers, actors, artisans, transporters’.⁷⁴⁸ In acknowledgement of money politics, Rose Ackerman observed that ‘direct payment to voters have a long history, going back to Great Britain and the United States in the nineteenth century’.⁷⁴⁹ In ‘Italy, political bosses attempt to get out the vote not only from campaign funds but also by *mobilising state resources, patronage jobs and other types of favours to create webs of obligations*’.⁷⁵⁰ The same was said of Japan and Korea, where ‘politicians are accused of amassing illegal campaign war chests and justified their action by reference to the financial demands of campaigning in countries where voters expect gifts or other personalised benefits from candidates.’⁷⁵¹

⁷⁴⁶ Otusanya (n731)

⁷⁴⁷ Susan Rose Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge University Press 1999)

⁷⁴⁸ ‘Lagos APC condemns President Jonathan’s alleged cash-for-votes trip to Lagos’ *Premium Times* (Lagos, 26 February 2015) <<http://www.premiumtimesng.com/regional/ssouth-west/177575-lagos-apc-condemns-president-jonathans-alleged-cash-for-votes-trip-to-lagos.html>> accessed 12 June 2016

⁷⁴⁹ *ibid*

⁷⁵⁰ *ibid*

⁷⁵¹ *ibid*

International transactions can sometimes originate from the shadow economy, but the product moved to the formal economy.⁷⁵² An example to illustrate the link between the formal and informal sector arising from illicit wealth, corruption and money laundering is the large-scale oil bunkering that occurs in the Niger Delta region of Nigeria. Illegal bunkering of Nigerian Crude according to one report probably started in the late 1970s or early 1980s when the country was under military rule.⁷⁵³ Some top army and navy officers began stealing or allowing others to steal crude to enrich themselves and maintain political stability. Evidence provided in the box below shows Nigerian security personnel being complicit in the illegal oil bunkering activities.

Signs of alleged participation of security forces in oil theft

- Over a dozen retired military officers, including a rear admiral, were arrested on suspicion of oil theft during the 2000s; all were later freed without a charge.
- One brigadier general, then a commander in the Joint Task Force – that patrols parts of the delta, was relieved of his post in March 2006 owing to alleged involvement in oil bunkering;
- Ships impounded by the JTF or navy have allegedly been released under political pressure or have gone missing,⁷⁵⁴ only to turn up later reflagged and repainted

⁷⁵² Cockcroft (n736)

⁷⁵³ C. Katsouris and A. Sayne, *Nigeria's Criminal crude: International Options to Combat the Export of Stolen Oil* (Chatham House 2013) 5

⁷⁵⁴ BBC, 'Missing tanker found in Nigeria' (BBC, 24 September 2004) <<http://news.bbc.co.uk/2/hi/africa/3686284.stm>> accessed 8 January 2017

It was reported that 'The MT Jimoh was found at Dutch Island, close to Port Harcourt with a freshly painted name - MT Lord on its side. The MT Jimoh and a Russian oil tanker, the MT African Pride, were seized suspected of being used to smuggle crude oil out of Nigeria. But both disappeared from custody several

- Security and oil company sources report having seen ships engaged in oil bunkering pass through maritime checkpoints, in full view of military patrols.

Oil bunkering involves tapping of oil pipelines out to vessels capable of taking sizeable quantities of crude oil and sold out to ready buyers in the Gulf of Guinea or transported to refineries within the West African sub-region. Saliu and Luqman observed that 'crude oil is tapped from pipelines and terminals of oil companies with advanced technological equipment and pumped into barges, ships and tankers on sea. In some instances, rather than go through pipelines, bunkerers and militants go straight to wellheads abandoned by oil companies as a result of militant attacks to pump the crude into barges, ships and tankers for transportation from the swamps for sale to neighbouring states like Cote d'Ivoire, Benin Republic and Togo and to the international market.⁷⁵⁵ The bunkered pipe location is often times controlled by settling communities or through superiority of force. Local youths are normally employed to assist in the bunkering operations mainly through provision of labour while local communities are routinely settled. The local militias provide security cover whereas the navy and other government officials are 'settled' to allow access of the barges for safe delivery to the end users.⁷⁵⁶ One

weeks ago causing huge embarrassment, with navy and police officials blaming each other.' See also: David Blair, 'Embarrassment as Nigerian navy 'loses' impounded tanker' *The Telegraph* (London, 21 September 2004)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/1472282/Embarrassment-as-Nigerian-navy-loses-impounded-tanker.html>> accessed 8 January 2017

⁷⁵⁵ H.A. Saliu, and S Luqman, 'Oil, Greed and Conflict in the coastal areas of Nigeria' (2009) 30(9) Nigerian Forum 310

⁷⁵⁶ Ben Naanen and Patrick Tolani, *Private Gain Public Disaster: Social Context of Oil Bunkering and Artisanal Refining in the Niger Delta* [NIDEREf 2014]

<<http://www.nideref.org/images/Private%20Gain%20Public%20Disaster%20c.pdf>> accessed 9 January 2017. Ben and Patrick noted that 'some members of the military Joint Task Force (JTF) collaborate or aid the illegal bunkering process. Most of the participants in the business claims that the JTF has at one time

study estimates the size of illegal bunkering and artisanal refinery to worth an annual cash value of 9 billion US dollars.⁷⁵⁷ This figure comprises of 6 billion dollars in lost government revenues and 3 billion dollars that is generated by other activities along the value chain. While some of the proceeds of oil bunkering is used to promote continued militancy of the Niger Delta region through arms procurements/exchange of arms for crude, the rest is either deposited into safe overseas bank accounts or invested in the formal property sector of the economy or in other viable business ventures such as operating a private secondary school, university or other viable economic projects in the formal economy. The chart below illustrates the flow of illegal bunkering activities from the informal (illegal activities) to the formal and legal markets where they are accounted for formally.

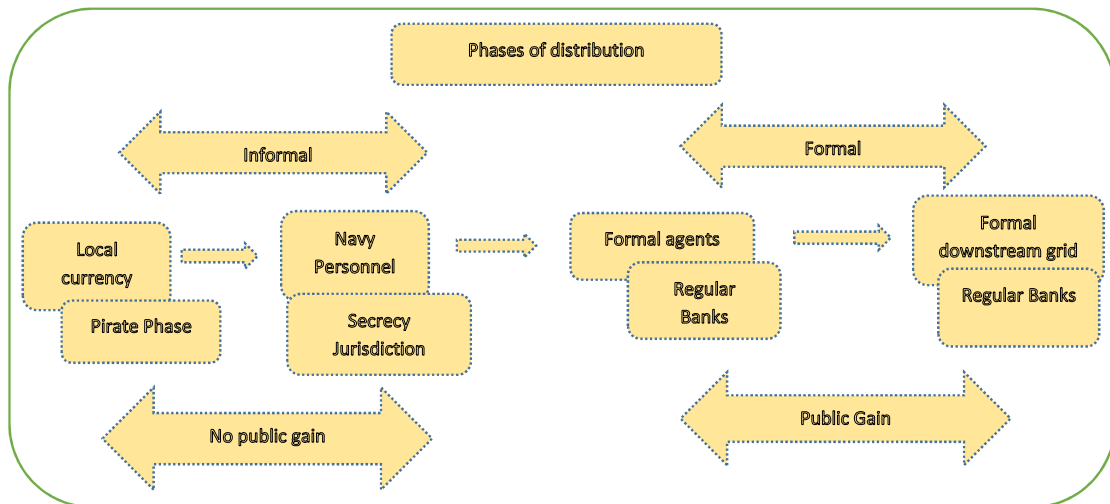


Figure 8 - Informal economy and oil bunkering

Source: Adapted from Cockcroft's *Global Corruption. Money, power and ethics in the Modern world.*

or the other demanded fees from them in order to allow them continue their business.' They also report that a group interviewed in one community claimed that they paid the JTF N30, 000 per week in order to continue.

⁷⁵⁷ Ibid 50

6.5 Remittance Systems and Money Laundering Risk

In its report of illicit financial flows, the OECD noted how kleptocrats and despots primarily moved illegal wealth out of developing countries by 'quite a simple means, such as wire transfers through complicit banks or carrying of cash in large denominations across borders'.⁷⁵⁸ To move out large sums of illegal money requires specialist and experts who are familiar with the international market and who are able to determine the risks of detection and to exploit the differences in controls and regulations among countries,⁷⁵⁹ which brings to fore the complicity of banks and other financial intermediaries. As Sharman observed, it is relatively hard to conceal large amounts of cash which may arouse the suspicion of law enforcement, *wire transfers or other electronic transactions are generally preferred by those engaged in grand corruption*.⁷⁶⁰ To achieve this objective, corrupt officials find ways to evade regulations requiring banks to screen and identify suspicious financial behaviour and experience over time shows that both domestic and international financial institutions lack the commitment to take effective action.

The prevalence of informal remittances systems in the West African sub region for instance is due to the low levels of financial inclusion as access to the formal banking system is out of reach for the majority. Money Transfer Operators (MTOs)

⁷⁵⁸ OECD (n204) 15; Alexander Cooley, John Heathershaw and J.C. Sharman, 'The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations' (2018) 29(1) *The Journal of Democracy* 39,1; Alex Cooley and Jason Sharman, 'How today's despots and kleptocrats hide their stolen wealth' *The Washington Post* (New York, 14 November 2017)

⁷⁵⁹ Armando Fernández Steinko, 'Financial Channels of Money Laundering in Spain' (2012) 52(5) *The British Journal of Criminology* 908, 5; Nicholas Lord and Michael Levi, 'Organizing the Finances for and the Finances from Transnational Corporate Bribery' (2017) 14(3) *European Journal of Criminology* 365, 376

⁷⁶⁰ Jason Sharman, 'Chasing Kleptocrats' Loot: Narrowing the Effectiveness Gap' (Anti-Corruption Resource Centre, U4 Issue 2012) 4

are prohibitively expensive which has created a demand for alternative systems operating outside of government regulation, thus increasing the risks of money laundering.⁷⁶¹ To close the remittance gap, various informal solutions have emerged to meet the needs of migrants and communities stemming from strong regulation in the formal economy and entry barriers, of which hawala dealers forms the main. These provides money transfer services using trust based networks of cash exchange, though effective and a low-cost solution, the risks are relatively high that they will be used to transfer proceeds of criminal activity.⁷⁶² Informal remittance systems known for speed of service, competitively superior to that of wire transfers, can be decisive in making funds available but are vulnerable to terrorist groups and activities, with a poor approach to record keeping as no records are kept, or if maintained are in aggregate only for settlement purposes.⁷⁶³ Basic mechanics of IVTS includes: physical transportation of cash; in-kind payments, compensatory payments; commodity shipments, false invoicing, Stored value transfers, chit, hundi, pre-paid cards, bearer instruments, IVTS operators interfacing with formal banking sector, Online gift services, Debit/Credit cards used by multiple Individuals; brokerage accounts, Internet-based payment systems, Trade diversion, and use of Correspondent accounts.⁷⁶⁴

The FATF standard guidance note identifies participants involved in the provision of MVTs to include financial institutions, hawala and other similar services providers and agents. It requires financial institutions that have MVTs as customers to identify, assess and manage the ML/TF risks associated with

⁷⁶¹ OECD (n727) 24

⁷⁶² OECD (n727) 40

⁷⁶³ Matteo Vaccani, *Alternative Remittance Systems and Terrorism Financing: Issues in Risk Management* (WP 180, The World Bank 2009) 17

⁷⁶⁴ Passas (n700) 23;

individual MVTs, rather than avoid this category of customers.⁷⁶⁵ It defines money or value transfer services (MVTs) as:

Financial services that involve the acceptance of cash, cheques, other monetary instruments or other stores of value and the payment of a corresponding sum in cash or other form to a beneficiary by means of communication, message, transfer or through a clearing network to which the MVTs provider belongs. Transactions performed by such services can involve one or more intermediaries and a final payment to a third party and may include any new payment methods. Sometimes these services have ties to particular geographic regions and are described using a variety of specific terms, including hawala, hundi, and fei-chen.⁷⁶⁶

Within various remittance channels, Money or Value Transfer Services (MVTs) are usually perceived as vulnerable to ML/FT risks. Scholars agree that the contemporary practice of the IVTS involves frequent interfaces with banks and other financial institutions and in most cases, IVTS providers had bank accounts or accounts at other financial institutions, which they use in the settlement of transactions. Given that MVTs is a broad term used in the FATF recommendations, which include not just money transfer systems but also value transfer systems, a country based risk assessment is required to mitigate the ML/TF risk. As the FATF notes, 'informal players are commonly used by both illegal migrants who want to send remittances to their home country for legitimate needs and by criminals to move illicit money (such as proceeds from drugs, tax

⁷⁶⁵ FATF, 'Guidance for a Risk-Based Approach: Money or Value Transfer Services' < <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-money-value-transfer-services.pdf> > accessed 3 September 2018

⁷⁶⁶ Ibid 3

evasion, or other types of illegal activities) across borders'.⁷⁶⁷

In most cases, inbound remittances are linked to migration to cater for loved ones and settle family and other obligations while a few are also a result of illegal activities. Studies indicate that remittances are used mainly for household consumption and investment. The evidence from studies reveals remittances reduce the level and severity of poverty among households—but the remittance market in Africa is largely undeveloped, and a potential exists for the improvement of remittance services and consumer products that will be valuable to migrants.⁷⁶⁸ Between 2010 and 2015, over US\$200 billion was received in Sub Saharan Africa in remittances representing an average 5% of GDP based on the 2016 World Bank report.⁷⁶⁹ Actual payment flows for SSA are much higher because as Sander and Maimbo shows, remittances are massively underreported⁷⁷⁰ and informal remittance transfers play a significant role. Except for Somalia with a somewhat defined informal remittance system, there are no clear informal remittance channels in Sub Saharan Africa, as most remittances are made through trusted friends and acquaintances.⁷⁷¹

⁷⁶⁷ Emiko Todoroki, Wameek Noor, Kuntay Celik and Anoma Kulathunga, *Making Remittances Work: Balancing financial integrity and Inclusion* (The World Bank, 2014)

⁷⁶⁸ The World Bank (*Remittance in Africa*, n699) 8

⁷⁶⁹ The World Bank, 'Migration and Remittances Data' <<http://www.worldbank.org/en/topic/migrationremittancesdiasporaisues/brief/migration-remittances-data>> accessed 5 September 2016

⁷⁷⁰ C. Sander and S. M. Maimbo, 'Migrant Labour Remittances in Africa: Reducing obstacles to Development Contributions' <<http://documents.worldbank.org/curated/en/191171468742795861/Migrant-labor-remittances-in-Africa-reducing-obstacles-to-developmental-contributions>> accessed 5 September 2016

⁷⁷¹ Ehui Adovor, *Remittances in Africa: A catalogue of Studies and Technical Assistance by World Bank, Development Agencies and Government in Africa* (The World Bank, 2011) p.13

In contrast with inflows, it is estimated that over the last 50 years, Africa is estimated to have lost in excess of \$1 trillion in illicit financial flows and more than \$50 billion annually arising from criminal activities, corruption, tax evasion, bribes and transactions from cross-border smuggling.⁷⁷² Sending funds abroad makes tracing the money extremely challenging, particularly when transactions are conducted by operators not subject to or complying with AML/CFT obligations. This is even more so because reconstructing a money trail requires international cooperation, which is challenging, costly, and usually slow.⁷⁷³ To mitigate wire/electronic transfer risk as well as risk associated with IVTS, it is vital to assess and understand the risk posed since it is a prerequisite in designing risk-based regulation and supervision. Risk assessment can be used to evaluate whether the current framework needs to be revised. Already highlighted is the issue of despots⁷⁷⁴ using the financial system to launder the proceeds of crime, therefore, the need to redesign and strengthen the system in order to curb the tide. Faced with lack of enforcement and ineffective supervision, non-compliant actors will have no incentives to comply with rules, while compliant operators face a powerful incentive to cease their compliant behaviour to remain competitive in the market.⁷⁷⁵

CONCLUSION

The informal sector is vast in developing countries and accounts for a sizeable portion of its economic activities. Proceeds of bribery in many instances are either

⁷⁷² UNECA, 'Illicit financial flows - why Africa needs to "track it, stop it and get it

⁷⁷³ Todoroki (n763) 28

⁷⁷⁴ Ben Judah, *The Kleptocracy Curse: Rethinking Containment* (Hudson Institute 2016) 9

⁷⁷⁵ Vaccani (n760) 17

received in cash or paid into shell/front companies in order to obscure the identity of the recipient. Cases have been seen where large amounts of cash have been stored in secured vaults in private residences, sewage tanks, and other secured places to avoid a trail from law enforcement. The informal economy characterised by the cash-based economy is a fertile ground to fester the integration of proceeds of financial crimes into the legitimate sector since no distinction can be made between 'dirty money' and clean money. Such accumulated wealth can be easily integrated into real estate and other viable business ventures. It is recommended that measures be put in place to reduce cash dependence in the economy gradually. This will entail not only improving on infrastructure for essential social amenities as well as financial infrastructure, but also increasing the financial inclusion rate of the citizens. Ensuring rural integration and providing banking facilities to all en sundry.

In the area of cross-border remittances, the borders of most developing countries are vulnerable to a massive flow of cash across the border in different currencies mainly due to the informal markets and regional ties. The research does not foresee substantial money laundering issues arising from informal remittance transfers except the cross-border movement of cash. Regional authorities should improve on cross-border monitoring and encourage through both enforcement and persuasion the need for the declaration of cash. Where improvements in financial inclusion are attained it is believed would stem the tide, but this is an area for further research.

procedures in South Africa and Nigeria jurisdictions vis-à-vis the UNCAC. But first we examine the criminal conviction based system to underscore the need for non-conviction based recoveries, then we appraise existing barriers in asset recovery and conclude with some recommendations in the form of proposed reforms to improve the system.

7.1 Forfeiture

The origin of penal forfeiture is traceable to feudal England.⁷⁷⁹ The principle of attainder served to extinguish a person's legal existence upon conviction for a felony resulting in death. The disentitlement included the forfeiture of personal and real property. The old attainder proceedings at common law, which operated to deprive persons convicted for capital crimes, e.g. treason, of the use of their land for a year and a day, while also heirs lost their rights of inheritance and title.⁷⁸⁰ Although attainder and other common law forms of forfeiture have been abolished by state,⁷⁸¹ the concept has attained prominence as a viable tool of penal policy. Modern civil forfeiture originated in the United States in the 1970s and 1980s and had proliferated in most common law jurisdictions. A major advantage of the modern forfeiture laws are that they typically have procedural and substantive safeguards that protect due process interests and legitimate property rights of

⁷⁷⁹ Confiscation of property by the state is not a new concept as legal historians have traced its genesis to biblical times as contained in Exodus 21:28: 'when an ox gores a man or woman to death, the ox shall be stoned, and its flesh may not be eaten....'

⁷⁸⁰ William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765 – 1769 With An Introduction by Thomas A. Green* (Volume 4, University of Chicago Press 1979) 374

⁷⁸¹ The harshness of the attainder resulted in its abolishment in England. As part of the attainder, the source of the property did not matter, no distinction existed between property legally obtained and that arising from the proceeds of crime. The forfeiture laws deprived a traitor or felon of all personal property. This was a disproportionate punishment on the offender as well as his family members. The laws denied the victim the opportunity to obtain money damages from the wrongdoer. See *an Act to Abolish Forfeiture for Treason and Felony, and to otherwise amend the law relating thereto*, 33&34 Vict. C.23, S.1 (1870).

individuals. They arose as a result of the increasing sophistication of profit-motivated crime which cuts across national and geographic borders and uses every innovative technique to obfuscate the trail of criminal income.⁷⁸² According to some statistics, between \$1 trillion and \$1.6 trillion is lost each year to various illegal activities, and corrupt public officials in developing countries loot as much as \$40 billion each year, concealing these funds overseas where they are tough to recover.⁷⁸³

Civil forfeiture refers to the exercise of state power to seize an individual's property because of its use in the commission of a crime. This means the state may remove and retain the instrumentality of crime, which is the object used in the crime or to hide the crime. The objective of modern forfeiture laws are concerned not so much with punishing individuals for their past wrongs but with achieving specific criminal justice objectives including disgorging offenders of their ill-gotten gains, disabling the financial capacity of criminal organisations, and compensating victims of crime.⁷⁸⁴ The significance of forfeiture laws as a substantive penal measure is more noticeable about its deterrence as well as its destabilising effect on criminals or criminal organisations. If in addition to conventional corrective measures like imprisonment, punishment can strike at the motivating factor of the crime – the financial benefit- it is likely to discourage many persons from committing such crimes. As noted by Woolf CJ 'One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offenders is to ensure that if the offenders are brought to justice, any profit which they have

⁷⁸² Mary S.N. Young, *Civil forfeiture of criminal property: Legal measures for targeting the proceeds of crime* [Edward Elgar Publishing Limited 2009] 2

⁷⁸³ T. S Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (The World Bank 2009) 7

⁷⁸⁴ Young (n765) 1

made from their offending is confiscated.⁷⁸⁵ Invariably crimes that are financially motivated involve a deliberate calculation of risks and benefits by the offender. Where the risk of detection also includes the risk of losing the benefit, it can be argued that this would sufficiently deter criminals. Also, as a deterrence tool, forfeiture serves as a weapon to tackle and weaken crime particularly where it occurs in an organised form, it is cliché that money is the lifeblood of crime and cutting off the money source serves to strangle or suffocate their operations. Some jurisdictions have increased the stakes significantly by extending forfeiture to circumstances where criminal trial does not take place and also to any asset which is not necessarily proceeds of the crime. The limitations of criminal forfeiture (including the fact that the sentencing process is an inappropriate forum to confiscate all crime-tainted property)⁷⁸⁶ informs the recent trends in some jurisdictions that incline more to civil forfeiture processes. Civil forfeiture represents the second generation of modern forfeiture laws. It is evident that the in rem⁷⁸⁷ the character of civil forfeiture which avoids the need to prove a person's guilt beyond a reasonable doubt would have an undeniable appeal.⁷⁸⁸

7.1.1 Criminal Forfeiture.

Criminal forfeiture is an *in personam order*. That is, an action against an individual which requires a criminal trial and conviction. Criminal forfeiture is often part of the sentencing process. Forfeiture has been described variously as a deterrence, punishment and the embodiment of the maxim, *ex turpi causa non oritur actio*,

⁷⁸⁵ Lord Woolf CJ in *R v Sekhon* [2003] 1 WLR 1655, 1658

⁷⁸⁶ Jeffrey Simser, 'An Introduction to Civil Forfeiture' in Simon N. M. Young, ed. *Civil Forfeiture of Criminal Property: Legal Measure for Targeting the Proceeds of Crime* (Edward Elgar Publishing Ltd, 2009) 3.

⁷⁸⁷ Civil forfeiture involves proceedings against the crime-tainted property as opposed to proceedings against the person that characterises criminal forfeiture.

⁷⁸⁸ *Ibid.*

interpreted to mean ‘a person should not benefit from an illegality in contract, tort or criminal law.’⁷⁸⁹ It is an element of the sentence imposed following conviction, or as a plea bargain. Thus, it is unavailable where the defendant is absent because of death, elopement, or immunity. Criminal forfeitures require a conviction for the underlying offence, and the guilt of the defendant must be proved beyond reasonable doubt⁷⁹⁰ in common law jurisdictions whereas in civil law jurisdictions the court must be intimately convinced of the defendant's guilt. It is noteworthy that criminal forfeiture constitutes part of the sentence and is used to enhance the punishment of a defendant who has already been convicted of a particular offence. Criminal forfeiture systems can be object-based, which means that the prosecuting authority must prove that the assets in question are proceeds or instrumentalities of crime, or it can be value based, where in this case, it allows the forfeiture of the value of the offender's benefit from the crime, without proving the connection between the crime and the specific property.⁷⁹¹ If the underlying conviction is vacated as a result of an appeal, the forfeiture based on that conviction must also be vacated as well.⁷⁹²

⁷⁸⁹ ‘Oxford Reference: Overview - ex turpi causa non oritur actio’
<<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095806471>> accessed 12 January 2018

⁷⁹⁰ The requirements that the prosecution should have the immovable burden to prove the guilt of an accused person is enshrined in the Nigerian Constitution. Specifically, S.36(5) states that ‘every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty provided that nothing in this section shall invalidate any law by reason only that the law imposes upon such person the burden of proving particular facts in a civil or criminal proceedings.’ In the same vein, S. 131(1) of the Nigerian Evidence Act states that ‘whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. S. 131(2) further states that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. See R. Lawrence [1932] 11 NLR 6 at 7. Ukolari v. State [1993] 4 SC 167; Bozin v State (1985) 2 NWLR pt8. P.465 SC. Also in the common law case of Woolmington v DPP, it was held that ‘it is better that ten guilty men should escape than that an innocent man should suffer.’ [1935] AC 462

⁷⁹¹ Greenberg (n781) 13

⁷⁹² It is noteworthy that before the amendment to the Money Laundering Act in 2011, there was no penalty for non-declaration of funds at Nigeria's exit points. Most of the cases charged to court for non-declaration under the Money Laundering Act 2004 and 2006 were dismissed, and the assets recovered returned to the accused persons. <https://efccnigeria.org/efcc/what-efcc-did-with-recovered-loot>.

Forms of criminal forfeitures:

Adekunle identified three types of forfeiture embedded in Nigerian legislation, namely:⁷⁹³

- i. Forfeiture of proceeds of a specified offence or assets acquired through proceeds derived from the conviction of an offence. Various methods may be used to transfer, conceal or disguise the proceeds of crime. Money obtained from drug trafficking, illegal arms sales, and other criminal activities which cannot be channelled through banks and other formal institutions for the 'eagle eyes' of the law enforcement agencies, are laundered through trade malpractices such as massive importation of goods like spare parts, pharmaceuticals products, chemicals, automobiles. Once these illegal activities are unmasked, all the properties involved are liable to forfeiture on the order of the court. S.18(2) of the Money Laundering Act provides that where a body corporate has been convicted of an offence under the Act, such body corporate shall be wound up and its assets forfeited to the government.⁷⁹⁴
- ii. Where a statute imposes pecuniary penalties or authorises the forfeiture of assets equivalent to the penalty or any benefit derived by the convict

⁷⁹³ Adedeji Adekunle, 'Proceeds of Crime in Nigeria: Getting our act together' [An inaugural lecture by the Nigerian Institute of Advanced Legal Studies, 2011] 10

⁷⁹⁴ Money Laundering and (Prohibition) Act 2011 as amended. See also ICPC Act, s 47

from the offence. Any property of the convict may under this process be liable for forfeiture to satisfy the penalty. As practised in the UK, whereupon proof that the convict has a criminal lifestyle, all benefits attributable to his criminal activities are recoverable;⁷⁹⁵ and,

- iii. Forfeiture of Instrumentalities of Crime: Forfeiture which is subject to all traceable assets of the convicted person. Under the criminal code, the court has the power to order the forfeiture of any property used in the commission of an offence.

Plea Bargain

A less mild form of sentence on conviction adopted in some common law jurisdiction is plea bargain.⁷⁹⁶ Black's Law Dictionary defines a plea bargain as:

⁷⁹⁵ Ibid, page 11.

⁷⁹⁶ *R v Dougall* [2010] EWCA Crim 1048. [2011] 1 Cr. App. R.. In this case, the appellant (D) appealed against a sentence of 12 months' imprisonment following his plea of guilty to conspiracy to corrupt. It was held that (1) it was contrary to principle for a plea agreement to be entered into where the prosecution and defence agreed what the sentence would be. Accordingly, whilst the prosecution should be involved in the process by which the sentencing court was fully informed about matters arising from the evidence that might reflect on a defendant's culpability, including any matters of mitigation, and of any positive assistance given to the investigating authorities, that process did not involve an agreement about the level of sentence. Responsibility for the sentencing decision in cases of fraud or corruption was vested exclusively in the courts. There were no circumstances in which it might be displaced. The agreement told the court that only a suspended sentence should be imposed, which created in D the inevitable expectation that the court would be likely to accept that recommendation. (2) The sentence following a guilty plea would have been two years with D serving no longer than 12 months. The allowance for entering into the agreement, and taking on the considerable burdens, led to a halving of the appropriate sentence after the guilty plea. The effect was that D would serve 12 months and be released after serving six. The difference between a defendant who pleaded guilty, but did not give the co-operation and assistance, and a defendant who took on the full burden involved in being party to an agreement would be no more than a few months in actual custody. The consequence was that the reward for full co-operation was relatively small while the burdens taken on were substantial. Where the appropriate sentence of a defendant whose level of criminality, and features of mitigation, combined with a guilty plea, and full co-operation with the authorities investigating a major crime involving fraud or corruption, with all the consequent burdens of complying with his part of the agreement, would be 12 months' imprisonment or less, the argument that the sentence should be suspended was compelling. (3) That guidance for cases where the appropriate sentence was 12 months or less had nothing to do with any sentencing agreement between the prosecution, and the defence and the court were not saying that in similar circumstances a suspended sentence always had to be ordered. However, in all the circumstances, and in light of the guidance given, it was appropriate for the 12-month sentence imposed on D to be suspended. The appeal was allowed.

‘the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval.’⁷⁹⁷

Plea bargain usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge. Article 37(1) of UNCAC states that ‘each state party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.’⁷⁹⁸ On the part of the prosecutor providing reduced sentence, Article 37(2) Stipulates that ‘each state party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established by this Convention.’⁷⁹⁹ Article 37(3) further states that each state party shall consider providing for the possibility, by fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established by this Convention.⁸⁰⁰

⁷⁹⁷ Black’s Law Dictionary

⁷⁹⁸ United Nations Convention against Corruption, 2004.

⁷⁹⁹ Ibid. UNCAC, 2004

⁸⁰⁰ Ibid. UNCAC, 2004

This doctrine of plea bargain was alien to the Nigerian criminal procedure law until it found its way through the Economic and Financial Crimes Commission Act⁸⁰¹ used to expedite the trial of some cases including high profile cases.⁸⁰² The Administration of Criminal Justice Act 2015 has made elaborate provisions in this regard. The ACJA provides that the prosecutor may receive and consider a plea bargain from the defendant charged of an offence either directly or indirectly from that defendant or on his behalf,⁸⁰³ and offer of a plea bargain to a defendant charged with an offence,⁸⁰⁴ where in the opinion of the prosecutor the offer of the plea bargain is in the best interest of justice, the public interest, public policy and the need to prevent the abuse of legal process.⁸⁰⁵ The defendant may plead guilty for lesser offence(s) than offence charged.

The EFCC Act and ACJA on plea bargain conviction strategy is consistent with the provisions of the United Nations Convention against Corruption as discussed above and significantly it allows for the quick dispensation of justice. Some have argued that plea bargaining undermines the basic premise of crime and punishment and that it robs the accused of the full chances of full trial whereupon

⁸⁰¹ EFCC Act 2004, s 14(2)

⁸⁰² Tafa Balogun V. The Federal Republic of Nigeria (FRN). A former Inspector General of Police (IGP), Tafa Balogun was arraigned at the Federal High Court, Abuja, on charges involving about N13 billion obtained through money laundering and theft. The EFCC, in a suit No. FHC/ABJ/CR/14/2005, brought 70 count charges against Tafa Balogun covering the period from 2002 to 2004. He entered a plea bargain with the court in exchange for returning much of the property, and money. The charges were collapsed into eight counts and the former IGP was given a six-month jail term for each of the eight counts, to run concurrently, as well as a fine of N500,000 for each count. <<https://efccnigeria.org/efcc/images/Annexure%20I.docx.pdf>> accessed 4 January 2017.

Another notable case was that of Chief Diepreye Solomon Peter Alamieyeseigha, a former Governor of Bayelsa State, charged for stealing public assets worth over \$100 million. He pleaded guilty to 6 count charges and was sentenced to two years imprisonment on each charge, to run concurrently and an order of asset forfeiture for those assets that were traced.

See <<https://efccnigeria.org/efcc/images/Annexure%20I.docx.pdf>> accessed 6 January 2017

⁸⁰³ Administration of Criminal Justice Act 2015, s 270(1)(a)

⁸⁰⁴ Administration of Criminal Justice Act 2015, s 270(1)(b)

⁸⁰⁵ Administration of Criminal Justice Act 2015, s 270(2)

he might be free though culpable.⁸⁰⁶ Additionally, some members of the public who do not know the working of the law may see the practice as eroding the confidence of the judiciary.⁸⁰⁷ There is also the apprehension that public officials and political elites would abuse the process, these being significant stakeholders in illicit enrichment. The advantages of plea bargaining are that the prosecution secures faster conviction, it's cost-effective and prevents unnecessary public trial, though the offender ends up getting a milder punishment. Others have seen plea bargain as a means to reduce the workload of the court and prosecution list of cases especially with the court's inability to handle the volume of criminal cases.⁸⁰⁸

A challenge with S. 270(17)(a) of the ACJA is that a plea can be entered into where the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable.⁸⁰⁹ It has been argued that this category of plea bargain will not succeed as it is doubtful that the defence counsel would want to advise his client to accept criminal liability and be punished without full trial in the face of insufficient evidence against his client when he has the option of making a no case submission.⁸¹⁰

⁸⁰⁶ Oluseyi Olayanju, 'Relevance of Plea Bargaining in the Administration of Justice System in Nigeria' (2001) viii LASU Law Journal 40

⁸⁰⁷ Ibid 43

⁸⁰⁸ Oguiche Samuel, 'Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria' [2011] NIALS Journal of law and Development 70

⁸⁰⁹ Administration of Criminal Justice Act 2015, s 271(17)

⁸¹⁰ Marshall Umukoro, Emerging Trends in Criminal Proceedings'

http://njj.gov.ng/images/Workshop_Papers/2016/Refresher_Judicial_Officers/s08a.pdf accessed 16 January 2018

7.1.2 Civil forfeiture (Non-Criminal based forfeiture).

Civil forfeiture is drawn on the backdrop of two policy rationale: first, that gains from unlawful activity does not accrue and accumulate in the hands of those who commit illegal activity such as corruption, drug trafficking and fraud, therefore, the proceeds of their criminal conduct ought to be disgorged and distributed to the victims; and secondly, that the state should suppress conditions that lead to those unlawful activities. A conviction for certain offences renders an accused liable to punishment, of which forfeiture or restitution may be imposed, among others. However there is an array of laws in Nigeria and other jurisdictions which empowers the court or agency responsible for implementing those laws to confiscate property whether real or in personam in order to preserve the res from being destroyed or the title in the property from being transferred to another person, pending the time the criminal trial of the accused will be concluded. The standard of proof is usually on the balance of probabilities or preponderance of the evidence depending if it is a common law or civil law jurisdiction. Proceedings in civil forfeiture cases are brought in rem, that is, against the proceeds in any unlawful activity. The in rem nature of the proceedings offers the prosecutor to attack seemingly tricky problems such as corruption because the looted money may or may not be in the jurisdiction the crime was perpetrated, in so far as an offence has been committed, the courts can take jurisdiction over the property.

Below we examine the criminal and civil asset forfeiture regimes in South Africa and Nigeria to underpinning areas in which developing countries could curb the growing tide of concealing tainted assets.

7.2 South African Civil Forfeiture Regime:

Civil asset forfeiture has been in the statute books⁸¹¹ in South Africa for about 22 years and made very robust with the enactment of the Prevention of Organised Crime Act (No. 21 of 1998). This Act established a non-conviction based forfeiture scheme aimed at the proceeds of unlawful activities and the instrumentalities of criminal offences. The preamble to POCA 1998 (as amended by Provisions of Organised Crime Second Amendment Act (No. 38 of 1999) outlines the underlying objectives of the asset forfeiture provisions of the Act:

‘AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and the forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.’⁸¹²

The procedure by which this forfeiture scheme is effected is commonly expressed as civil. S. 37(1) states that ‘for the purposes of this Chapter all proceedings under this Chapter are civil proceedings, and are not criminal proceedings.’⁸¹³ A forfeiture order under Chapter 6 is focused on tainted money, is only granted and not dependent on the institution or completion of any criminal prosecution about

⁸¹¹ A narrow form of civil asset forfeiture was under the South African Drugs and Trafficking Act (No. 140 of 1992) where a conviction-based scheme of civil forfeiture applied for benefits derived by persons convicted of drug trafficking offences. In 1996, the Proceeds of Crime Act allowed for the forfeiture of the benefits derived by persons convicted of any offences.

⁸¹² This relates to the forfeiture scheme established under Chapter 6 of POCA 1998 (as amended).

⁸¹³ POCA 1998 as amended. S.37(1)

offences concerned. Civil forfeiture involves a two-stage process: a preservation and forfeiture stages.

a. A Preservation Stage

A preservation stage is marked by the granting of a preservation of property order.⁸¹⁴ A preservation order can be made against movable and immovable property.⁸¹⁵ Chapter 6, part 2 of the Act makes relevant provisions for the preservation order. Section 38(1) provides that ‘the National Director may by way of ex parte application apply to a High court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.’⁸¹⁶ The court according to S. 38(2) shall make an order if ‘there are reasonable grounds to believe that the property concerned –

- a. is an instrumentality of an offence referred to in Schedule 1;⁸¹⁷ or
- b. is the proceeds of unlawful activities.⁸¹⁸

⁸¹⁴ Property means money or any other movable, immovable, corporeal or incorporeal thing.

⁸¹⁵ In an editorial article, it was reported that the asset forfeiture unit after obtaining a preservation of property order from the Pretoria High Court seized the sum of R76, 725,714 and a Toyota Double Cab pick-up vehicle believed to have been used in the smuggling of cash. They were allegedly arrested in possession of the pile of cash, which reportedly took police more than five hours to count. www.fightagainstcrime.co.za/asset-forfeiture-unit-

⁸¹⁶ National Director according to Schedule 1(x) means ‘the National Director of Public Prosecutions appointed regarding Section 179(1)(a) of the Constitution.’

⁸¹⁷ Schedule 1 of POCA 1998 as amended, defines Instrumentality of an offence to mean ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.’ In an appeal brought before the Constitutional court by the NDPP in the case of Kumarnath Mohunram and Shelgate Investments CC vs The National Director of Public Prosecutions and BOE Bank Limited [2007] ZACC 4, Van Heerden AJ held that the *gambling operation in issue was an offence covered by POCA. POCA does not only apply to discrete areas of organised crime, but can encompass illegal acts outside of money laundering, racketeering, and criminal gang activity.*

⁸¹⁸ Schedule 1 of POCA 1998 as amended defined unlawful activities to mean ‘any property or any service advantage, benefit or reward which was derived, received or retained directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person.’

S.43 (1) on the other hand makes provision for the preservation order in respect of immovable property and states that 'A High Court which has made a preservation order in respect of immovable property may at any time, with a view to ensuring the effective execution of a subsequent order, order the registrar of deeds concerned to endorse any one or more of the restrictions....on the title deed of the immovable property.'⁸¹⁹ Under S.43(2), the following the restrictions can be made:

- a) that the immovable property shall not without the consent of the High Court be mortgaged or otherwise encumbered;
- b) that the immovable property shall not without the permission of the High Court be attached or sold in execution; and
- c) that the immovable property shall not without the consent of the High Court –
 - i. vest in the Master of the High Court or trustee concerned, as the case may be when the estate of the owner of that immovable property is sequestrated: or
 - ii. where the owner of that immovable property is a company or other corporate body which is being wound up, form part of the assets of such company or body corporate body.

The custody of immovable property on the title deed of which a restriction is contemplated according to the Act shall vest as from the date which –

- a) the estate of the owner of the immovable property is sequestrated; or

⁸¹⁹ POCA 1998 as amended, s43(1)

- b) where the owner of the immovable property is a company or other corporate body, such a company or corporate body is being wound up.⁸²⁰

Where a preservation order has been granted by the High Court, the National Director shall 'give a notice of the order to all persons known to have interest in the property which is subject to the order; and publish a notice of the order in the Gazette.'⁸²¹ Any person who has an interest in the property for which a preservation order has been granted, may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property from the operation thereof.⁸²²

The aim of a preservation order is to preserve the property to prevent it from being disposed of, or removed. Any police officer may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed⁸²³ but this will be by the directions of the High Court, which made the preservation order.⁸²⁴ A preservation order expires within 90 days of the relevant notice of the order published in the government gazette unless an application for a forfeiture order is pending before the expiry of this period or the order is rescinded before that period.⁸²⁵

⁸²⁰ POCA 1998 as amended, s 43(4)

⁸²¹ POCA 1998 as amended, s 39(1)(a-b)

⁸²² POCA 1998 as amended, s 39(3). It has been held that a Preservation order was appealable in the case of *Singh v NDPP* [2007] ZASCA 82, at 10

⁸²³ POCA 1998 as amended, s 41(1)

⁸²⁴ POCA 1998 as amended, s 41(2)

⁸²⁵ POCA 1998 as amended, s 40(1-3)

b. A forfeiture stage

This stage is characterised by the granting of a final order regarding which the property concerned is forfeited to the government. For the court to give a forfeiture order, the jurisdictional requirement is by balance of probabilities that the property involved is either an instrumentality of an offence or that it is the proceeds of unlawful activities.

7.3 Implementation of Chapters 5 And 6 of The Act

The Asset Forfeiture Unit (AFU) established in May 1999 in the office of the National Director of Public Prosecutions has the objective of the implementation of Chapters 5 and 6 of the Prevention of Organised Crime Act 1998 (as amended). It was created to ensure that the powers in the Act to seize criminal assets would be used to their maximum effect in the fight against organised crime and unlawful activities. From the outset, the AFU set out long term strategic goals which include: to develop the law by taking test cases to court and creating the legal precedents that are necessary to allow the efficient use of the law; build the capacity to ensure that asset forfeiture is used widely as possible to make a real impact in the fight against crime; make an impact on selected categories of priority crimes; establish a national presence; develop excellent relationships with its key partners such as the South African Police Service (SAPS), The South African Revenue Service (SARS); and, build the AFU into a professional and representative organisation.

Since funding the AFU to carry out its core mandate could be a significant challenge, the Act ensured that the monetary value realised from forfeited assets be deposited into the Criminal Asset Recovery Account, being a separate account

in the National Revenue Fund⁸²⁶ and used to provide financial assistance to law enforcement agencies⁸²⁷ involved in combating organised crime, money laundering, criminal gang activity and general crime, as well as assisting the victims of crime.⁸²⁸ S.64 of the Act regulates the constitution of the Criminal Asset Recovery Account (CARA) and shall consist of the following:

- a. All monies derived from the fulfilment of confiscation and forfeiture orders contemplated in Chapters 5 and 6;⁸²⁹
- b. All property derived from the fulfilment of forfeiture orders as contemplated in section 57;⁸³⁰
- c. The balance of all monies derived from the execution of foreign confiscation orders as defined in the International Cooperation in Criminal Matters Act, 1996 (act no 75 of 1996), after payments have been made to requesting states regarding the Act;
- d. Any property or monies appropriated by Parliament paid into or allocated to the CARA;⁸³¹
- e. Domestic or foreign grants;⁸³²
- f. Any property or amount of money received or acquired from any source;⁸³³ and

⁸²⁶ POCA 1998 as amended, s 63

⁸²⁷ POCA 1998 as amended, s 68(b). This is subject to S.65 of the Act establishes a Criminal Assets Recovery Committee which is responsible for providing Cabinet with recommendations on the utilisation of the CARA and providing advice on specific issues related to the criminal assets recovery process. Under S. 69(a) of the Act, cabinet may utilise the property and money allocated to or standing to the credit of the CARA – after considering the recommendations of the committee.

⁸²⁸ POCA 1998 as amended, s 68(c)

⁸²⁹ POCA 1998 as amended, s 64(a)

⁸³⁰ POCA 1998 as amended, s 57(4) states that the *curator bonis* shall deposit into the Criminal Asset Recovery Account any proceeds of any sale or disposition of forfeited property and any monies forfeited.

⁸³¹ POCA 1998 Act as amended, s 64(c)

⁸³² POCA 1998 as amended, s 64(d)

⁸³³ POCA 1998 Act as amended, s 64(f)

g. All property or monies transferred to the CARA.⁸³⁴

The importance of the specific funding mechanism cannot be overemphasized given the enormity of the task involved, albeit, the challenges of and litigation from wealthy and influential criminal figures anxious to retain their illicitly obtained wealth, legal wars of attrition against those lawyers retained to expose any weakness or lack of clarity in the civil forfeiture provisions and the need for adequately resourced, specialty capability built into the AFU to investigate and prosecute civil and criminal asset forfeiture cases.

7.4 Aspect of UK Civil Forfeiture Law

The proceeds of Crime Act 2002 (POCA) introduced civil forfeiture or confiscation *in rem* in the UK. The aim of the Act among others is to provide for confiscation orders in relation to persons who benefit from criminal conduct and for restraint orders to prohibit dealing with property, allow the recovery of property obtained through unlawful conduct or which is intended to be used in unlawful conduct⁸³⁵. This law enables civil action to be taken to restrain and recover assets and instrumentalities that represents the proceeds of crime by the appropriate authorities (earlier the Asset Recovery Agency,⁸³⁶ but not now the Financial Conduct Authority, HM Revenue and Customs, the National Crime Agency, the Crown Prosecution Service or the Serious Fraud Office). Four key elements elements introduced by the Act are:

⁸³⁴POCA 1998 Act as amended, s 64(e)

⁸³⁵ Chapter 29 Proceeds of Crime Act 2002

⁸³⁶ S.74 Serious Crime Act 2007 abolishes the Asset Recovery Agency

- i. Criminal confiscation: Part 2 of the POCA sets out powers to confiscate the proceeds of crime following a criminal conviction as part of the sentencing process. It also sets out powers to retrain⁸³⁷ or freeze a defendant's assets and prohibit the defendant from dealing with any realisable property held by him so that it will be available to satisfy any confiscation order that might be made by the Crown Court upon his being convicted of a criminal offence.

The purpose of the confiscation proceeding provided in the Act is to recover the benefit that an offender has obtained from his criminal conduct. A confiscation order is made by the Crown Court and requires the defendant to pay a particular sum that the court calculates to be the recoverable amount. Though, the confiscation order is made in personam, it does not apply to a particular item of property and the defendant can satisfy the confiscation order with both legitimate and illegitimate income. In making a confiscation order, the court must decide if he is (i) convicted of a criminal offence or committed for sentencing, and (ii) if the Director or the court believes it is appropriate to do so.

- ii. Civil Recovery: Part 5 (Chapter 2) sets out a system of confiscating the proceeds of Crime in the absence of a criminal conviction through the civil courts. A recent tool introduced by the Act⁸³⁸ is the use of unexplained wealth orders aimed at targeting assets held by politically exposed persons to disclose the source of their wealth in relation to the assets owned. The general purpose of Part 5 of POCA is to enable the enforcement authority

⁸³⁷ S.80 POCA 2002

⁸³⁸ S.362A of POCA as amended.

to recover in civil proceedings property or cash which is, or represents, property or cash obtained through unlawful conduct or which is intended to be used in unlawful conduct. The definition of property is deliberately wide to include (a) money; (b) all forms of property, real or personal, heritable or moveable; and (c) things in action and other intangible or incorporeal property.⁸³⁹ Unlawful conduct is one that is deemed unlawful by the criminal law of the country and a person obtains property through unlawful conduct if he/she obtains property by, or in return for that conduct.

An action for civil recovery can be brought before a court of competent jurisdiction where it is specifically provided for even though there have not been any criminal proceedings in connection with the property, or where criminal proceedings have been instituted and resulted in an acquittal.⁸⁴⁰

The standard of proof is the balance of probabilities for which the prosecuting authority has to show that the money or asset in question has been derived from criminal conduct.⁸⁴¹ There must be sufficient evidence to enable the court to decide⁸⁴² whether the conduct so described was unlawful under the criminal law of the UK or in relation to cross border matters, the unlawful conduct will be under the UK law or the foreign state.

- iii. Cash forfeiture: part 5 (chapter 3) sets out powers to seize and forfeit cash, through a civil process, where there are reasonable grounds to suspect that

⁸³⁹ S 316(4) POCA 2002

⁸⁴⁰ SOCA v Olden [2009] EWHC 610

⁸⁴¹ R v Jia Jin He and Dan Dan Chen (2004) EWHC Admin 3021. Collins J stated that 'the court should look for cogent evidence before deciding that the balance of probabilities has been met.'

⁸⁴² Director of ARA v Jeffrey David Green [2005] EWHC Admin 3168

it is the proceeds of crime.⁸⁴³ Seizure of cash is not only at the borders but also inland, anywhere in the UK where there are reasonable grounds for suspicion. POCA 2002 also establishes power to search any person or any article in his possession where there are grounds that the person is carrying cash which constitutes a recoverable property or is intended for an unlawful conduct and the amount is not less than the minimum amount.⁸⁴⁴ Powers of search and seizure is subject to the approval of a justice of peace or sheriff or a senior officer. Cash seized can be forfeited upon an order by the court.

- iv. Criminal taxation: part 6 allows the National Crime Agency to tax income which it suspects are the proceeds of crime without a conviction.

An evaluation of the UK civil recovery regime shows that only a small proportion of criminal gains are ever confiscated which is because much crime is not reported, criminal gains are often disposed of quickly or transferred out of reach, and many criminals are determined to keep as much as they can regardless of the sanctions made against them.⁸⁴⁵ According to the Fifth report of Session 2016-17,⁸⁴⁶ the actual amount confiscated in 2012-2013 amounted to an estimated 26p in every £100 of criminal gains generated. Given the tough legal framework, ambitious government goals and weaknesses in a number of areas of the confiscation process it was concluded that the recovery was too small.⁸⁴⁷ From figure 9 below, the

⁸⁴³ In *Commissioners of Customs and Excise v Duffy* [2002] EWHC 425, it was held that the court was entitled to aggregate to cover 'smurfing'.

⁸⁴⁴ S.294 POCA 2002

⁸⁴⁵ House of Commons, 'Proceeds of Crime: Fifth Report of Session 2016-17. Report together with formal minutes relating to the report' <<http://www.parliament.uk/homeaffairscom>> accessed 21 September 2017

⁸⁴⁶ *ibid.*

⁸⁴⁷ *Ibid*

number of confiscation orders imposed fell by 500 to 5924 in 2014-2015 and a further 222 in 2015-16 representing 11.95% over a two year period (2013 being the base year in this instance).⁸⁴⁸ The total value of orders imposed also fell by £31.5 million to £247.3 million between 2012-13 and 2014-15 (an 11% reduction) after adjusting for inflation.⁸⁴⁹ The number of criminal conviction also fell over the same period but the proportion of confiscation orders imposed is still a small fraction.

⁸⁴⁸ National Audit office, Confiscation Orders: Progress Review (Report by the Comptroller and Auditor General, 11 March 2016) <<https://www.nao.org.uk/wp-content/uploads/2016/03/Confiscation-orders-progress-review.pdf>> assessed 21 September 2017

⁸⁴⁹ Ibid 14

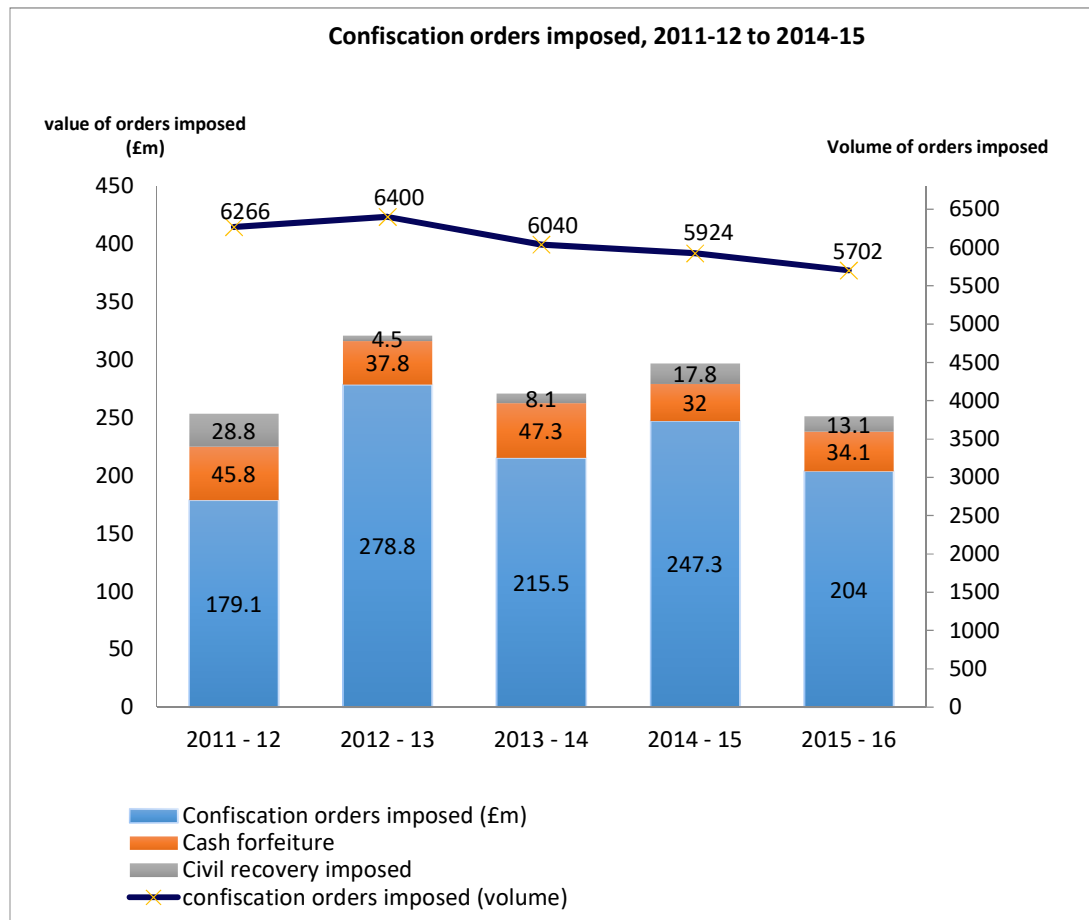


Figure 9 - Confiscation orders imposed, 2011 - 2015
 Source: National Audit office, Confiscation Orders progress review 2016

OECD members experience the same dismal position of asset recovery. According to a STaR report which analyzed data from OECD countries for the periods 2010–2012 compared with an earlier report of 2006-2009, it observed that the total assets frozen in the period 2010-2012 increased by US\$0.173 billion from \$1.225 billion to US\$1.398 billion. The findings also showed that countries were more successful in freezing and returning stolen assets through innovative legal avenues and powers; more assets were returned to developing countries; and that countries with established asset recovery policies and solid legal and institutional frameworks

achieved greater success in returning the proceeds of corruption. However, a huge gap remains between the results achieved and the estimated billions of dollars stolen from developing countries each year. Between 2006 and mid-2012, OECD members returned US\$423.5 million, compared to the estimated US\$20-40 billion stolen each year.⁸⁵⁰

Some factors which explain the shortfall of the UK asset recovery regime includes the non-coherent overall strategy for confiscation orders with no agreed success measures, insufficient awareness of proceeds of crime and its impact,⁸⁵¹ the lack of proportionality,⁸⁵² lack of understanding and experience of civil recovery proceedings among law enforcement agencies; restraining orders and property of legal entities;⁸⁵³ breaching of the presumption of innocence⁸⁵⁴ and double jeopardy rule.⁸⁵⁵ Also, the need for more high level commitment to asset recovery, taking action to identify and freeze allegedly stolen assets, failure to introduce and encourage incentives for domestic practitioners to initiate cases and low level of international cooperation on mutual legal assistance and cross border jurisdiction issues.⁸⁵⁶

⁸⁵⁰ Larrisa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linea Mills, *Few and Far: Hard Facts on Stolen Asset Recovery* (The World Bank 2014)

⁸⁵¹ House of Commons (n843) 6

⁸⁵² See *McIntosh v. Lord Advocate* [2001] 2 All ER 638; *Director of ARA v. John and Lord* [2007] EWHC 360 (UK).

⁸⁵³ *R v. Seager and Blatch* (2009) EWCA Crim 1303

⁸⁵⁴ *Director of ARA v. Walsh* [2004] NIQB 21. See also *R (on the appeal of Director of ARA) (Paul) v Ashton* [2006] EWHC (Admin) 1064 where it was held that the imposition of a civil recovery order was not punitive and could not therefore violate Article 7 (no punishment without law) and that such orders had a compensatory aspect and the fact that deprivation of property is involved does not constitute a penalty because the holder of the property was not entitled to the property in the first place.

⁸⁵⁵ Angela V. M. Leong, 'Asset Recovery under the Proceeds of Crime Act 2002: The UK Experience' in Simon N. M. Young ed, *Civil Forfeitures of Criminal Property: Legal Means for Targeting the Proceeds of Crime* (Edward Elgar Publishing 2009) 218

⁸⁵⁶ *King v. Director of Serious Fraud Office* [2009] UKHL 17

7.5 Aspects of Criminal and Civil Forfeiture Under Nigerian Law

The law on the recovery and management of proceeds of crimes in Nigeria are fragmented in some existing legislation, including the Independent Corrupt Practices Offences and Other Related Matters Act 2000, the Economic and Financial Crimes Commission (Establishment) Act 2004, the National Agency for the Prohibition of Traffic in Persons Act, 2003, the National Drug Law Enforcement Agency Act 2004, the Advance Fee Fraud and other Fraud Related Offences Act 2006, the Money Laundering (Prohibition) Act 2011 and more recently the Administration of Criminal Justice Act 2015. While there are provisions in these statutes, which allow the government to recover the proceeds of crime, the results have been disjointed and ineffective. Although in recent times the anti-corruption agency has been able to make significant recoveries,⁸⁵⁷ yet criminals still manage to hold to sizeable part of their ill-gotten gains since some of these would have been laundered to secrecy jurisdictions or invested into other legitimate businesses locally and abroad. As the Stolen Asset Recovery (STAR) Initiative by the World Bank and the United Nations Office on Drugs and Crime indicated, developing countries lose between \$20 billion and \$40 billion each year to bribery, embezzlement and other corrupt practices and of these over the past 15 years only

⁸⁵⁷ Economic and Financial Crimes Commission, 'Remarks by Ibrahim Magu' <<https://efccnigeria.org/efcc/news/2729-remarks-by-ibrahim-magu-ag-chairman-efcc-luncheon-with-media-executive-rockview-hotel-abuja-august-30-2017>> accessed 12 February 2018. The press briefing indicated that 'the Commission between January and August 30, 2017 recorded the following monetary recoveries: Four Hundred and Nine Billion, Two Hundred and Seventy Million, Seven Hundred and Six Thousand, Six Hundred and Eighty Six Naira, Seventy Five Kobo (N409,270,706,686.75); Sixty Nine Million, Five Hundred and One Thousand, One Hundred and Fifty Six Dollars, Sixty Seven Cents (\$69, 501,156.67); Two Hundred and Thirty One Thousand, One Hundred and Eighteen Pounds, Sixty Nine Shillings (Pounds 231,118.69; Six Hundred and Ten Thousand, Eight Hundred and Sixteen Thousand, Twenty Euros (Euro 610,816.20); Four Hundred and Forty Three Thousand, Four Hundred Dirham (Dirham 443,400.00 and (Seventy Thousand, Five Hundred Saudi Riyal (SR70, 500.00).'

\$5 billion has been recovered and returned.⁸⁵⁸ It is noteworthy that the unrecovered loot belongs to the people who are being deprived of essential social amenities which a responsible government should provide. Another worrisome aspect of the present recovery effort of the Nigerian Government is that property that has been frozen by order of the court has been allowed to languish and rot; businesses have been allowed to die. There are allegations of misappropriation of recovered assets by the law enforcement agencies, or they have been dissipated, lost, or in any event, not adequately accounted.

7.5.1 Criminal Forfeiture Procedure

There is no single legal framework about interim measures for the freezing or seizure of the proceeds of crime in Nigeria, the proposed Proceeds of Crime Bill seeks to address the proceeds of unlawful activity from both criminal and civil recovery perspective. Part V of the proposed bill aims to establish criminal forfeiture and confiscation.

Various statutes in Nigeria make provisions for the forfeiture of property where such property is the subject matter or evidence in a criminal action. Part 34 of the Administration of Criminal Justice Act 2015 provides for the seizure, forfeiture, confiscation and destruction of instrumentality of crime. Under section 333 of the Act, the court may:

⁸⁵⁸ Jean-Pierre Brun, Larissa Gray, Clive Scott and Kevin M. Stephenson, *Asset Recovery Handbook: A Guide for Practitioners* (The World Bank 2011)

- a. Order the seizure of any instrument, material or thing which is reason to believe are provided or prepared or being prepared, to the commission of an offence triable by the court;⁸⁵⁹ and,
- b. Direct the instrument to, material or thing to be forfeited, confiscated, held or otherwise dealt with in the same manner as property under S.336 of the Act.⁸⁶⁰

Under Sections 336 of the Act,⁸⁶¹ a defendant convicted of an offence carried out by criminal force and the victim dispossessed of any immovable property, the court, where it deems fit, may order the possession of the property to be restored to the victim.

Under the Independent Corrupt Practices and Other Related Offences Act 2000, an interim measure, it makes provisions that empower an officer of the Commission to seize property in the course of investigation if he or she suspects it is the subject matter of an offence or evidence relating to the offence. The Act empowers the Chairman of the Commission, where he or she has reasonable grounds to believe that an offence under the Act has been committed, to require a person to identify every property, whether movable or immovable, within or outside Nigeria, belonging to this person or in their possession, or in which this person has any interest, whether legal or equitable, and specify the date on which each of the properties identified was acquired and the manner in which each was received.

⁸⁵⁹ Administration of Criminal Justice Act 2015, s 333(a)

⁸⁶⁰ Administration of Criminal Justice Act 2015, s 33(b)

⁸⁶¹ Administration of Criminal Justice Act 2015, s 336

Similarly, under section 27 of the EFCC Act 2004, where a person is arrested for committing an offence, he must make a full disclosure of his/her assets and property by completing the declaration of assets form as specified in Form A of the schedule to the Act which form shall then be investigated by the commission. The Act makes it an offence to make a false declaration or refuse to make full disclosure or any disclosure at all. Upon the attachment of any property under the act, the Commission shall immediately trace and attach all assets and property of the person as a result of such economic or financial crime and shall then obtain an interim attachment order from the court. The Act further provides that where assets or property of any person arrested for an offence under the Act has been seized, or any assets or property have been seized by the commission under the Act, the Commission shall cause an ex parte application to be made to the court for an interim order. This action forfeits the property concerned to the Federal Government, and the Court will, if satisfied that there is prima facie evidence that the property involved is liable to forfeiture, make an interim order by section 29. An arrest under section 27 of the EFCC Act triggers the investigation of assets and property of a person arrested for an offence under the act.

Under the proposed Proceeds of Crime Bill, the pre-requisite for 'criminal confiscation' or 'criminal forfeiture' is the conviction of a defendant of an offence upon which an order to confiscate or forfeit items is obtained. Items forfeited could include such things as property obtained from criminal activity and property that directly represents one illegally obtained and the instrumentalities of crime.

Proceedings for application of freezing or confiscation orders are of a civil nature,⁸⁶² the rules of evidence in civil proceedings will apply⁸⁶³ and question of fact to be decided by a court shall be determined on a balance of probabilities⁸⁶⁴ basis. This is notwithstanding any rule of law or practice relating to hearsay evidence, evidence given in respect of freezing, restraint, forfeiture or confiscation in furtherance to part V is admissible in court.⁸⁶⁵

In criminal matters, a restraint order⁸⁶⁶ is made on the property for it not to be disposed of, or otherwise dealt with by any person before the issuance of a forfeiture or confiscation order by the court. The Bill makes provision that in respect of a freezing, restraint, forfeiture or confiscation order, the rules of evidence applicable in civil proceedings applies, and question of fact in regard of an application for such orders will be made on the basis of balance of probabilities⁸⁶⁷ as against proof of beyond reasonable doubt. Furthermore, the Bill provides for freezing orders. Sections 42 to 50 relates to provisions in respect of freezing order. Specifically, Section 43 makes provision for a freezing order to prohibit a financial institution from allowing a withdrawal from an account with the financial institution, covering the specified amount or any related accounts to which the defendant is a signatory. It also deals with procedure for applying to the court, service of freezing orders, renewals, and protection of individuals/corporations from suits for compliance and offences relating to non-compliance by financial institutions and

⁸⁶² Proceeds of Crime Bill 2017, s 39(1)

⁸⁶³ Proceeds of Crime Bill 2017, s 39(2)

⁸⁶⁴ Proceeds of Crime Bill 2017, s 39(4)

⁸⁶⁵ Proceeds of Crime Bill 2017, s 39(5)

⁸⁶⁶ The Bill makes provision for in civil forfeiture for a Preservation order whereas in criminal matters a restraint order is provided.

⁸⁶⁷ Proceeds of Crime Bill 2017, s 39(4)

its officials. During criminal confiscation, however, restraint orders are used which prevents the named person from dealing all the property that he owns.

7.5.2 Non Conviction based Recovery Procedure Under The Nigerian Proceeds of Crime Bill 2017

As already shown above, there is no comprehensive legislation in Nigeria in respect of the confiscation, forfeiture and management of proceeds of crime derived from unlawful activities. Successes so far achieved by the law enforcement agencies, the EFCC, in particular, arose from taking advantage of provisions in other legislations to attain interim forfeitures of assets. The Corrupt Practices and Other Related Offences Act, 2000 provides for the possibility for non-conviction based forfeiture. Specifically, S.48(1) provides that ‘where in respect of any property seized under the Act there is no prosecution or conviction, the Chairman of the Commission, may before the expiration of twelve months from the date of the seizure, apply to the High Court for an order of forfeiture, if there is satisfactory evidence that such property has been obtained as a result of or in connection with an offence under the Act.’⁸⁶⁸

To bridge the gap and in conformity with UNCAC, the proposed Proceeds of Crime Bill seeks to introduce non-conviction based recovery of the proceeds of crime. At the time of this research work, it is awaiting assent by the President. Expressing the sorry state of recovered assets, the Bill sponsor, Senator Mohammed Hassan noted: ‘what we have now creates a very consuming system that have left both the victim, the state as losers as the values recovered by agencies of government end

⁸⁶⁸ Corrupt Practices and Other Related Offences Act, 2000, s 48(1)

up decrepit and decaying with little or no accountability or ultimate responsibility.⁸⁶⁹

The objective of the Bill is to:

- i. Provide for an adequate legal and institutional framework for the recovery and management of the proceeds of crime or benefits derived from unlawful activities;
- ii. Deprive a person of the proceeds of illegal activity, the instrumentalities of an offence and any other benefit derived from an offence committed within or outside Nigeria;
- iii. Prevent the reinvestment of proceeds of unlawful activity in the furtherance of criminal enterprise;
- iv. Harmonise and consolidate existing legislative provisions on the recovery of proceeds of crime and related matters in Nigeria; and
- v. Make comprehensive provisions for the restraint, seizure, confiscation and forfeiture of property derived from unlawful activities used or intended to be used in the commission of such unlawful activities.⁸⁷⁰

There are three types of asset recovery provided for in the Bill. These are 'civil forfeiture', 'criminal forfeiture' and 'criminal confiscation'. Most of these procedures will be carried out by law enforcement agencies but will be subject to oversight by the Agency.

Civil forfeiture and related issues such as the nature of proceedings, preservation orders and seizure of property subject to a preservation order are covered in Part

⁸⁶⁹ Senator Mohammed Hassan, 'Lead Debate on the Proceeds of Crime Bill 2017' <<http://placng.org/wp/wp-content/uploads/2017/05/Lead-Debate-on-the-Proceeds-of-Crime-Bill-2017.pdf>> accessed 25 March 2018

⁸⁷⁰ A Bill for an Act to make Comprehensive Provisions for the Confiscation, Forfeiture and Management of Properties derived from Unlawful Activities and for Related Matters. SB.376

II. Under the Bill, where there is a reasonable ground to believe that a property is the proceeds of unlawful activity;⁸⁷¹ or represents the proceeds of unlawful activity;⁸⁷² is involved in the facilitation of illegal activity;⁸⁷³ or is intended to be used to facilitate unlawful activity,⁸⁷⁴ the court may make an order⁸⁷⁵ upon an ex parte application filled by the agency,⁸⁷⁶ to restrain any person from dealing in any manner with the property.⁸⁷⁷ 'Proceeds of unlawful activity means property wholly derived or realised, whether directly or indirectly, from unlawful activity, or partly derived or realised, from unlawful activity whether property is situated within or outside Nigeria.'⁸⁷⁸ Preservation orders when granted would usually last for 120 days⁸⁷⁹ and can be renewed for a further 60 days⁸⁸⁰ upon application by the agency and the court is satisfied that there are reasonable grounds for renewal, the preservation order has not been rescinded, and no previous renewal order had been sought. However, the period for the subsistence of the preservation order will not lapse where an application for forfeiture order is still pending before the Court or where there is an unsatisfied forfeiture order. A request for a forfeiture order can then be made while the preservation order subsists. A preservation order is necessary to prevent crime-tainted property from being disposed of or dissipated before a judgment is satisfied. Additionally, the Bill also makes provision

⁸⁷¹ Proceeds of Crime Bill 2017, s 4(2)(a)

⁸⁷² Proceeds of Crime Bill 2017, s 4(2)(b)

⁸⁷³ Proceeds of Crime Bill 2017, s 4(2)(c)

⁸⁷⁴ Proceeds of Crime Bill 2017, s 4(2)(d)

⁸⁷⁵ The Preservation Order is used during the investigation into the assets of the suspect in civil forfeiture matters to restrain any person from dealing in any manner with any property.

⁸⁷⁶ The Agency here refers to the Proceeds of Crime Recovery and Management Agency

⁸⁷⁷ When a preservation order is made, the Agency is required to give notice to all persons known to have interest in the property to oppose the making of a forfeiture order or apply to the court for an order excluding his or her interest in the property from the operation of a forfeiture order

⁸⁷⁸ Proceeds of Crime Bill 2017, s 163

⁸⁷⁹ Proceeds of Crime Bill 2017, s 6

⁸⁸⁰ Proceeds of Crime Bill 2017, s 7(3)

for the seizure of property that is subject to a preservation order where there are reasonable grounds to believe that the value of the property may have diminished, or be may dispose of, damaged or removed contrary to the subsisting order.⁸⁸¹

Forfeiture of the proceeds of unlawful activity in civil recovery proceedings is provided within sections 15 and 25⁸⁸² and is achieved where the property subject to the preservation order has neither been rescinded, nor interest proved by any person to the contrary, that the property is not derived from unlawful activities. With effect from the date when the court makes a forfeiture order, the property subject to the order shall be forfeited to the agency and vests in the Agency on behalf of the Federal Government.⁸⁸³ With the passage of the Bill, civil recovery procedures will become very clear which in the first instance does not require the conviction of an individual before property arising from unlawful activity is forfeited. In addition to the provisions of Part II discussed above, under Part III of the Bill, on an ex parte application by the Agency, the Court may make a discovery order in favour of the Agency where it is satisfied that the Agency is conducting a civil forfeiture investigation. To justify why unlawful property can be seized and forfeited to the government, the Constitution of Nigeria 1999 though guarantees the right to property subject to section 44 (2) (b) where it provides that 'for the imposition of penalties or forfeitures for the breach of law, whether under civil process or after conviction for an offence'. In an attempt to ensure that functions are not duplicated, the Bill seeks to amend relevant provisions in all existing legislations containing elements of confiscation, forfeitures and management of proceeds of unlawful activity⁸⁸⁴ and

⁸⁸¹ Proceeds of Crime Bill 2017, s 8(1)

⁸⁸² Proceeds of Crime Bill 2017, s 15, s 25

⁸⁸³ Proceeds of crime Bill 2017, s 21(1)

⁸⁸⁴ Proceeds of Crime Bill 2017, s 162(1) provides amendments to The National Drug Law Enforcement Agency Act, 2004, s 162(2) amends The Trafficking in Persons (Prohibition) Law Enforcement and

proceeds of unlawful activity, instrumentalities of offences and property recovered by the relevant organisations before the commencement of the proposed Bill when passed into law that has not been passed to the Federal Government shall vest in the Agency.⁸⁸⁵ It is, however, a cause of concern that with the passage of the Bill, due to government bureaucracy and inter-agency squabbles the proposed transfer of property seized by the different law enforcement agencies may not be effective and property may be lost in the process. In the same vein, the Act mandates the Agency to investigate unlawful activities, which seem to be an outright duplication of functions thus the result will be inter-agency rivalry which may result in hiding of information or even shielding persons believed to have committed an offence. Furthermore, the researcher believes that the modus of receiving information necessary for investigation and prosecution of unlawful activity is still inadequate and unattended to by the proposed Bill. For instance, officials of the EFCC and ICPC acts on petitions received from individuals, corporate bodies and other governmental and non-governmental bodies as the basis for commencing investigation into alleged corrupt practices; from political office holders against their perceived adversaries; and from the financial intelligence unit for suspicious activities report but this is insufficient as it not a holistic approach. What percentage of these unlawful activities are captured in this ring of illicit enrichment? Where corrupt leaders/officials are perceived to be 'good' to their subordinates or followers and have cascaded their illicit proceeds downward to even the office clerk, would these perceived 'good' persons ever be faced with a just trial and forfeiture? In recent times, a whistle-blowers policy has been put in place with an accompanying

Administration Act 2003, s 162(3) amends the Economic and Financial Crimes (Establishment) Commission Act, 2004, s 162(4) amends The Corrupt Practices and other related offences Act, 2000.

⁸⁸⁵ Proceeds of Crime Bill, s 162(7)

legislation in advanced stage of being passed to law aimed at unravelling corrupt people and their illicit proceeds, would this also bring about the extensive capture corruption reporting? While this may be the subject of another research, it can be argued that a more holistic mechanism of information gathering be put in place to provide law with all enforcement agencies with information relevant to the fight against illicit enrichment. For instance, overpricing of contract is one of the commonest means of stealing of government funds and law enforcement agencies should be able to have access to information about major contracts awarded and their values compared with market realities. Whether the full amounts have been given executive consent or not, it is imperative that an investigation is launched immediately without recourse to receiving petitions because such contracts would be at the behest of the incumbent. Similar to suspicious activity reporting for banks and other financial institutions, there should be suspicious transaction reporting in the public sector with very low threshold incorporated in the existing public service rules and regulations governing the operations of ministries and parastatals of government. Also, law enforcement agencies should be keen to use anecdotal audit reports issued by the internal audit units of government, although, admittedly, these sometimes are subject to manipulation and connivance as heads of ministries and agencies could bribe/intimidate the auditors to dilute the extent of graft and non-compliance in their reporting. In the same vein, law enforcement agencies should initiate regular and unannounced special investigations subject to an order by the court in the activities of government agencies employing the specialised services of forensic accountants and examiners who could help to unravel schemes aimed at syphoning funds of government. There should be a paradigm shift by law enforcement from a passive approach (receive petitions and

orders from above) before launching an investigation to an aggressive approach (special investigations, court orders, bottom-up reporting of corrupt practices) in order to nip these activities in the bud.

Proceeds of Crimes Recovery and Management Agency.

Part VI and VIII of the Bill seeks to create the Proceeds of Crimes Recovery and Management Agency.⁸⁸⁶ The Agency is expected to be a body corporate⁸⁸⁷ with perpetual succession, may be sued or be sued in its corporate name⁸⁸⁸ and may acquire, hold, purchase, mortgage property and shall be an independent body. This includes its powers and duties in respect of property seized, procedure for the preservation of controlled property, rights attaching to shares, destroying or disposing of property and notice of proposed destruction or disposal. The objects of the Agency include the enforcement and administration of the provisions of the Bill and the coordination and enforcement of 'all other laws' on the investigation, identification, tracing and recovery of the proceeds and instrumentalities of unlawful activity. It will also be responsible for overseeing the management of recovered assets, authorise and appoint private asset managers and ensure that assets managers are adequately bonded and insured. It will as well maintain: disposal systems; lists of approved auctioneers and provide fair process, lists of approved valuers and issue instructions for the realisation or security of assets; and establish a central database of the activities; and casework of the Agency, it will also be responsible for negotiating the return and management of all assets

⁸⁸⁶ Proceeds of Crime Bill 2017, S 96(1)

⁸⁸⁷ Proceeds of Crime Bill 2017, S 96(2)(a)

⁸⁸⁸ Proceeds of Crime Bill 2017, S 96(2)(b)

seized by foreign countries on behalf of the Federal and State Governments for the benefit of Nigerians.

A notable facet of the proposed Bill is the creation of confiscated and forfeited properties account. This is a designated account to be established in the central bank of Nigeria which is to be managed by the Accountant General of the Federation. Under Section 147, proceeds to this account will include funds realised from sale, management or other forms of disposal of seized, attached, confiscated and forfeited property, proceeds of property seized pursuant to the code of conduct Bureau Act and other establishment Acts, money paid by foreign countries in respect of mutual assistance on criminal matters. This is laudable because the nation lacks a database or account of seized assets. However, where allegations and counter allegations of diversion of recovered assets have been the order of the day, it is still doubtful if the account will not be susceptible to corrupt infractions and dominance by the executive class since the account will be managed by the Accountant General who in itself is subservient to the President.

While the objectives of the Agency are laudable, creating a new agency to investigate, prosecute and manage recovered assets will only contribute to additional financial burden to the already heavy cost the government has been unable to settle. Under Section 105 the fund accruing to the agency is made up of a take-off grants, annual subventions and other budgetary allocations received from the federal government, other grants, gifts, aid and five percent of the total amount realised from proceeds of unlawful activities that has been paid into the confiscated and forfeited properties account.⁸⁸⁹ A country where ghost workers⁸⁹⁰

⁸⁸⁹ Proceeds of Crime Bill 2017, s 105

⁸⁹⁰ Ismail Akwei, 'Nigerian rids civil service of 50,000 ghost workers, saving over \$600m'

constitute a sizeable portion of recurrent cost, and payment of pension liability is not guaranteed may provide further opportunities for corruption and outright embezzlement of recovered funds.

CONCLUSION

Corruption cases abound, and the need for a speedy regime of seizing the proceeds of unlawful activity before criminal conviction is attained is a step in the right direction in the fight against corruption. The criminal conviction approach to combat high profile cases of corruption is subject to abuse and delays arising from the exploitation of court processes. Since non-conviction based recovery targets the proceeds of unlawful activities and the instrumentalities, conscientious effort is needed on the part of law enforcement to sharpen their skills in enforcing these laws. Since corrupt public officials are materially wealthy, they would employ the best of defence lawyers and other professionals to devise means of legitimising their illicit wealth. It is recommended that law enforcement agencies should have regular training to be able to meet these challenges.

The funding of law enforcement agencies in the fight against illicit enrichment is one to be given serious attention. The research noted that the approach adopted by the South African CARA is one to be adapted in the proposed Proceeds of Crime Bill. The provisions of CARA gives more focus on crime fighting, it's independent of the executive that may attempt to cripple the activities of law enforcement by underfunding or using other antics to slow down the wheels of the prosecution

<<http://www.africanews.com/2016/12/28/nigeria-rids-civil-service-of-50000-ghost-workers-saving-over-600m/>> accessed 16 March 2018

especially where it is complicit. Allowing the parliament to interface with the committee managing the CARA and thoroughly review viable methods to curtail criminality provides an immediate opportunity for legislative reviews. Rather than setting up additional agencies of government which will create more cost to the state, it is suggested that the Proceeds of Crime bill be merged with existing legislation, like the Economic and Financial Crimes Act, 2004 to give the agency expanded powers to fight financial crimes from both criminal conviction and asset recovery perspective. The advantage of this uniform approach is that it allows for greater coordination within the same agency, reduces bureaucracy and enhances knowledge sharing.

CHAPTER EIGHT

GOVERNANCE ISSUES AND REFORMS

When the righteous are in authority, the people rejoice.⁸⁹¹ Sadly, most developing countries fall short of the good governance indices. That corruption is destructive and complicated is no longer in dispute, yet it remains ubiquitous in the functioning of society. How can one justify that a Health Minister who has the duty to protect lives of people divert funds allocated to primary health care or for providing basic health care facilities for his personal use? or a public official who converts for himself funds allocated for basic welfare needs such as water, road, schools or for securing the state? The corrupt nature of the ruling class have filtered down and infected the fabric of the socio-political, economic and cultural environment of most developing countries.

Lack of political will at implementing programmes required to provide safety nets for the populace has encouraged intending political office holders to view governance as a business venture. Acts of diversion of government fund, diversion of foreign aid, outright embezzlement and looting of the treasury is the result. Corruption has helped to concentrate income and wealth in the hands of a few individuals and exacerbated inequalities and inequalities in the distribution of resources.

In this chapter, we have argued for the review and strengthening of executive and judicial (including constitutional) reforms to close the loopholes used to perpetuate corruption. Additionally, legal tools such as unexplained wealth orders,

⁸⁹¹ Proverbs 29:2 The King James Version

international cooperation through legal mutual assistance and re-awaking the urgency for criminalising all known facets of unjust enrichment to achieve parity in society. Because good governance and political will are essential to sustain the wheel of development, we conclude the chapter by suggesting complementary and innovative approaches aimed at preserving the wealth of the state to the benefit of the masses.

8.1 Good Governance

Citizens expect a state to protect economic activities from corruption, money laundering and other illegal and criminal practices by establishing clear rules to govern the economic relationships and consistently enforce them.⁸⁹² The quality of and adherence to these rules have a direct impact on the internal markets, fostering trust in the public and democratic institutions, and attract foreign investment. Governance has been defined as ‘the sum of the many individuals and institutions, public and private, manage their common affairs and good governance among other things ‘participatory, transparent and accountable.’⁸⁹³ Governance according to Venter Dennis ‘has a strong normative overtone. It is the practice of good government, and remains essentially a fragile process that depends on the restraint of the ruler and the tolerance of the ruled. Certainly,

⁸⁹² Commission on Security and Cooperation in Europe, ‘The Link between Security and Good Governance, 49 Human Rights, the Helsinki Accords and the United States: Selected Executive and Congressional Documents’
<https://www.csce.gov/sites/helsinkicommission.house.gov/files/Official%20Transcript_1.pdf> accessed 2 March 2018

⁸⁹³ *ibid*

governance is a more useful concept than government or leadership mainly because it does not prejudice the locus or character of real decision making.⁸⁹⁴

The concept of good governance emerged at the end of the 1980s, at a time of unprecedented political changes, such as the collapse of the Berlin wall, the developmental problems in Sub-Saharan Africa rejecting the standard explanations of Africa's failures in development. Sub-Saharan Africa economist had argued that the region's difficulties were due to kleptocratic elites.⁸⁹⁵ A 1989 World Bank Study report on SSA observed, that Africa needs 'not just less government but *better government* – a government that concentrates its efforts less on direct interventions and more on enabling others to be productive.'⁸⁹⁶ In that study, the term 'governance' described the need for institutional reform and a better and more efficient public sector in sub-Saharan countries and defined governance as 'the exercise of political power to manage a nation's affairs.'⁸⁹⁷ This study introduced governance without explicitly referring to the connotation 'good', however, in the foreword of the report, the then World Bank President Conable used the term 'good governance', to refer to a 'public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public.'⁸⁹⁸ Governance according to the study 'is epitomized by predictable, open,

⁸⁹⁴ Venter Denis, 'Democracy, Good Governance and leadership' <http://foundation-development-africa.org/africa_development/africa_general/democracy_governance_leadership.htm> accessed 1 March 2018

⁸⁹⁵ Catherine Weaver, 'The Meaning of Development: Constructing the World Bank's Good Governance Agenda' in Rawi Abdelal, Mark Blyth and Craig Parsons (eds) *Constructing the International Economy* (Cornwell University Press 2010) 55. As the author noted, the draft report was opposed by senior managers and executive directors because the language was too political, however, in the second draft, a more neutral language of good governance was used which was defined as the exercise of power to manage a nation's resources.

⁸⁹⁶ The World Bank, 'Sub-Saharan Africa from Crisis to Sustainable Development: A Long-Term Perspective Study' <<http://documents.worldbank.org/curated/en/498241468742846138/pdf/multi0page.pdf>.> accessed 10 February 2018

⁸⁹⁷ *ibid*

⁸⁹⁸ World Bank 2007, p. I para 3.

and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.⁸⁹⁹ The concept on governance now refers to ‘the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide goods and services.’⁹⁰⁰ Kauffman and Kraay, further defined governance as:

*The traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions.*⁹⁰¹

These definitions provide three distinct aspects of governance:

- the form of political regime;
- the process by which authority is exercised in the management of the country's economic and social resources for development; and
- the capacity of government to design, formulate and implement policies and discharge functions.

⁸⁹⁹ World Bank 1994, p. vii.

⁹⁰⁰ World Bank 1992, p. 1.

⁹⁰¹ Daniel Kaufmann and Aart Kraay, ‘Governance Indicators: Where are we, where should we be going?’ <<http://siteresources.worldbank.org/DEC/Resources/KraayKaufmannGovernanceIndicatorsSurveyNov12.pdf>> accessed 3 October 2016. Since corruption is closely linked to poor governance as Khan expressed: the ‘pressure to reduce corruption and move towards good governance is both necessary and desirable, but these ends cannot be achieved unless attention is given to other governance capacities required for accelerating that sustaining growth.’

More so, is the importance of a capable state operating under the rule of law, and as Kaufmann and Kraay underscore, good governance emphasises the 'role of democratic accountability of governments to their citizens.'⁹⁰²

There are identified challenges of good governance about sub-Saharan Africa. The United Nations Economic Commission⁹⁰³ for Africa noted, that the 'increasing level of corruption in Africa is the result of three factors:

- i. The level of institutional weakness in many African countries makes it possible for political leaders and public servants to misuse resources and abuse their power without being checked;
- ii. The continued decline in the living standards of public servants associated with poor incentives.....makes corruption attractive and a viable means of social livelihood; and;
- iii. The blind eye often turned to corruptors by western countries. Foreign companies and private interests usually take advantage of the weak and ineffective institutional mechanisms available to deal with corrupt practices. This has allowed international companies to corrupt state officials to gain undue advantage or secure political privileges in state policies.'

In the same vein, the concentration of political and economic power in the hands of powerful elites combined with inadequate checks and balances gives rise to the abuse of privileges. This concentration of power facilitates the subversion of domestic institutions including law enforcement agencies, suppress the press and

⁹⁰² Ibid, page 6

⁹⁰³ UNECA, 'Measuring Corruption in Africa: The International Dimension Matters' <https://www.uneca.org/sites/default/files/PublicationFiles/agr4_eng_fin_web_11april.pdf> accessed 2 March 2018

ultimately undermine the rule of law. As Ayittey 2008 observed, the ruling elites exercise this power to direct economic activity, dispense government positions, extract rents, build personal fortunes and dispense patronage to buy political support. Potential rivals are enticed through appointments and favours but withdrawn at the first sign of disloyalty.

The central fact of contemporary African governance is that enormous political and economic power is centralised in the hands of African presidents and loyal elites. Checks and balances on that power remain inadequate. In particular, the separation of powers among the executive, legislative and judicial branches of government does not function properly, as it does in western democracies, to check the power of African leaders. Besides, the people often do not have the means or power to control the activities of the state custodians, in addition to the fact that the existing laws do not adequately constrain the state to be accountable.

The World Bank dataset - from 1996 until 2015, measures six dimensions of governance as follows:

- Voice and accountability, measures the extent to which a country's citizen are able to participate in selecting their government, as well as freedom of expression, freedom of association and free media;
- Political stability and absence of violence measures the perception of the likelihood of political instability and or politically motivated violence including terrorism.
- Government effectiveness, measures the quality of the public services, the quality of the civil services and the degree of independence from political

pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.

- Regulatory quality captures the perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.
- The rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society and in particular the quality of contract enforcement, property rights, the police and the courts, as well as the likelihood of crime and violence
- Control of corruption. This measures the extent to which public power is exercised for private gain, including both petty and grand corruption, as well as capture of states by elite and private interests. The World Bank has come with several initiatives designed to ensure that government processes are transparent. These include transparency in procurement especially in the tenders process and award of significant contracts, in public-private partnership arrangements, transparency in the extractive industry, construction contracts, recommending appropriate freedom of information legislation, providing reports to benchmark governments in transparency reporting. Boosting transparency in the areas of budgets, natural resources, aid, and the retention of resources can significantly assist citizens in developing countries adequately track resources of the country and how they are utilised. For example, in the yearly budgeting process, transparency will ensure that governments publish the annual budget proposal, the appropriation, the actual expenditure compared with the budget and the comprehensive audit report for the year. This is a far cry

from reality which still obscures the activities of government from the citizens thus shrouding their actions in secrecy.

8.2 Political Will and The Lack of It

Governance includes formal institutions, regimes empowered to enforce compliance as well as informal arrangements that people, and organisations either have agreed to or perceive in their interests. Poor governance is characterised by a culture of impunity, where public officials feel little obligated to be accountable to its citizens and the citizens, in turn, have limited expectations that the elected leaders should be responsible for their actions. No anti-corruption mechanism or strategy will succeed without strong leadership and political will. Political will involves building legitimacy, credibility and broad-based political support and compliance both in society and within the government. When conceived, political will includes leaders in all occupations but especially in governance, the executive, legislature and judicial arms to show proper commitment. Political will has varying definitions due to its complexity. Brinkerhoff defined political will as 'the commitment of political leaders and bureaucrats to undertake actions to achieve objectives and to sustain the cost of those actions over time.' Some have argued that for political will to emerge and develop over time, 'power holders must want to take action as a result of their volition, feel capable of successfully implementing such action, and be committed to such implementation as would render inaction politically costly.' Another author defines it as 'the motivation to engage in strategic, goal-directed behaviour that advances the personal agenda and objectives of the political actor that inherently involves the risk of relational and reputational capital.' Political will is essential success when it comes to promoting goals with increased political costs such as corruption, and the lack of it could

become the term to describe failure when the underlying reasons for such failure are unclear (Post et al. 2010).⁹⁰⁴ Post et al. defines political will as ‘the extent of committed support among key decision makers for a particular policy solution to a particular problem.’⁹⁰⁵ The definition suggests that political will is meaningful only at the group level and those decision makers should have sufficient authority, capacity and legitimacy, and should be strongly committed to their preferences. In arguing against an individual level concept of political will, the writers contend that the Greek idea of ‘polis’ denotes ‘a social collective and political will involves aggregating preferences in such a way that is meaningful for outcomes in political processes.’⁹⁰⁶ As they noted ‘singular preferences about political issues and,...personal willingness to act do not constitute political will unless *‘I am a totalitarian dictator and can effectively force my preferences on an entire jurisdiction.*’⁹⁰⁷ The definition characterises individual level concept of political will with an authoritarian state in which the ‘autocrat has control over the military and, consequently, control over other political actors and the populace through the use of fear and intimidation.’⁹⁰⁸ In the same vein, such regimes lack transparency and disregard the rule of law which helps to obscure the true identities of the potential policy blockers and decision-makers who could contribute significantly to a set of policy passage and implementation.⁹⁰⁹ On the other hand, group level decision making is more characterised with ‘democratic regimes, the number of veto players depends on the configuration of formal and informal political institutions;’ there is

⁹⁰⁴ Lori Ann Post, Amber N. W. Raile and Eric D. Raile, ‘Defining Political Will’ [2010] 38(4) Politics & Policy 653

⁹⁰⁵ Ibid

⁹⁰⁶ Ibid

⁹⁰⁷ Ibid

⁹⁰⁸ Ibid

⁹⁰⁹ Ibid

judicial independence, and the law-making process is devoid of tyranny and suppression by the executive arm. According to Hopkinson and Pelizzo, to curb corruption, the commitment of government and parliament is required.⁹¹⁰ If the political will is absent at the top, there will be a general lack of commitment to enforce laws and punish the corrupt. In the same vein, the duty of elected representatives and other public officials is imperative for corruption to be curbed. For Strapenhurst and Sedigh, if those who govern a society lack political will to refrain from corruption and institute change, real reform is difficult to undertake and virtually impossible to sustain. Kpundeh and Dininio believes that political will, as it applies to anti-corruption crusade is most effective when it is institutionalised and not dependent on the personality and intentions of a particular person.⁹¹¹ In the African context, however, the situation is a bit more different. Although most African governments are democratic, they are saddled with weak institutions, and in most instances, as suggested by some writers, 'Africa needs strong, dedicated and self-confident leaders who must be the creators of great ideas, command loyalty of their people and be committed to the development of their countries. Skilful, visionary and capable leadership is the key to the reforms Africa need, and the policy actions that are required for the development of the continent: a true leader must have the courage and ability to communicate reality to its followers.' In reality, African countries that have experienced some strong effort in its determined fight against corruption emanates from the political will of the individual leaders other than the institutions. But as Marshall argues, leadership is necessary

⁹¹⁰ John Williams, 'Building Parliamentary Networks' in Rick Stapenhurst, Niall Johnston and Riccardo Pelizzo (eds.) *Role of Parliament in Curbing Corruption* (World Bank Development Studies, The World Bank 2006) 217

⁹¹¹ *ibid*

but not a sufficient condition for controlling corruption.⁹¹² Political will, therefore, must be given space to grow from within a political system and eventually becomes an integral part of the entire system.

About Nigeria, Achebe noted that 'the trouble with Nigeria is simply and squarely a failure of leadership. There is nothing wrong with the Nigeria land, or climate or water or air or anything else. The Nigerian problem is the unwillingness of its leaders to rise to its responsibility, to the challenge of personal example which is the hallmark of true leadership.'⁹¹³ Prevalent in poor governance structure is one of monopolies on power which undermines the operation of institutional checks and balances and disrespect for the rule of law. There is the power of vested interest, and civil society organisations who supposedly ought to be voices for the masses, as well as check on governance, are silenced, and the viable opposition is suppressed. Factors that could contribute to weak governance includes corruption, weak institutions, conflicts of interest, lack of political will, inadequate resources, weak enforcement and lack of stakeholder participation in legislation and decision making. The fight against corruption is no longer discussed as a matter of transparency and information. It has the theme which touches on the subjects of accountability, the rule of law, public sector management and much more. Corruption as earlier defined in this thesis by the World Bank is 'the abuse of public power for private gain'.⁹¹⁴ Thus, corruption encompasses two elements: first, a moral abjection Court misuse of power, and second, as a result, the substantive or incorporeal gain.

⁹¹² *ibid*

⁹¹³ Chinua Achebe, *The Trouble with Nigeria* (Revised ed., Fourth Dimension Publishing Co. 2000)

⁹¹⁴ World Bank, WDR 1997, 102

The World Bank's realisation that corruption was a much bigger obstacle to development than initially anticipated led it in 1996 to launch, by the former World Bank President Wolfensohn, 'that the Bank would focus more on the fight against corruption by assisting countries to combat the 'cancer of corruption.' The following year, 1997, a 'comprehensive anti-corruption policy framework' was launched which focused mainly on the issue of corruption of governments and ensuring that nearly all loans granted by the Bank in that year for public sector management contained specific targets relating to the fight against corruption.⁹¹⁵ Therefore, the year 1997 marked a starting point for the Bank's enhanced engagement in the fight against corruption. From the end of the 1990s on, the fight against corruption became more and more an independent topic on the Bank's agenda. As already mentioned, in 2007 former Bank president Wolfowitz and the United Nations initiated the Stolen Asset Recovery (StAR) Initiative, which aims to return those state assets stolen through corruption. Also in 2007 'Governance and Anti-Corruption Strategy' made clear that governance and anti-corruption are not synonymous because corruption would also occur in the private sector while governance was looking at the performance of the state and public institutions. Former World Bank president Wolfowitz stressed: 'Improving governance is certainly about fighting corruption, although it is also about much more than fighting corruption.'⁹¹⁶

One veritable tool to ensure the sustenance of policies and programmes including but not limited to the fight against corruption and other social menace is the

⁹¹⁵ World Bank, annual report 1997 (79)

⁹¹⁶ Wolfowitz, Paul, speech at the International Conference on Improving Governance and Fighting Corruption, Brussels, 15 March 2007, available at <<http://go.worldbank.org/FRQQCB8740>> assessed 21 September 2017

presence of a strong political will on the part of state actors. The absence or lack of political will on the part of state actors (legislators, bureaucrats and judicial officers) has been cited as the most frequent reason for unsuccessful governance and economic reform efforts globally. Lack of political will most often is reflected in inaction of politic and judicial leaders in enforcing laws and regulations. In other instances, this is manifest in a lack of commitment of adequate resources (underfunding) of viable programmes and institutions of government saddled with the responsibility to either regulate or enforce activities of state, or a failure to follow through on public declaration or promise.⁹¹⁷ Political support is crucial for setting strategic direction, securing planning resources, championing the policy change and enforcing implementation. The concept of political will, however, is complex for some reasons: first, it involves intent and motivation which are inherently intangible phenomena and are hard to access accurately or objectively and is also subject to manipulation and misrepresentation. Second, political will may exist at both individual and collective levels – for an individual, it can relate to ones' characteristic reflecting personal values, desires and priorities which are different from all others. Third, political will is reflected most commonly in actions although there could be written or spoken words by the political actor.

As noted by Kpundeh and Dininio identifying political will to fight corruption is not always straightforward.⁹¹⁸ To defuse opposition, bolster support or placate external agencies, anti-corruption rhetoric is used. In other instances, some politicians

⁹¹⁷ Carmen Malena, 'Building Political Will for Participatory Governance: An Introduction' in Carmen Malena (eds.) *From Political won't to political will: Building Support for Participatory Governance* [Krumarian Press 2009]

⁹¹⁸ Sahr Kpundeh and Phyllis Dininio, 'Political will' in Rick Stapenhurst, Niall Johnston and Riccardo Pelizzo (eds.) *Role of Parliament in Curbing Corruption* (World Bank Development Studies, The World Bank 2006).

publicize allegations and evidence of corruption in an effort to demonstrate opponents or former administrations' hypocrisies.⁹¹⁹ Kpundeh and Dininio identified six indicators of political will, namely:

- i. There must be a domestic origin of the initiative: that is, the principal advocates for change perceive corruption as an issue requiring attention or whether an external group has induced or coerced the advocates to endorse the anti-corruption point;⁹²⁰
- ii. There must be a high degree of analysis applied to the understanding of the context and causes of corruption. This involves recognising the complexities that give rise to the abhorrent behaviour, identifying and developing measures to deal with those institutions, mandates and practices that either impede or promote integrity in government;⁹²¹
- iii. There should be a strategy in place to ensure a high degree of participation in the change effort, incorporating and mobilising the interest of many stakeholders. This involves shared ownership of the process to engender sustainability in spite of the support from the leadership;⁹²²
- iv. The inclusion of prevention, education and sanctions in the reform strategies. They noted, 'the record of failure is exceedingly high for anti-corruption efforts that use the blunt instrument of prosecution (or fear of prosecution) as their principal tool for compliance.'⁹²³ Effective strategies as they argue must include prevention and education as well as prosecution, which will help to provide positive incentives for compliance, publicise

⁹¹⁹ *ibid*

⁹²⁰ *ibid*

⁹²¹ *ibid*

⁹²² *ibid*

⁹²³ *ibid*

positive outcomes and establish the for compromised individuals and institutions. Additionally, as noted by Fjelstad and Isaksen, because corruption is itself a symptom of governance failure, *the higher the incidence of corruption, the less an anti-corruption strategy should include tactics that are narrowly targeted at corrupt behaviour and the more it should focus on the broad underlying features of the governance environment.*⁹²⁴ They further argued that support for anti-corruption agencies and public awareness campaigns are likely to have *limited success* in environments where corruption is rampant and the governance environment flawed. Doig et al. argue that, in such environments, anti-corruption agencies are prone to be used as tools for political victimisation.⁹²⁵ For instance, in a recent show of now non-support to the ruling party and the President Muhammadu Buhari's administration anti-corruption fight, the opposition party (PDP) senators in a signed communique issued to the press, accused the ruling party of 'belligerent attitude toward PDP members'. Their grievances were based on 'the deployment of state instrument of coercion to intimidate an independent arm of government like the legislature...and the glaring witch hunt of perceived opposition elements.'⁹²⁶ They argued that the 'war on corruption should not be selective, must be fought with sincerity and not politics' and since the war on corruption had devolved into probing of campaign funds, the government should extend the probe to the ruling

⁹²⁴ Italics added

⁹²⁵ Alan Doig, David Watt, and Robert Williams, 'Measuring 'Success' in Five Anti-Corruption Commissions: The Cases of Ghana, Malawi, Tanzania, Uganda and Zambia' <<http://www.u4.no/publications/measuring-success-in-five-african-anti-corruption-commissions/>> accessed 3 January 2017

⁹²⁶ Hassan Adebayo, 'PDP Senators to Buhari: We wont support you again' Premium Times (Lagos, 22 June 2016) <<http://www.premiumtimesng.com/news/top-news/205763-pdp-senators- a -wont-support.html>> accessed 2 January 2017

party's (APC) campaign funds and other parties too other than the deposed party (PDP).⁹²⁷ To further bolster the issue of political victimisation and lop-sidedness in the anti-corruption efforts, Shah and Schacter contends that such interventions are more appropriate in a low corruption setting where the governance fundamentals are reasonably sound, and corruption is a relatively marginal phenomenon;⁹²⁸

v. Adequate resources dedicated for anti-corruption reforms.

A former President Olusegun Obasanjo who during his tenure set up anti-grat agencies (the ICPC and EFCC) investigated and prosecuted corrupt government officials who misappropriated public money. However, he received criticism for been selective and focused on the president's enemies or the politically expendable and doing little to address institutional failings. 'Mr President, I must be bold to tell you that nobody believes in your anti-corruption war...Although corruption is fast trickling to the lowest level of government, over 50% of it occurs in the presidency....., in few instances where the government has prosecuted people for corruption, they invariably turned out to have political disagreements with you.' The Nigerian Labour Congress, for example, remarked that Nigeria needed more thorough, result oriented and comprehensive measures against corruption at all levels and spheres of life. The success rate has been low in compliance with Section 308 which permits the investigating agencies like the EFCC and ICPC to prosecute erring political office holders including the president.

⁹²⁷ ibid

⁹²⁸ Anwar Shah and Mark Schacter, 'Combating Corruption: Look before You Leap' <<https://www.imf.org/external/pubs/ft/fandd/2004/12/pdf/shah.pdf>> accessed 6 February 2018

8.3 Civil Restitution and Unjust Enrichment

The United Nations Convention on Corruption places emphasis on alternatives to the traditional criminal approaches to fighting corruption. Under Article 51 of UNCAC, one fundamental principle of the convention is recovery and restitution of the proceeds of corrupt practices. It requires states to bring proceedings in their own and other jurisdictions to pursue ill-gotten gains of those who have been involved in corruption.

Smith asserts that restitution is a legal response to unjust enrichment⁹²⁹ and posit that there are two distinct aspects of the law: the cause of action in unjust enrichment and the response of disgorgement that is available for certain wrongs. Restitution is the restoration of some specific thing to its rightful owner or status. It is concerned with a situation whereby benefit is recoverable by way of compensation for loss suffered from an individual who had enriched or benefitted himself from another's expense. Unjust enrichment arises where a party receives gains or benefit because of another's efforts or acts, but for which that other has received no compensation. An enrichment means anything of value whether moveable or immovable, money or services.⁹³⁰ Unjust enrichment entitles the plaintiff to restitution. While the standard response to a wrong is compensation for certain wrongs,⁹³¹ gain-based responses are available.⁹³² Other wrongs, which may trigger restitution, include property torts⁹³³ and breach of fiduciary duty.⁹³⁴ As

⁹²⁹ Lionel D. Smith, 'The Province of the Law of Restitution' (1992) 71(4) Canadian Bar Review 672

⁹³⁰ J. Beaston, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press 1991)

⁹³¹ Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 Western Australia Law Review 13

⁹³² James Edelman, *Gain Based Damages* (Hart Publishing 2002). See also *Attorney-General v Blake* [2001] 1 AC 268

⁹³³ *Livingstone v Rawyards Coal Co* (1880) 5 App cas 25; *Strand Electric v Brisford Entertainment* [1952] 2 QB 246

⁹³⁴ *Reading v Attorney-General* [1951] AC 507 where it was held that the gain made by Sergeant Reading in shielding smugglers with his uniform through road checkpoints was treated as gains made at the expense

Rider observed, 'it is the ability of the law to trace the proceeds of corruption and fraud into other property and to regard it as belonging to the person with the equitable claim that is perhaps the most significant weapon.'⁹³⁵ We have noted in separate chapters of this thesis how government officials have diverted millions of US dollar from their countries for private gains. Based on equitable principles that no person is allowed to profit at another's expense it is imperative that stolen wealth is recovered by the state and returned for beneficial use.

8.4 Illicit Enrichment

Public officials engage in corrupt activities essentially to reap the expected monetary rewards. Some officials before been elected or appointed into offices had little or modest income. They enter public service from humble beginnings and emerge tremendously wealthy due to lucrative corrupt engagements. States often face vast procedural challenges in successfully detecting and prosecuting corrupt officials since they typically leave no evidence trail. The officials and their collaborators most often enter into secret, illegal agreements, usually without third-party witnesses or documentation. The only signal that corrupt acts have transpired would be in the apparent increase in wealth enjoyed by the officials arising from the list of luxury cars, boats, extravagant homes and exotic vacations they embark upon.

of the Crown in the sense that though the Crown lost no money to him in the subtractive sense, the gain of reading in breach of his fiduciary duty to the crown. See also *Boardman v Phipps* [1967] 2 AC 46

⁹³⁵ Barry Rider, 'Strategic Tools – for now and perhaps the future?' in Barry Rider eds *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015) 741

Article 20 of UNCAC requires that subject to the constitution and legal system of a state, to consider adopting such legislative and other measures to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase of the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. It makes provision for the requirement of intention (*mensrea*) for the crime to be committed. The Bribery ordinance in Hongkong is of interest in this respect as it creates a statutory presumption that any wealth over and above the lawful remuneration of a public official is the proceeds of corruption.⁹³⁶ Similar provision is contained in the Nigerian Code of Conduct Bureau and Tribunal Act where political office holders are expected to declare their assets immediately after taking and thereafter after every four years or at the end of his term of office. Any property acquired by a public officer after declaration which is not fairly attributable to income, gifts or loans approved by the Act shall be deemed to have been acquired in breach of the Act. Any property acquired in abuse or corruption of a public officer found will be seized and forfeited to the State.⁹³⁷ Chaikin recommends conducting a net worth analysis to determine whether a political leader has accumulated wealth.⁹³⁸ Net worth analysis is an invaluable tool in circumstances where there is no direct link between the political leader and alleged activity, and where the target has acquired many assets, or where the records or documents showing the financial activities of the political leader are missing, destroyed or are unreliable.⁹³⁹

⁹³⁶ S. 10, Prevention of Bribery Ordinance (Cap. 201) Hong Kong

⁹³⁷ S. 23(2)(c) Chapter C15 Code of Conduct Bureau and Tribunal Act, No. 1 of 1989, Laws of the Federation of Nigeria 2004

⁹³⁸ David A. Chaikin, 'Controlling Corruption by Heads of Government and Political Elites' in Peter Lamour and Nick Wolanin (eds) *Corruption and Anti-Corruption* (ANU Press 2013) 97

⁹³⁹ Ibid

Some have argued that criminalizing illicit enrichment violates human rights⁹⁴⁰ because it puts burden on the accused person to put forth evidence demonstrating the origins of the assets at issue.⁹⁴¹ Others disagree that the right to corruption-free society constitutes a fundamental human right and that, as a corollary, a breach of this right is a crime of universal interest under international law, therefore, it does not amount to a violation.⁹⁴² Besides, the criminalization of illicit enrichment by UNCAC for instance does not necessarily include a reversal of the burden of proof, rather, the onus is upon the prosecutor to prove his case beyond a reasonable doubt which is confined to the disproportionate assets of the accused. I contend that given the scale of grand corruption perpetuated by corrupt officials that there is the need to amend the burden of proof provision in corruption matters whereby the onus is shifted from the prosecution to the accused.

8.5 Executive Immunity, Corruption and Reforms

'a system is corrupt when it is strictly profit-driven, not driven to serve the best interest of the people'⁹⁴³ – Suzy Kassem

Immunity is an ancient concept with roots in the old feudal structure of medieval England at the time of absolute monarchies in which 'it was the norm that sovereignty and governmental powers were personified in the person on the throne of England'. The English crown was at the top rung of the feudal ladder and as

⁹⁴⁰ The presumption of innocence, the right to silence and the privilege against self-incrimination. This line of argument overlooks the fact that corruption is a clandestine offence and that certain corrupt acts are naturally difficult to detect and hardly impossible to discover evidence of their commission.

⁹⁴¹ Jeffrey R. Boles, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offences and Human Rights Violations' (2013) 17 NYUJ Legislation Policy 835

⁹⁴² Thomas R. Snider and Won Kidane, 'Combating Corruption Through International Law in Africa: A Comparative Analysis' [2007] Cornell Int'l L.J 691, 729. See Ndiva Kofele-Kale, op cit, 97

⁹⁴³ Suzy Kassem, *Rise Up and Salute the Sun* [Awakened Press 2011]

such the person occupying it was not subject to the court within the realm. It is founded on the antiquated legal principle of *rex non-potest peccare* (the king can commit no wrong). As the king enjoyed absolute immunity, he could neither be impeded in his courts nor subject to any foreign jurisdiction. Menelaus of Sparta confirmed that the king was above the law of the Realm when he said: 'when a king takes spoils, he robs no one; when a king kills, he commits no murder, he only fulfils justice.' Black's dictionary defines immunity as 'any exemption from a duty, liability, or service or process...such as exemption granted to a public official.' Immunity insulates and shields the beneficiary from liability that would otherwise have been imposed. An immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the persons, activity or entity in question at the expense of those injuries by its tortuous act. Immunity protects the holder from liability that would otherwise have been imposed. Immunity is not a defence to a legal action; it eliminates or postpones a person's ability to advance a legal claim against the immune for wrongful action. If a legal claim is filed against the immune, he or she only needs to ask the court to dismiss the claim by the immunity, without necessarily filing a defence to the claim. Immunity may be qualified or absolute. Qualified immunity exempts the beneficiary from civil liability that is conditional or limited, for instance, by a requirement of good faith or due care. This applies to judges and lawmakers in Nigeria. Absolute immunity, on the other hand, provides an exemption from civil liability that is accorded to officials while performing their duties. In Nigeria, for instance, by Section 308 (1) of the 1999 Constitution 'no civil or criminal proceedings shall be instituted or continued against the President, Vice President, Governors and

Deputy Governors during their period of office.’ The purpose of the immunity contained in the Constitution is to bar any form of inhibition of the office holder in the performance of his duties during his tenure in office. It is a temporary privilege which ensures that no one is allowed to stop the wheel of governance by holding the President or Governor to ransom under any guise. It is a temporary protection intended to shield the occupant of the office from distractions while executing the duties inherent in that office.⁹⁴⁴ The implication of the immunity clause is that any of the persons to whom the section applies shall not be arrested or imprisoned either, in pursuance of the process of any court or otherwise and no process of any court requiring or compelling the appearance of the person shall be applied for or issued. The immunity granted under section 308 of the Nigerian Constitution is personal and not official. Thus, the immunity covers them in their private capacity and does not extend to the following situations:

1. Civil proceedings against that person in his official capacity.
2. Civil or criminal proceedings where he/she is only a nominal party.⁹⁴⁵

It implies therefore that the person occupying the position of president or Governor is exempt from legal action whereas the office of the president or governor may be sued or joined in a suit. Additionally, the person so protected under the immunity clause cannot continue to pursue an appeal or any other court action against other

⁹⁴⁴ *Dalhatu v. Muazu* [2002] 16 NWLR (Pt 793) 319, supra, note 12. By s. 308(3) of the 1999 Constitution, a person holding the office of President or Vice-President, Governor or Deputy Governor, is entitled to enjoy constitutional immunity. Section 3 of the 1999 Constitution provides that ‘There shall be thirty-six States in Nigeria...’ It follows therefore that the immunity clause in the 1999 Constitution benefits 74 public officials at both the federal and state levels during any four-year term. The immunity ceases once the beneficiary is removed from office or when his term of office expires.

⁹⁴⁵ Section 308(2); *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228

persons, once he assumes office.⁹⁴⁶ This immunity does not extend beyond the tenure in office of the officials captured in section 308 of the constitution.

It has been argued that the immunity clause is one of the root causes of endemic corruption in Nigeria. As Plato states:

No man can be imagined to be of such iron nature that he would stand fast in justice. No man would keep his hands off what was not his own when he could safely take what he liked out of the market. Plato, *Politeia II*, 359-360

Studies shows that immunity has a pernicious effect on the quality of governance in established democracies. Immunity provides politicians with extra means to reward those that help them put them in power. It also reduces accountability and encourages those disposed to criminal activities to run for public office, thereby producing poor governance outcomes in modern democracies.⁹⁴⁷

Remarkably, the South African Constitution make no express provision for immunity of the President or his vice. In their study of constitutional immunity in relation to the various immunity regimes, legislators and head of state of government, they contend that immunity provisions are strongly associated with poorer governance, stronger immunity is associated with more significant corruption, bribery, and the diversion of public funds.⁹⁴⁸ While in reality executive immunity still exists, there is the need to review existing laws to accommodate the

⁹⁴⁶ In the case of *Tinubu v I.M.B. Securities Plc* (2001) 16 NWLR (pt.740)670, the court of appeal adjourned the case until the appellant shall have vacated the office. In upholding the decision of the appeal court, the Supreme Court held that 'section 308 constitutes a total prohibition and any step taken to proceed with the appeal is a contravention of Section 308(1).'

⁹⁴⁷ Joseph Maingot and David Dehler, *Politicians above the Law: A Case for the Abolition of Parliamentary Inviolability* [UK Ed., Baico Publishing 2010]

⁹⁴⁸ Karthik Reddy, Moritz Schularik and Vasiliki Skreta, 'Immunity' <http://web-docs.stern.nyu.edu/old_web/economics/docs/workingpapers/2012/Reddy_Schularick_Skreta-Immunity_Oct2012.pdf> accessed 12 September 2017

present realities. Although constitutional provision exists for the removal of executives from office, this is impracticable in an environment characterised by the weak institution and the parliament which is conferred with the responsibility to institute impeachment proceedings is also accused of corruption, lacks the moral capacity to dispense its function correctly.

8.6 Judicial Corruption and Reforms

Judicial corruption is a global problem.⁹⁴⁹ In a recent survey of the judicial system in Africa, 33% believe that most or all of the judges and magistrates are corrupt, 54% reported that obtaining assistance from courts was difficult and 30% paid a bribe to get assistance from courts. Judicial corruption is the ‘abuse of court process or judicial process by judicial or non-judicial officers, for purposes of satisfying their pecuniary or personal needs, which may carry monetary or non-monetary values.’ Judicial corruption involves the misuse of public power or entrusted power for private gain by people charged with the administration of justice.⁹⁵⁰ Judicial corruption also includes all forms of inappropriate influence that would damage the impartiality of the justice system, which includes lawyers and other administrative support personnel. Weak public trust, high perceptions of corruption, and difficulties encountered when engaging with the courts make access to justice a challenge in many African countries. According to the former chair of Transparency International, Huguette Labelle, ‘equal treatment before the law is a pillar for democratic societies. When greed or political expediency corrupt

⁹⁴⁹ The United Nations Office for Drug Control and Crime Prevention (UNODC), ‘Judicial Integrity and its capacity to enhance the Public Interest’

<http://www.unodc.org/documents/nigeria/publications/Otherpublications/Judicial_Integrity_and_its_Capacity_to_Enhance_the_Public_Interest_2002.pdf> accessed 12 February 2018

⁹⁵⁰ David H. Bayley, ‘The Effects of Corruption in a Developing Nation’ [1966] 19(4) The Western Political Quarterly 719

courts, the scales of justice are tipped, and the ordinary people suffer. Judicial corruption means the voice of the innocent goes unheard, while the guilty act with impunity.⁹⁵¹ The evidence on judicial corruption underscores the need for justice to be served at the right time to achieve the desired objective especially in the fight against illicit enrichment.

Causes of corruption especially in Africa are varied. From 'survival factor' due to abject poverty,⁹⁵² institutional weakness, unemployment, the deteriorating living standard of public office holders coupled with low salaries make corruption a viable means of livelihood. The same with private interests by multinational corporations who bribe officials to gain undue advantage. Other identified factors include short term of office, political instability and democratic insecurity, non-transparency in the recruitment process, the absence of technological equipment, lack of transparency in the court administration and court procedures, and complex procedural rules. One study identified fear of retribution by political leaders, appellate judges, influential individuals, the public and the media.⁹⁵³ However, Matei and Matei contend that where governance generally is weak and corruption levels high, traditional and anti-corruption reform measures that rely on reducing incentives for corrupt behaviour (higher wages, improved case-handling systems and disciplinary measures) have little effect unless accompanied by attitudinal change.⁹⁵⁴ Also, one of the most significant challenges to strengthen a public institution (the judiciary inclusive) lies in changing the prevailing culture and value

⁹⁵¹ Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) XVI, XXI

⁹⁵² *ibid*

⁹⁵³ Ernesto D. et al

⁹⁵⁴ Ani Matei and Lucica Matei, 'Assessing the Anti-Corruption Strategies, Theoretical and Empirical Models' [2011] 2(1) *Journal of Men's Studies* 23

system of the organisation. Where roles and relationships prevail over rules and regulations, due process will be compromised. Judicial corruption is classified into:

1. Petty corruption, this involves the exchange of money or favour between a plaintiff and a judge to have a positive outcome of the judicial matter, and where a bribe has to be given in the administrative process in return for the performance of a task. This form of corruption can be addressed by improvement in material condition of judicial personnel and support staff, normative change in the attitude towards bribery primarily within the legal profession and the broad society, increased transparency in the different types of transactions within the judiciary and ensuring systems of discipline and accountability;

2. Grand corruption: which refers to situations where 'the highest level of government gets involved in the work of the judiciary.' Executive interference has been widely reported in election matters in Nigeria. For instance, in one election petition tribunal case between two political parties,⁹⁵⁵ the Appeal Court and the Supreme Court were severely affected and created rancour between the President of the Court of Appeal and the Chief Justice of the Federation, which led to the compulsory retirement of the former, approved by the President upon the recommendation of the national Judicial Council.⁹⁵⁶

⁹⁵⁵ Aregbesola v Oyinlola (2009) 14 NWLR (Pt 1162) 429

⁹⁵⁶ Abimboye D (5 September 2011) 'Anarchy in the Temple of Justice' in Newswatch Judiciary in disarray, Lagos: Newswatch communications limited to 12. In the words of Professor Sagay, 'Salami (the President of the Court of Appeal) has filed an action to restrain them from taking any further steps on the matter. In spite of being aware of that, the NJC went ahead and recommended that Salami should be suspended and removed. That is an act of lawlessness. It is shameful given the fact that these people are senior judicial officers.' He further condemned the action of the Chief Justice of the Federation when he said: 'If you should go through all the facts of this crisis, the only person whose guilt was established but not punished is Katsina-Alu, the CJN. It was established that he illegally and unconstitutionally interfered in the Court of Appeal case in Sokoto governorship election over which he has no jurisdiction. All of his friends who have now ganged up to try to remove Salami admitted that. But he wasn't punished for it. Nothing was recommended to him. The NJC merely said that he carried out his unconstitutional act in good faith. So, you can have good faith in doing something wrong, and that would be alright.'

Another common area of judicial corruption is the frivolous abuse of legal process. In the case of *Saraki v Kotoye*,⁹⁵⁷ the court observed that ‘the abuse process may lie in both proper and improper use of the judicial process in litigation. The employment of a judicial process is only regarded as abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It can also arise by instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues.’⁹⁵⁸ Lawyers and judges have been accused of frustrating the anti-graft agencies from successfully prosecuting politically exposed persons and other members of the ruling class charged with corrupt practices and money laundering by exploiting the legal system in favour of rich and powerful criminal suspects to the detriment of accountability and transparency in the society. The granting of perpetual injunctions, allowing criminal defendants to have criminal cases suspended or adjourned sine die and conferring immunity have been graciously used to delay high profile suspects accused of money laundering and illicit enrichment.

Effective deterrence sanctions for abuse of discretionary powers by judicial officers and administrators, including those institutions responsible for legal education, gazetting of penalties prescribed for actions, inactions, and practices that undermine the integrity of the judiciary, collaboration with clearly defined

<http://articles.onlinenigeria.com/news/3219-anarchy-in-the-temple-of-justice.html>, assessed 28 August 2017

⁹⁵⁷ (1990) 6 NILR 8

⁹⁵⁸ (1992) 9 NWLR (Pt264) 256

governmental and non-governmental agencies in expanding access to justice have been suggested as ways of improving judicial corruption.⁹⁵⁹

CONCLUSION

In this chapter, the need for good governance especially in bringing about democratic dividends have been examined. Governance entails the exercise of political, economic, judicial and administrative authority in a manner that meets the aspirations and needs of the citizens. It has been showed that commitment from all stakeholders in the good governance process is essential for the realisation and prevention or at best reduction of the looting and embezzlement of state resources. Furthermore, for the fight against corruption and money laundering to be successful requires political will on the part of the executive in enforcing the extant laws devoid of interference in the activities of the law enforcement agencies. The executive arm should work at strengthening the respective institutions rather than relying on the president to initiate the fight on corruption and money laundering. Judicial officers are to restrain from involvement in partisan politics by maintaining neutrality in political matters or adjudicating matters in favour political office holders either for fear of intimidation or in response to bribes offered. There is a need to review the judicial process to proffer sanctions even to senior lawyers who have formed the practice of abusing court processes.

⁹⁵⁹ Peter Chukwuma Obutte, 'Corruption, Administration of Justice and Judiciary in Nigeria (Feb. 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727319> accessed 3 February 2018

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

This research work finds that anti-money laundering controls play a significant role in electronic banking and informal remittance systems but are inadequate to prevent theft and diversion of stolen wealth, primarily due the structure and incentives associated with governance and the lack of accountability by leaders. The rich and powerful elites affect the performance of institutions and influence their outcomes. The unrecorded nature of informal remittance systems, size and nature of the informal economy especially its cash based nature, gives room for stolen wealth laundered to legitimate use with ease. Illicit wealth as a crime, are committed by the custodians of the common wealth, and except good governance is entrenched in the fabric of developing countries, laws not minding its framework, will be inadequate and with the situation will either remain unchanged or get worse. The following measures will strengthen the efficacy of money laundering controls.

Reduce incentives for corruption

The incentive structures in a country largely determined by its institutional arrangement may create opportunities for corruption and provide an environment in which the honest and ethical individuals engage in corrupt activities in order to survive. Following the rationality theory, if the cost associated with financial crimes is less than the benefits derivable from the commission of the offence, there is a high likelihood for individuals to exploit the opportunities of corruption. The use of discretionary authority, poor remuneration, exercise of monitoring and supervisory powers, failure to punish erring officials, and power to sanction are notable

incentives at the disposition of government officials. It has been argued that low remuneration does not necessarily lead to corrupt behaviour as those who loot government coffers are the very well paid and top civil servants who do not have any problem meeting their basic needs. I differ in that line of thought, since the absence of welfare opportunities breeds corrupt behaviour because the average employee seeks to provide basic infrastructure at high cost to himself (both highly and poorly paid employees). A key component of the effort to decrease the opportunities and incentives for corruption is to follow the Singapore model whereby salaries of civil servants and political leaders were increased but made the definition of corrupt behaviour clear to the public and enforced penalties for violating regulations against corrupt behaviour.

Changes in institutional design can be through a thorough examination of the way in which responsibilities and compensation are structured, and, to understand the system through which corrupt transactions take place. As Mbaku observed, to rid African economies of pervasive corruption, is to 'reconstruct and reconstitute the state and provide institutional arrangements that meet the following criteria.

- i. They effectively constrain civil servants and politicians and prevent them from engaging in opportunistic behaviours (e.g. rent seeking and corruption);
- ii. They enhance entrepreneurship and wealth creation; and
- iii. They provide an environment within which all of a country's diverse population groups can live together peacefully, while they compete for the benefits of economic growth.'⁹⁶⁰

⁹⁶⁰ Mbaku (n54)

Improved enforcement strategies effectively reduces corruption by increasing the likelihood that key participants engaging in corrupt activities can be caught and punished. This can be achieved by increased funding of infrastructure necessary to improve monitoring and detection of corrupt cases.

Strengthen institutional capacity and independence

In Nigeria, serving or retired police officers have held the Chairman of the EFCC based on the provisions of the Act. While their depth of knowledge and expertise is invaluable, I differ in the choice of these personnel to hold such sensitive office given the corruption perception ranking of the police. The Nigerian Police ranks foremost among the institutions adjudged corrupt in Nigeria, not less with other agencies of government like the custom service or even the military. If these law enforcement agencies are the panacea for the detection and prevention of corrupt practices in the presence of an existing Police Force, structured with special anti-fraud/crime units, why then are members of the police seconded to the anti-corruption agencies to fight corruption? Would it make any difference? It should suffice that the Nigerian Police and other responsible departments of government are members of the board of the anti-graft agency and no more as these will be able to provide oversight and policy framework for the efficiency and effectiveness of the anti-graft agencies. The selection and screening process of the chairperson and other principal officers is through placed advertisement⁹⁶¹ regulated by an

⁹⁶¹ The qualification of the principal officers is provided by the EFCC Act, however, we suggest an amended removing serving or retired police, military and other para-military personnel and replacing it with persons with integrity and substantial knowledge of criminal justice system.

internationally reputable/independent firm and selected finalist ratified by the Legislative arm, thereafter the President appoints. To ensure balance and independence in the choice of the Chairman of any law enforcement agency, the adhoc committee would then appoint a reputable firm to advertise, select and screen candidates

Financial Independence

Sequel to the issue of choice of personnel and composition of the anti-graft agencies is that of funding. The framework of the South African civil recovery regime helps the law enforcement agency to be self-funding, effective and accountable. Where law enforcement agencies depend largely on the executive for funds needed to fight financial crimes, it in itself limits their operational capacity and effectiveness more less their independence. The law enforcement agency will no doubt become the tool of the executive to witch hunt whomever it perceives to be an enemy because he who pays the piper calls the tune. The proposed Proceeds of Crime Bill on the establishment of the Proceeds of Crime Recovery and Management Agency, while it makes provision for the establishment of the Confiscated and Forfeited Properties Account it vests the appropriation powers to the president unlike the South African POCA which vest the appropriation authority to the cabinet on the recommendation of the committee. The South African legislation has more control in the administration of the Asset Recovery Account (ARA) as the committee members report to the Cabinet rather than the President who is responsible for reviewing the recommendations made by it in respect of allocation of moneys from the account to specific law enforcement agencies. There is still no parliamentary oversight though. Outright independence of the anti-corruption agencies will limit executive interference in the fight against graft and

illicit enrichment.

Attitudinal Change - Culture/role expectation

An important factor in the individual's attempt to rationalise corruption is the physical or cultural distance to the victims of crime, typically the members of the society where the corruption takes place. Some cultural and institutional factors lead to corruption. For instance, Nepotism and the strength of family values are linked to the feeling of obligation. Robert K. Merton's means-ends schema implies that corruption is at times a motivated behaviour responding to social pressures to violate the norms, in order to meet the set goals and objectives of a social system⁹⁶². An individuals' feeling of guilt or shame depends on how the society responds to the specific form of crime. Society's general opinion⁹⁶³ is a factor in understanding the extent of corruption, different from perception elicited by politicians of an individual who has been alleged or even convicted of a corruption offence. In some occasions political/public office holders who maintained their integrity while in office and had nothing to show for, have been scuffed by his fellow kinsmen for not utilizing the benefits of the position he or she occupied. As Dowden observed, any politician who does not end up a multi-millionaire is regarded a fool⁹⁶⁴. On the other hand, political/public office holders who had embezzled state resources but were perceived to have performed while in office are celebrated in the community. Lack of state legitimacy in this case is characterised by government's inability to provide for the economic wellbeing of its citizens and this has created a general low perception of corrupt behaviour.

⁹⁶² Robert K. Merton, *Social Theory and Social Structure* (Free Press 1968) 246-248

⁹⁶³ Tina Soreide, *Drivers of Corruption: A Brief Review* (The World Bank 2014)

⁹⁶⁴ Richard Dowden, *Africa: Altered States, Ordinary Miracles* (Portobello Books 2008) 445.

International Cooperation

Articles 51 – 59 of UNCAC emphasise and provide for international cooperation mechanisms for states to employ to recover stolen assets.

The following suggested features are to be included in a legal framework for effective civil forfeiture and the development of the law:

- Introduce the reverse onus clause in all corruption related matters;
- Direct enforcement of overseas orders;
- Provision within state law for the transfer of the proceeds or instrumentalities to the foreign state following the enforcement of foreign forfeiture order;
- Increase the penalties associated with stolen wealth;
- Bilateral and multilateral cooperation in information sharing, training;
- Jurisdictional cooperation in enforcement;
- Strengthen mutual legal assistance; and
- Continuous life style audits conducted for public office holders.

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