

**IMPLEMENTATION AND ENFORCEMENT OF THE LAW ON MONEY
LAUNDERING: AN ANALYSIS OF KENYA'S LEGAL AND
INSTITUTIONAL FRAMEWORK.**

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DECLARATION

I, **BETH NGIMA WARUI**, do hereby declare that this is my original and innovative work which has neither been submitted nor intended to be submitted for a degree in any other university.

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List of Statutes

1. Constitution of Kenya, 2010, *Chapter 4, the Bill of Rights*.
2. Kenya Competition Act, Act No. 12 of 2010 revised in 2012, *Section 3 & 21*.
3. Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya, *E23-37*.
4. Kenya Treaty Making and Ratification Act No. 45 of 2012, *Sections 4-12*.
5. Kenya Proceeds of Crime and Anti-Money Laundering Act, No 9 Laws of Kenya, *Sections 1-134*.
6. Kenya Penal Code Cap 63, *Part II*.
7. Kenya Criminal Procedure Code Cap 75, *Sections 1-395*.
8. Kenya Anti- Money Laundering Regulations of 2012, *Section 1-42*.
9. Kenya Anti-Corruption and Economic Crimes Act No. 3 of 2003, *Sections 16-74*.
10. Kenya Public Officer Ethics Act, 2003 Act 4 of 2003. *Section 23 & Part IV*.
11. Kenya Narcotic Drugs and Psychotropic Substances Act No 4 of 1994 *Section 3 & Part IV*.
12. Seychelles Economic Development Act No. 20 1995 (Repealed)
13. Seychelles The Anti-Money Laundering Act No 8 of 1996 (Repealed)
14. Seychelles Anti- Money Laundering Act No 5 of 2006, *Part 1-7*.
15. Seychelles Proceeds of Crime (Civil Confiscation) Act No 19 of 2008, *Section 3-13*.
16. Seychelles Anti-Money Laundering (Amendment) Act of 2008; *Section 3*.
17. Seychelles National Drugs Enforcement Agency (NDEA) Act No 20 of 2008; *Sections 1-17*.
18. Seychelles Anti-Money Laundering (Amendment) Act 2011.
19. Seychelles Anti- Money Laundering Regulations of 2012; *Sections 1-17*.

List of Cases

1. St Intercom Services Limited vs. Standard Chartered Bank (1985), High Court Civil Case No.761 of 1985.
2. Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others; Civil Appeal No. 37 Of 2003.
3. Christopher Ndarathi Murugaru vs. Kenya Anti- Corruption Commission & Another (No 2) [2006] eKLR.
4. Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Chrysanthus Barnabas Okemo Criminal Revision 926 Of 2011 (From original order in Miscellaneous Criminal Application No. 9 of 2011 of the Chief Magistrate's Court at Nairobi).
5. In Stephen Mwai Gachiengo vs. Republic (unreported), High Court Miscellaneous Application No. 302 of 2000.
6. Republic v. Attorney General ex parte Kipngeno arap Ngeny (unreported).
7. Republic vs. Crucial Properties Ltd; 2001 (unreported).
8. Attorney General vs. Podlipny; Seychelles Court of Appeal No 32 of 2011.
9. Hans Hackl v/s The Financial Intelligence Unit (2012) Seychelles Law Reports 225.
10. Gichuru vs. Walbrook Trustees 2008 Jersey Law Reports 131.

List of Abbreviations

1. AML- Anti- Money Laundering
2. ARA- Assets Recovery Agency
3. CBK- Central Bank of Kenya
4. CFT- Counter Fighting Terrorism
5. CMA- Capital Markets Authority
6. EACC-Ethic and Anti Corruption Authority
7. FATF- Financial Action Task Force
8. FRC- Financial Reporting Centre
9. GAO- Government Accounting Office
10. IDCM- Inter-ministerial Drug Co-ordinating Committee
11. IMoLIN -International Money-Laundering Information Network
12. IRA-Insurance Regulatory Authority
13. KACA- Kenya Anti-Corruption Authority
14. POCAMLA- Proceeds of Crime and Anti- Money Laundering Act
15. UN- United Nations
16. UNODC- United Nations Office on Drugs and Crime

ABSTRACT

Prior to 2009, Kenya did not have a formalised Anti- Money Laundering institutional and legal framework. The criminal and anti- corruption statutes in existence did not adequately provide for the tracing and confiscation of proceeds of crime from these crimes. There was a therefore a visible gap and due to the increasing international pressures and threats of blacklisting from the United Nations, World Bank and the Financial Action Task Force, Kenya hastily enacted the Proceeds of Crime and Anti- Money Laundering Act. This thesis examines that effectiveness of this Act and there frameworks established under the Act. The thesis argues that, though there was a gap and indeed the efforts to criminalise the crime of money laundering are laudable, the impact and responsibilities created by the Act are slowly crippling some financial sectors designated as reporting institutions under the Act in turn rendering the Act ineffective. The Act introduces onerous and costly compliance requirements which must be complied with failure of which stiff penalties and personal liability may accrue to anyone who fails to demonstrate compliance with the Act, such failure is construed as aiding and abetting the offence of money laundering. The Act is therefore advocating for preventative controls whilst being silent on how to effectively and actively enforce the core objectives of the Act which is to trace and confiscate the proceeds of crime. This thesis therefore highlights the gaps in the Kenya Anti Money Laundering Framework and proposes some salient recommendations that could further enhance the effectiveness of the Act and its regulations. The thesis also conducts a comparative analysis on how Seychelles has implemented the Anti- Money Laundering legal and Institutional frameworks.

CHAPTER ONE

INTRODUCTION

1.1 Background

1.1.1 Definition of Money Laundering

Money laundering has been defined as the act of converting money gained from illegal activities, such as drug trafficking, smuggling, theft, falsification of currency, bribery and corruption, into money that appears legitimate and in which the source cannot be traced back to the illegal activity.¹ The Proceeds of Crime and Anti-Money Laundering Act² breaks down this definition to encompass several components of the crime of money laundering to mean the act of a person who:

- (i) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (ii) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Kenya proceeds of any unlawful activity; or
- (iii) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, deposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity where:-
 - a) as may be inferred from objective factual circumstances, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - b) In respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.³

The Act further defines the proceeds of crime to mean, “any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and irrespective of whether committed before or after the passing of this Act and includes, on a proportional basis,

¹ The GAO (2004) US General Accounting Office; Anti Money Laundering Issues Concerning Depository Institution Regulatory Oversight. <http://www.gao.gov>. Accessed on, 14 July 2013.

² Act No.9 of 2009 Laws of Kenya.

³ Ibid, Section 2.

property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the offence.’⁴

1.1.2 The Effects of money laundering

The effects of money laundering have been described as three fold, namely, economic, social and political. Unger presents a list of twenty five effects of money laundering on the society which are positive, negative, short or long term.⁵

Economically, people pay more for insurance because of fraud and higher taxes on account of public expenditure due to widespread corruption.⁶ Another devastating consequence of money laundering is its effect on government revenues as laundered money essentially represents income that has evaded the tax net.⁷ Consequently, the increase of predicate offences and money laundering demands public enforcement expenditure, which draws further on public revenues.⁸

For institutions, money laundering threatens to weaken structures and affect their reputation when criminals and corrupt individuals transmit funds through them. Ultimately, reputational loss may lead to a loss of critical investor interest and, possibly, lead to the collapse of the financial institution.⁹

⁴ The Guideline on Proceeds of Crime and Money Laundering (Prevention) CBK/PG/08 of 1st January 2006.

⁵ Unger, B. 2007. *The Scale and Impacts of Money Laundering*. Edward Elgar Publishing Ltd at pg 52.

⁶ Nigel Morris, Cotterill.1999. *How Not to be a Money Launderer*. 2nd edition Brentwood, Silkscreen Publications at pg 17.

⁷ Quirk Peter J.1997. *Money Laundering: Muddying the Macroeconomy*. Oxford Publishers at pg 9.

⁸ Mugarura N. 2012. *The Global Anti Money Laundering Regulatory Landscape in Less Developed Countries*. Ashgate Publishing Limited at Pg 10.

⁹ Supra, note 7, p.22.

On the economy as a whole, money laundering weakens the financial sector's role in economic growth and its ability to raise market resources because the market becomes flooded with funds that have not been produced using the normal curve of demand and supply. Money laundering also depresses productivity; laundered illicit funds are often placed in what are known as "sterile" investments or investments that do not generate additional productivity for the broader economy and often form the financial muscle.¹⁰

On account of the effects of money laundering, some countries risk losing control of their economic policies as these illicit proceeds from laundering and other economic and financial criminal activities have the capacity to dwarf government budgets as well as shrink the domestic markets.¹¹ Money laundering can also adversely undermine currencies and interest rates, particularly in developing economies, as criminals tend to move money in various currencies as they desire. The implication of this is that such "irrational" movement of funds creates inexplicable changes in monetary demand and increases volatility of international flows, interest and exchange rates.¹²

1.1.3 Money Laundering in Kenya

As observed in the preceding section, money laundering is an offence that entails making dirty money clean. This often involves movement dirty money either through the formal/institutional systems to disguise the source, or through informal sectors to be able to derive value through the purchase of goods and services. It's an offence that has existed since crime started. Kenya has therefore been grappling with the offence

¹⁰ Nigel Morris, Cotterill.1999. "*How Not to be a Money Launderer*", 2nd edition Brentwood: Silkscreen Publications.

¹¹ John Mc Dowell. 2001. "*The Consequences of Money Laundering and Financial Crimes in Economic Perspectives*". p12.

¹² Yusuf Ibrahim and Ahmad Ibrahim. 2009. "*The devastating Impact of Money Laundering and other Economic and Financial Crimes on the economy of developing countries; Nigeria as a case study*" Paper available at:<http://www.unilorin.edu.org> accessed on July 27, 2013, p7.

and the effects of money laundering just like any other country in world way before the Proceeds of Crime and Anti Money Laundering Act was passed in 2009. Due to the dynamic nature of the offence, it difficult to measure exactly how much money was laundered in Kenya prior to 2009. A research done by the Global Financial Integrity centre found that more than US\$13.5 billion flowed illegally into or out of Kenya from 2002 through 2010 through the mis-invoicing of trade transactions, fuelling crime and costing the Kenyan government at least US\$3.92 billion in lost tax revenue.¹³

This study will look at the historical development of anti-money laundering legislation in Kenya and the gaps that still exist in the area of prevention of money laundering post the enactment of the Proceeds of Crime and Anti-Money Laundering Act. The last chapter make recommendations on improvements that can be made to the Act to bridge these gaps.

1.2 Statement of the Problem

The Proceeds of Crime and Anti- Money Laundering Act of 2009 seems to have been enacted as a reaction to the recommendations of the international community and was not informed by specific gaps in legislation against criminal proceeds in Kenya. As a result the law is a duplication of measures already contained in other legislation and the one size fits all approach stipulated under the Proceeds of Crime and Anti- Money Laundering Act of 2009 is clearly not effective. For instance the Civil Proceedings provided for in the Act are similar to those under the Civil Procedure Code and the rules of evidence applicable in civil proceedings apply in forfeiture, seizure and confiscation proceedings.¹⁴ These are civil proceedings instituted mostly in the course

¹³ <http://www.gfintegrity.org/kenyas-removal-fatf-gray-list/>. Report by Grace Zhao, July 14, 2014.

¹⁴ POCAMLA Part III.

of ongoing criminal proceedings or where there is reasonable cause to believe that a person was leading a criminal lifestyle. The aspect of duplication is that the investigative and prosecuting bodies that have powers to carry out investigations and obtain these orders are the fragmented, i.e. the Office of the Director of Public Prosecutions, the Ethics and Anti Corruption Commission, the Criminal Investigations department and sometimes the Kenya Revenue Authority. For each of these departments to establish probable cause, multiple applications maybe made concerning the same matter before a court of law compromising the evidence and weakening the ongoing cases. In an attempt to provide for identification of criminal proceedings, the Act delves into the area of regulation and provides for aspects that are already regulated by other bodies. For instance, the customer identification measures for banks, insurance companies, and other financial intermediaries were already contained in the sector specific regulations and guidelines. Additional measures prescribed under Sections 45-47 on identification, maintenance of records and internal procedures for banks, insurance companies, and Capital Markets intermediaries are already contained under the sector specific regulations issued for these sectors by the Central Bank of Kenya, Insurance Regulatory Authority and the Capital Markets Authority. Furthermore the Act still vests the enforcement powers on these bodies and could have the effect of relegation of the Anti money laundering controls prescribed in the Act, to the sector prescribed controls. This may also introduce duplication of efforts in supervision since the Act also requires these institutions to make reports to the Financial Reporting Authority which the sector specific regulator is not privy to and may not be able to enforce some of these requirements. The Act requires reporting institutions to report cash transactions equivalent to or exceeding USD 10,000 whether suspicious or not to the FRC on a

weekly basis in the prescribed format.¹⁵ At the same time, the Act requires institutions to file a report of all suspicious, unusual transactions or attempted transactions within seven days of detection to the FRC in the prescribed format.¹⁶ The amount of administrative activities and transactional reporting that the requirements of the POCAMLA makes on reporting institutions also results in duplication of reports which in turn leads to reporting for the sake of reporting with no effectiveness.

The approach adopted by the international community of signing UN Conventions, Europe treaties, EC directives and forming a Financial Action Task Force which then laid down 40+ recommendations was good at that level. It was wrong to then require different Countries all over the world to legislate against money laundering at the back of these 40+ recommendations with little or no room for a different approach. The result has been the development of an onerous law with little or no enforceability.

Also, whilst the international community identified the need to criminalize money laundering in order to take the profit out of crime. Most focus and spirit of the law seems to be that it was wrong for individuals and organizations to assist criminals to benefit from the proceeds of their criminal activity or to facilitate the commission of such crimes by providing financial services to them. As result, the law places an onerous compliance burden on these reporting institutions which reduces the focus on the perpetrators of the crimes as well and minimizes the roles and responsibilities of the Government agencies set up under the Act to investigate and prosecute the offence of money laundering.

¹⁵ Pocamla; Fourth Schedule.

¹⁶ Pocamla Section 44 (3).

It is widely recognized that the unique nature of the African states means that a one size fits all approach to combat money laundering is not going to work. States and business' working within these states, must adopt anti-money policies which suit them but comply with the global best practice initiatives in the spirit of state sovereignty and different local economic and social conditions that each country has a glaring common problem within the African States that have enacted legislation to criminalize money laundering is the lackluster or non-existent of enforcement. Kenya for instance has barely implemented its anti-money laundering legislation and the legislation in force is absent an adequate framework for the freezing, seizing and confiscation of funds suspected to be involved in money laundering. Although numerous investigations have ensued there is no record of the enforcement or prosecution of money laundering related offences in Kenya to date.

It is against this background that this study examines the Proceeds of Crime and Anti-Money Laundering Act of 2009 with a view to assessing the effectiveness of the legal and institutional framework in the fight against money laundering in Kenya and also seek to answer the question whether the Act adequately bridged the presumed legislative gap in the country for the fight against money laundering or resulted in duplication of the law.

1.3 Hypothesis

This study is premised on the basic hypothesis that the Proceeds of Crime and Anti-Money Laundering Act of 2009, does not, as the principal legislation on the subject, establish a comprehensive and effective legal and institutional framework for the fight against money laundering in Kenya.

1.4 Research questions

This thesis answers the following fundamental questions namely;

- 1) What are the root causes of money laundering in Kenya?
- 2) What are the current legal and institutional frameworks for addressing money laundering in Kenya?
- 3) What are the strengths and weaknesses of these frameworks?
- 4) What changes in and to these frameworks are required in order to make them more effective, especially in the light of the growing technological advancement in the financial sector?

1.5 Objectives of the study

This study seeks to:

1. Establish whether indeed there was a legal and regulatory gap in the area of Anti Money Laundering regulation and whether the Proceeds of Crime and Anti Money Laundering Act and Regulations adequately bridged this gap.
2. Bring out the gaps and flaws in the provisions of the Proceeds of Crime and Anti Money Laundering Act and Regulations. This will be achieved through an analysis of the methodologies and obligations prescribed under the Act to combat money laundering. A review of the role, powers and effectiveness of the established legal and institutional frameworks under the Proceeds of Crime and Anti Money Laundering Act and Regulations.
3. Make recommendations on how bridge the gaps and eliminate the flaws identified above. The study also seeks to make recommendations on how to strengthen the effectiveness of the institutional frameworks mandated to fight money laundering under the Act and how to achieve best results without duplication of roles and resources.

1.6 Theoretical Framework

Anti Money laundering laws can best described as having been developed from a sociological perspective which is beyond standards of custom and other progressive laws.¹⁷ Sociological School thus can be referred to as a reflection to the relationship between sociology and law and the respective human interactions. Money laundering is a social problem, and developing a law to regulate money laundering involves putting in place measures to deal with aspects of social behaviour that endanger the country's financial system and the economy at large. Certain human behaviour makes it essential to have a system to sort out positive interactions (contracts, taxation) from negative ones (crimes, torts, illegal searches, unconstitutional seizure of property).¹⁸

To further support this argument that money laundering laws were founded on the sociological school of thought, Guy Stessens argues that, “notwithstanding the prerogatives of parliament to criminalise money laundering, the fight against money laundering was fought using ‘soft law’ instruments. The term ‘soft law’ refers to the broad general principles rather than prescriptive rules. This approach is due to the changing and evolving nature of the crime of money laundering and hence a prescriptive/strict approach to legislation would be rendered obsolete as the crime evolves.”¹⁹

In further examining why the other schools of thought were not deemed to be applicable, I start by looking at the positivist school of thought. This school distinguishes law from morality arguing that conflicting claims over what constitutes morality could lead to civil strife. The positivists also argue that law should not be

17 Anurag Devkota, 2013- 2014; Manoeuvring the Purpose of Law in Nepali Society with Special Reference to Ihering: An analytical Study. PROLAW. Page 6.

18 Freeman M.D.A 2001. Introduction to Jurisprudence. London Sweet & Maxwell Ltd at p.142.

19 Guy Stessens, 2003, Money Laundering, a new International Law Enforcement Model. Cambridge University Press, Page 15.

based on morality because reactionaries could argue that a law is moral and hence, cannot be changed, thereby obstructing legal reforms.²⁰ However, this school of thought cannot entirely form the basis of money laundering legislation because morality still plays a role in the legislative prohibitions projected in the Proceeds of Crime and Anti- Money Laundering Act. Proceeds of crime are defined as proceeds from any offence under the laws of Kenya, which includes offences under the Sexual Offences Act²¹ Narcotic Drugs and Psychotropic Substances (Control) Act²² which are based on morality.

On the other hand, Roscoe Pound (1870-1964), a supporter of the sociological school of thought, argues that the law should be looked at as a means to an end not an end by itself. He argues that law should be viewed as the reconciler of conflicting interests by ordering human conduct so as to make the goods of existence and the means of satisfying claims go round as far as possible with the least friction and waste. To Pound, there are claims or interests which exist independently of the law and which are pressing for recognition and security. This model of law, however, fails to recognise that such laws which appear to limit the activities of powerful groups, such as factories legislation or anti-trust legislation which at face value seems to constrain the powerful, may in fact be in the interest of most powerful if administered inadequately. Thus, pollution legislation may be in the interests of large organisations who are, then, enabled to knock out small competitors.²³ That is not to say that class interests are the only ones that influence legislation, but they inter alia, play an important role in the passage of legislation.

²⁰ Hart H.L.A. 1994. *The Concept of Law*. 2nd ed. P.A. Bulloch and J. Raz eds, Clarendon Press, Oxford at pg. 206.

²¹ Act No 3, of 2006.

²² Cap 245, Laws of Kenya.

²³ Becker, Howard S. 1963. *Outsiders*. Chicago, IL: The University of Chicago Press p. 21

Modern sociological thinkers, such as Ehrlich,²⁴ argue that the sociological school of law goes beyond protecting classes, groups and clusters of people, mostly the minority, and includes protection of the social order against individuals who are beyond the grain of society. This protection may be effected by means of a part of the criminal law, police law, and procedural law. The sociological school of thought, therefore, views the law as ‘living’ and this has an independent value which consists in the fact that it constitutes the foundation of the legal order of human society. Ehrlich argues that in order to uphold this order, one must view the usages and the relationship of legal relations, codes of conduct, independently of the question whether they have already found expression in judicial decisions or statute. For instance, the banking system has an order which has a legal side as well as that of the mercantile establishment which is regulated in detail by the commercial code.

The main advantage of a rule-based regulatory regime supported by the positivist school is its predictability and certainty. The regulated entities are able to make decisions without worrying that their actions will be second-guessed by regulators. The problem with the rule-based approach, however, is lack of flexibility and the inability to provide for new regulatory challenges which may from time to time arise in the course of regulation. Principles-based regulation that follows the sociological school is generally more flexible and more sensitive to context, but potentially less certain. There are also challenges of enforcement under the principles-based approach given that, in most cases, violation of a principle alone may not justify punitive action

²⁴ Ehrlich, E. 1967. *Fundamental Principles of the sociology of law*; Harvard Law Review Journal at p.145.

in jurisdictions which require specific provision of law for certain regulatory offences.²⁵

The approach supported by the sociological school thinkers is that regulation must exhibit some certain basic features. First, it should focus on defining broad themes, articulating them in a flexible and outcome-oriented way, accepting input from industry, and managing incoming information effectively. Secondly, it argues that in order to be able to take advantage of the regulations, industry needs reasonable lead times to adjust to the new model, education and support, and the ability to rely on legacy rules during the transition period. Further, the regulator's conduct must be reasonable, predictable, and responsive and it must have the statutory power to promulgate principles and interpret them.²⁶

The development of anti- money laundering legislation in Kenya seems more suited for sociological approach. This is because of the enormity of the offence and its evolving nature and the difficulty in predicting its regulatory needs with certainty. Given the innovative and creative energies that criminals are applying across the world, it is hard to predict with certainty what turn the offence of money laundering will take in future. As a result, fixing anti-money laundering rules may not only be an arduous task, but may also prove to be an exercise in futility if the components of the offence outgrow the rules in a short duration of time. In developing the anti-money laundering law, the sociological school of thought would weigh several interests in terms of what the law hopes to achieve. This school views law as a social institution to satisfy social wants, that is, the claims and demands and expectations involved in

²⁵ Stessens, G 2005. Money Laundering: A new International Law Enforcement Model, Cambridge University Press, New York p.232.

²⁶ Cristie Ford, 2008. Principles Based Regulation. A Research Study Prepared for the Expert Panel on Securities Regulation.

the existence of civilized society, by giving effect to as much as we may, with the least sacrifice so far as such wants maybe satisfied or such claims given effect by ordering of human conduct through politically organised society.²⁷ In the context of the development of anti-money laundering legislation, the anti - money laundering law should be effective and at the same time flexible to allows for the detection and prevention of the crime of money laundering in a consistent manner over a period of time in order to form sound precedent.

1.7 Literature Review

The literature review below is undertaken in order to eliminate duplication and to provide a clear understanding of the existing knowledge base on the subject. The review is based on authoritative, recent and original sources, including journals and text books.

On the development of anti-money laundering regulation, Becker ²⁸argues that, traditionally, there was no anti-money laundering and combating of money laundering had been through monetary and fiscal policies which focused on legal financial transactions, while the regulation of crime has generally neglected its financial aspects. To bridge this gap, Becker argues that clarity in regulation has to begin with the understanding of the crime of money laundering. While the perpetrators of money laundering aim at modelling their behaviour and conduct to make dirty money appear clean, anti-money laundering law requires a multidisciplinary approach of aspects of law, criminology, sociology and political science, to be able to address these social and criminal aspects crime of money laundering. For instance, he argues that one has

²⁷ Freeman, M.D & Lloyd of Hampstead, 2001: D.L, Lloyd's introduction to jurisprudence. Sweet & Maxwell, London. Page 659.

²⁸ Becker, G.1968.*Crime and Punishment: An Economic Approach*. Journal of Political Economy, p.169-217.

to know how criminals behave, and which legal restrictions they anticipate to face.²⁹ Becker also notes that most legislation focuses on the banking and the financial sector industry, something which is borne out of the recognition that this sector can play a pivotal role for the development of the criminal sector as the most preferred vehicle for money laundering. He adds that the control side of money laundering consists of regulatory agents, who want to combat money laundering and of financial intermediaries who can either be honest and compliant or dishonest and non-compliant and therefore asymmetric information and principal agent problems are typical for this market. Becker identifies another problem in combating the problem of money laundering as being difficulties in achieving international cooperation in order to develop a harmonious legislation. One major concern is with the definition of what activities constitute money laundering.³⁰ He argues that currently, one is bound to the countries' legislation and differences in legal definition. A person can only be prosecuted for money laundering if the underlying crime is on the list of crimes that are predicate crimes for laundering. For instance, he points out that proceeds from tax evasion are a predicate crime in the US, whereas in Germany only proceeds from business and criminal organisations are predicate crimes. In Austria and Switzerland, tax evasion is not a crime. In some jurisdictions proceeds from gambling are predicate crimes, while in others they are not.

On the other hand, Masciandaro et al. argue that there is a different school of jurisprudence that relates illegal or criminal activities to finance, and that, due to this separate development, the current legal and economic theories have not addressed financial crime sufficiently so far, and this creates a disturbing gap in literature; lately,

²⁹ Ibid Note 44 p216.

³⁰ Ibid note 44 p103.

the issue of combating money laundering has become subject to debate that has been accentuated in the public and political arena.³¹ They add that, given the great variety of money laundering techniques, it is very difficult for the police to prosecute money laundering. In many countries, the police are trained to prosecute the real criminals for murders and theft. To prosecute an intelligent financially literate money launderer would, therefore, necessitate much more differentiated skills than the traditional police training.³²

B. Unger and G. Rawlings argue that the global nature of money laundering makes international cooperation important.³³ Most legislation assumes that countries can make a deliberate choice whether to let money laundering happen or not. They assume that an anti- money laundering policy will be adopted and implemented at will and will be effective. According to them, the laws forget that some countries, such as the Seychelles in 1990s, deliberately offered their services to criminals. However, they argue that it can also happen that countries which establish big functioning financial markets attract all kinds of investors, including criminal ones. Countries then start to employ measures to combat money laundering to keep their reputation as solid financial centers. On the development of money laundering law, they argue that, with the increase of crime, defences provided for in the law, such as disclosing the source of funds or proving that one did not know the source of funds, only facilitate the aiding of money laundering. For instance, they argue that the requirement to file suspicious transaction reports for transactions above certain thresholds can be flouted by a bank employee who chooses to ignore and not report a customer who shows up

³¹ Donato Masciandaro, Elod Takats and Brigitte Unger 2007. *Black Finance: The Economics of Money Laundering*. Edward Edgar Publishing Limited, p72-84.

³² *Ibid*, p 257.

³³ Unger B and G. Rawlings 2005. *Competing for Criminal Money*. Paper prepared for the conference of the Society for the Advancement of Socio-Economics (SASE), Budapest.

ten times in a day to deposit a sum which is just slightly below the reporting requirement. Similarly, a bank staff can choose to report a small transaction on a separate account to divert attention from the main account. They also note that regulators across the world have also registered concern that financial institutions are becoming increasingly convinced that the key to avoiding regulatory and criminal scrutiny under the anti-money laundering regime is to file excess suspicious transaction reports. This is because the discretion of what transaction to report largely lies with the financial institutions. They, therefore, conclude by noting that national laws cannot be drawn in isolation and that the problem of money laundering has to be looked at as an externality.

Ferwerda conducted an analysis in order to construct a universal definition of money laundering used by different legislations and international organisations and compared them with one another.³⁴ With regard to the source of the subject, he points out that some definitions refer only to serious criminal acts, whereas others also include other illegal activities, such as tax evasion, illegal copying, illegal gambling and illegal prostitution. He further argues that the main problem with these definitions is two-fold, namely, one, economists have classified money laundering both as a stock and a flow and this needs to be taken into consideration when developing legislation and, two, the definitions presented thus far are still missing the crucial component of the concrete crimes to which money laundering refers.

³⁴ Ferwerda J, 2010. Criminals saved our Banks: The Effect of Money Laundering during the Financial Crisis. Paper for the course Inclusion and Exclusion in Contemporary European Societies Challenges of a New Europe: Chances in Crisis IUC Dubrovnik, Utrecht University School of Economics.

Unger and Busuic argue that the definition of predicate offences is the most important legal problem in arriving at a definition of money laundering.³⁵ Particularly from a legal point of view, the ‘achilles’ heel in defining and criminalising money laundering relates to the so- called ‘predicate offences,’ understood to mean the criminal offences which generated the proceeds, thereby making laundering necessary. Hiding or disguising the source of certain proceeds will, of course, not amount to money laundering unless these proceeds were obtained from a criminal activity that is a predicate crime. Therefore, what exactly amounts to money laundering, which actions, and who can be prosecuted are largely dependent on what constitutes a predicate crime for the purpose of money laundering.

William F. Wechsler argues that the current legislation on money laundering assumes that all funds or most funds will be channelled through the banking system.³⁶ However, despite having generally defined money laundering as the act of channelling proceeds of crime, legislation has basically failed to recognise the various parts of the economy that are shadow/underground and purely criminal, that infiltrate dirty money into the economy. For instance, he argues that the proceeds out of the production of fake or counterfeit goods and social fraud, such as extortion, may go undetected because the principle of peculiarity used to identify the source of such funds when they are channelled through the banking system may be met. He also notes that under-regulated banking systems that facilitate the infiltration of dirty money have sparked financial meltdowns in the world. He adds that legislation has to take cognisance of the various techniques of money laundering. Some of the techniques used to avoid or circumvent detection of money laundering, for example,

³⁵ Brigitte Unger and Elena, Madalina Busuic. 2007. *The Scale and Impacts of Money Laundering*. Cheltenham; Northampton p22.

³⁶ William F. Wechsler 2001. *Follow the Money; Foreign Affairs*. Vol. 80. Published by: [Council on Foreign Relations](#), p. 40-57.

smurfing and structuring (breaking up of large deposits into smaller deposits which helps avoid the currency transaction reporting requirements), are used to introduce smaller amounts of illicit money into the main system. Since the law has made it a requirement in many countries to report transactions above a certain threshold, money launderers will try to stay slightly below the benchmark for reporting.³⁷

Wouter, Kalin and Goldsworth, argue that regulations on money laundering need to be informed by statistics.³⁸ They add that international and national initiatives show that money laundering can effectively be fought in theory, but on the practical side, there is a significant decrease of reports on suspicious transactions. They, however, note that some financial institutions in sophisticated economies, entrenched money laundering controls in theory, to only increase their competitive edge with no intention of observing the requirements of anti-money laundering laws in practice. While this could be true for sophisticated financial centres, for the less sophisticated centres, as long as bribery and corruption are still common place in those countries, it is difficult to assess the real impact of anti-money laundering regulations, even though they are adopted into law.³⁹ They also argue that some legal institutions are structured in such a way that any regulation that does not target properly the areas of concern is likely to lead to significant wasted effort and useless checks. Such work then detracts from the value of regulating against money laundering and generates a mechanism of unthinking approaches to the issue. Institutions, such as non-governmental organisations, charities and trusts, are run by front-liners who are not necessarily the founders and, depending on the jurisdiction, they need not disclose their true, beneficial owners, making it impossible for the law to penetrate their operations.

³⁷ Ibid p. 61.

³⁸ Wouter H. Muller, Christian H. Kalin and John G Goldsworth, 2001. *Anti – Money Laundering: International Law and Practice*; John Wiley & Sons.

³⁹ Ibid p. 9-10.

However, they conclude by stating that countries cannot afford not to persevere in finding ways and means to effectively combat money laundering and terrorist financing, in absence of which countries will run the risk of too many economies being run by criminals and corrupt governments thereby destabilising economies.⁴⁰

Kaspersen, on the other hand, argues that new loopholes in money laundering make enforcement of anti-money laundering regulation very difficult.⁴¹ One such new development is gambling over the internet and other financial transactions that are carried out in the cyber space. He notes that legal enforcement for casinos and gambling activities, as it were, is very difficult, and a new loophole for money laundering through the internet has now emerged, making it even more difficult to regulate.

Guilhem argues that there could be a link between money laundering and financial crises.⁴² He states that the post-cold war financial system rested on two assumptions about the way the financial system should be governed. One of them was the idea of a self-regulating market which underestimated the importance of legal standards that were instrumental to the development of a capitalist economy over the last two centuries as well as the significant burden imposed by the lack of such legal standards in transitional economies. This co-existence of free international capital flows and national institutional and regulatory systems created a void in which transnational economic and financial delinquencies flourished.

⁴⁰ Ibid p.15.

⁴¹ Kaspersen, H.W.K 2005. 'De Wet op kansspelen en handhaving in Cyberspace'. Presentation held at the seminar 'Gokken en georganiseerdecriminaliteit'. 6th of April 2005, Centre for Information and Research on Organised Crime, Amsterdam, Vrije Universiteit.

⁴² Guilhem Fabre 2005. Prospering on Crime: Money Laundering and Financial Crisis. Working paper No.5; Centre for East and South East Asian Lund University, Sweden.

In some of these economies, corruption and criminal activities played a major part in creating public debt and diverting funds to speculative overseas financial markets. He concludes by noting that, a predatory, kleptocratic, and, in the end, mafia style of abuse, created substantial demand for money laundering on international capital markets, including the demand for Russian treasury bonds, and was an important factor in the Russian financial crisis of 1998. Guilhem had also earlier on demonstrated that significant profits, derived from organised crime and corruption, were deposited in Swiss banks and re-invested in Russia to finance the growing national debt.⁴³ He argues that this went without detection because of the ever evolving criminal methods that were used to introduce ill-gotten gains to the financial system. These methods included separating the criminal activity from source of the funds by creating complex layers of financial transactions designed to disguise the audit trail.

Quirk describes the many phases through which dirty funds are integrated into the legitimate economy by using an apparent legitimate transaction to disguise illicit proceeds, hence making it difficult to detect and regulate such flows of dirty money.⁴⁴ This is accomplished through the purchase of assets, such as real estate, securities or other financial assets, or luxury goods, which are governed by other legal processes and private contracts. To him, illegal diamonds, gold and other natural resource deals, are hard to detect because, often, they are covered by a trail of bribery and corruption

⁴³ Fabre, Guilhem 2003. Criminal Prosperity; Drug trafficking, money laundering and financial crises after the cold war. London-New York: Routledge Curzon, p163-164.

⁴⁴ Quirk, Peter J. June 1996, Macroeconomic Implications of Money Laundering. International Monetary Fund Working Paper 96/66.

and are conducted in a secretive manner away from the banks and other areas where the law requires monitoring to take place.⁴⁵

Levi argues that it is unlikely that the effectiveness of anti-money laundering laws could be determined with any degree of accuracy given the evaluation problems involved in assessing such an issue. He states that there can be no precise measurement of the costs of regulation balanced against the harms associated with money laundering.⁴⁶ According to him, this is compounded by the fact that, in some jurisdictions, it is not possible to measure with accuracy the significant negative effects of money laundering on economic development because of other deeply entrenched practices, such as bribery, corruption and the levels of crime.

Charles Goredema conducted an analysis which showed that the factors that expose the financial and commercial sectors in Southern African Development Community (SADC) to money laundering are increasing trends of crime, in the form of drug trafficking, cash in transit robberies, and an unchecked black market.⁴⁷ He concluded that SADC states are yet to adopt comprehensive responses to money laundering. At the very least, the incidence of the predicate crime and other unlawful activities which yield funds for laundering should be measured. The existence of a dual economy in many parts of the sub-region should be considered in formulating strategies against money laundering. There are indications that participation in the formal economy, and its institutions, is not as high as is assumed by emerging anti-money laundering laws.

⁴⁵Quirk, Peter J. 1997. Money Laundering: Muddying the Macro economy, International Monetary Fund Working Paper, pg. 10.

⁴⁶Levi, Michael and William Gilmore 2002. Terrorist Finance, Money Laundering and the Risk of Mutual Evaluation: A New Paradigm for Crime Control. European Journal of Law Reform p 337-364.

⁴⁷Goredema, Charles, "Money Laundering in East and Southern Africa: An overview of the threat", Institute for Security Studies, Paper 69, April 2003.

G. Kegoro argues that as long as other factors, such as bribery and corruption, are still common place in certain countries, it is difficult to assess the real impact of anti-money laundering regulations even when they are adopted into law.⁴⁸ He further argues that poor record of law enforcement in the past in Kenya and poor keeping of public records, especially on registered businesses and registered land, make it difficult to detect instances of money laundering and also reduces the need to launder money. Earlier on, Kegoro pointed out that reports had shown that, in Kenya, the police can barely cope and serious crimes often go un-investigated and there would be, therefore, no incentive to launder money in a jurisdiction where law enforcement is weak.⁴⁹

The cross section of authors listed above, identified flaws in anti money laundering legislation in the United Kingdom and other European Countries. They also gave recommendations on what amendments should be made to the anti money laundering law in order to make it effective. Some of the identified flaws include, failure to understand the nature of the crime of money laundering, failure to anticipate the evolving nature of the crime of money laundering, lack of clear enforcement mechanisms, reliance on unskilled third parties to police the controls prescribed in anti money laundering legislation, complexity of cross border investigation and prosecution of anti money laundering offences. The key recommendations observed from the above literary works is that for the legislation against the offence of money laundering to be effective, it cannot be looked at in isolation from the underlying predicate offences. The criminal and civil law enforcement frameworks have to be revamped to include modern ways of combating the predicate offences and establish

⁴⁸ Kegoro, George, "Tackling Money Laundering in East and Southern Africa, An Overview Of Capacity: Volume One, Chapter 3, The Control of Money Laundering and Terrorist Funding in Kenya", Institute for Security Studies, Monograph 107, October 2004, p. 38-75.

⁴⁹ George Kegoro; Profiling Money Laundering in Eastern and Southern Africa; Unpublished 2002.

institutional frameworks that complement the mechanisms prescribed in the anti money laundering laws. These include strengthening controls by whilst reducing the cost of regulation to encourage compliance. Kegoro's analysis of the Kenyan situation, was done before a formal money laundering law was enacted some of the loopholes he identified still remain unaddressed. He however put in strong arguments such that, given the progressing state of development of the economy in Kenya, an elaborate regulatory framework needs to be put in place to combat this evolving offence of money laundering from all angles. The flaws identified by the authors on the existing anti money laundering legislation in various European countries will also support my hypothesis that the Proceeds of Crime and Anti- Money Laundering Act of 2009, does not, as the principal legislation on the subject, establish a comprehensive and effective legal and institutional framework for the fight against money laundering in Kenya. The recommendations proposed by the authors will also partially inform some of the recommendations made in my thesis. The above literature review however did cover and analyse the challenges faced by African countries including Kenya in the development of anti- money laundering legislation since the authors focused on European countries. My thesis will fill this gap in literary works by focusing on Kenya with a case study of the Seychelles legislation.

1.8 Research Methodology

The study was library based and involved analysis and review of relevant primary and secondary data, including books, articles, and other relevant literature on the law on money laundering regulation in Kenya and elsewhere in the world.

The study also analysed legal instruments, which included international agreements and domestic laws of Kenya that touch on money laundering, especially the Proceeds

of Crime and Anti- Money Laundering Act,⁵⁰ the Anti-Corruption and Economic Crimes Act,⁵¹ the Public Officer Ethics Act,⁵² the Narcotic Drugs and Psychotropic Substances Act,⁵³and the Penal Code⁵⁴among others.

Other sources of information were government agencies, including the Central Bank of Kenya (CBK), the Financial Reporting Centre (FRC), and the Capital Markets Authority. Additional material was sourced from local libraries, such as the High Court Library, University of Nairobi School of Law library and the Jomo Kenyatta Memorial Library.

More information was sourced from internet websites, including, www.kenyalaw.org, international money laundering networks such as www.imolin.org and www.moneylaundering.com.

1.9 Chapter Breakdown

This study comprises five chapter structures as here below.

1. Chapter One: INTRODUCTION.
 - 1.1 Background
 - 1.2 Statement of the problem
 - 1.3 Hypothesis
 - 1.4 Research Questions
 - 1.5 Objectives of the Study
 - 1.6 Theoretical Framework
 - 1.7 Literature review

⁵⁰Act No.9 of 2009.

⁵¹Act No.3 of 2003.

⁵²Act No. 4 of 2004.

⁵³Act No.4 of 1994.

⁵⁴Chapter 75, Laws of Kenya.

- 1.8 Research Methodology
- 1.9 Chapter Breakdown
- 2. Chapter Two: KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK ON MONEY LAUNDERING.
 - 2.1 Introduction
 - 2.2 The historical development of Kenyan anti-money laundering laws.
 - 2.3 Analysis of the Proceeds of Crime and Anti Money Laundering Act, 2009 and the subsidiary legislation there under.
 - 2.4 Discussion of the powers and functions of anti-money laundering institutions in place.
- 3. Chapter Three: ROLE OF INTERNATIONAL ORGANISATIONS AND REGIONAL BODIES IN ADDRESSING MONEY LAUNDERING.
 - 3.1 Introduction
 - 3.2 International Policy and Legal Frameworks Addressing Money Laundering
 - 3.3 Regional Policy and Legal Frameworks Addressing Money Laundering
 - 3.4 Conclusion.
- 4. Chapter Four: CASE STUDY: A REVIEW OF THE ANTI-MONEY LAUNDERING LEGAL FRAMEWORKS IN SEYCHELLES
 - 4.1 Introduction
 - 4.2 Country Profile- Seychelles
 - 4.3 Historical Development of the Anti Money Laundering Legal Framework in Seychelles
 - 4.3 The Anti Money laundering legal and Institutional framework in Seychelles
 - 4.3.1 The Anti-Money Laundering Act of 1996

4.3.2 Central Bank of Seychelles; Anti- Money Laundering Guidance Notes of 1998

4.3.3 Seychelles Anti- Money Laundering Act of 2006

4.3.4 The Anti-Money Laundering (Amendment) Act 2008

4.3.4 The Anti-Money Laundering (Amendment) Act 2011

4.3.5 The Anti- Money Laundering Regulations of 2012

4.4 The International bodies to which Seychelles is a member

4.5 Comparison between the Seychelles and Kenya's Anti- Money Laundering Legal and Institutional Framework

4.6 Conclusion

5. Chapter Five: CONCLUSION AND RECOMMENDATIONS

CHAPTER TWO

KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK ON MONEY LAUNDERING

2.1 Introduction

The last two decades have seen an outburst of regulatory measures at the global, regional and national levels, aimed at combating money laundering. Most of these measures were initiated by the developed countries in their efforts to reduce the impact and effect of money laundering practices and its curb any potential adverse effects caused by dirty money flows from across the borders. Such flows could cause a severe liquidity crunch resulting into financial sector crises.⁵⁵

Prior to the enactment of the Proceeds of Crime and Anti-Money Laundering Act of 2009, Kenya had enacted fragmented legislation covering various economic crimes and other crimes which generate money to be laundered. Measures to control these offences would greatly complement whatever control mechanisms that were introduced against money laundering in Kenya and lead to the enactment of a law to address the problem of money laundering directly, as an independent and logical result of economic crime. The first part of this chapter will review legal frameworks in place for the control of the three major crimes that were identified as the root causes of money laundering namely, corruption, drug trafficking and violent crime and discuss the deficiencies in these legislation that led to the enactment of the Proceeds of Crime and anti-money laundering Act.

⁵⁵Ali, S.A. 2003. 'Money Laundering Control in the Caribbean'. KluwerLaw International Vol 16.Pg 36.

Kenya joined the international community in the fight against money laundering and became a party to the Vienna Convention⁵⁶ the Palermo Convention.⁵⁷ Kenya is also an associate member of FATF,⁵⁸ and a full member of ESAAMLG.⁵⁹ Kenya is therefore under an obligation to domesticate these Conventions and to incorporate the recommendations of the two international bodies in its domestic legal framework. FATF Recommendations 3 and 4 require states as a threshold, to criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. States are required to set the predicate offences, whose proceeds constitute money laundering, and these should include the widest possible range of offences. This chapter discusses in detail the provisions of the anti-money laundering legislation in Kenya and the institutional frameworks established therein.

2.2 Historical Development of the Anti-Money Laundering Legislation in Kenya.

The first indicator of the level of proceeds of crime that were likely to be laundered into the economy was the reported increased level of corruption in Kenya. Kenya is perceived as one of the most corrupt countries in the world and it was claimed that corruption accounted for the largest amounts of illegally earned wealth in the country, ahead of the illegal trade in narcotics and other forms of organised crime.⁶⁰ Kenya's

⁵⁶ United Nations Convention against illicit trafficking in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; adopted in December 1988. Kenya became a signatory to the Convention on 10th October 1992 and domesticated the Convention with the enactment of the Narcotic Drugs and Psychotropic Substances Control Act in 1994.

⁵⁷ United Nations Convention against Transnational Organised Crime of 2000. Kenya became a signatory to the Convention on 16th June 2004.

⁵⁸ Kenya is an associate member of FATF by virtue of its membership at ESAAMLG. ESAAMLG became an associate member of FATF in June 2010.

⁵⁹ Kenya was among the founding members of ESAAMLG in the meeting of August 2009.

⁶⁰ The Corruption Perception Index (CPI) is published annually by Transparency International, the leading global anti-corruption organisation. Kenya has maintained a poor score in [the global Corruption Perception Index \(CPI\) 2015](#) released on 27th January 2016 by the Transparency International movement. Kenya scored 25 on a scale of zero to 100 (with zero perceived to be highly corrupt, and 100 very clean), the same score recorded in 2014. Kenya is ranked at position 139 out of 168 countries and territories included in the 21st edition of the CPI. Kenya's score is below the global average of 43 and Sub Saharan Africa's mean of 33. Kenya had a score of 27 in 2013 and 2012, demonstrating that efforts to tackle corruption have borne little results. The CPI measures the perceived levels of public sector corruption in countries and territories worldwide and is based on expert opinion.

efforts to fight corruption and curb unethical behaviour in the public sector have not been fruitful. The legislative tools and administrative institutions that were established to fight corruption in Kenya became the target of many critics who sought to discredit them hence weakening their mandate.⁶¹

The legal framework for fighting corruption has also had its fair share of challenges. Until 2003, when it was repealed, the sole legal basis for fighting corruption was the Prevention of Corruption Act.⁶² The Act was enacted in 1956 and it made it an offence for a public official to accept a bribe or other inducement as consideration for the performance of official duties. In 1991, the Act was amended to provide stiffer sentences for corruption and in 1993 the government set up an anti-corruption unit within the police force which was disbanded two years later, following a mysterious fire which destroyed its headquarters. In 1997, the government amended the Prevention of Corruption Act to establish the Kenya Anti-Corruption Authority (KACA) as an independent anti-corruption authority. Its first director was appointed the same year, and when, the following year, the authority sought to prosecute a

⁶¹ The first director of the Kenya Anti Corruption Authority John Harun Mwau was appointed in December 1997. After only six months in office, Mwau was suspended and later removed in 1998 through a Judicial Tribunal appointed by the then President Daniel T. arap Moi. Justice Aaron G. Ringera was appointed to replace him in March 1999. In December 22, 2000, the High Court in the case of *Gachiengo V Republic (2000) 1 EA 52(CAK)* made a ruling that the existence of KACA undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution of the Republic of Kenya. In addition, the High Court further held that the statutory provisions establishing the Authority were in conflict with the Constitution. That spelt the death of KACA and the various efforts in the fight against corruption in Kenya. In 2003 the Anti-Corruption and Economic Crimes Act established the Kenya Anti-Corruption Commission (KACC) as a body corporate, prescribing its composition and conferring powers and functions to it. Justice (Rtd.) Aaron G. Ringera was also appointed as the Director, following parliamentary pressure in July 2009, Justice Ringera was forced to resign from office together with Ms. Sichale and Dr. Wanjala, paving way for appointment of Prof. P.L.O. Lumumba to take office in September 2010. Pursuant to Article 79 of the Constitution, Parliament disbanded KACC on 24th August 2011 through enactment of the Ethics and Anti-Corruption Commission Act (EACC), 2011. The EACC was established on 5th September 2011 and Mr. Mumo Matemu took the oath of office as Chairman, on 5th August 2013 after the Court of Appeal quashed an earlier ruling barring him from assuming office on claims of lacking integrity. This Commissions' life was also short lived because in May 2015 the Chairperson Mr. Mumo Matemu and other commissioners tendered their resignations as EACC Commissioners. In November 2015, President Uhuru Kenyatta nominated new Commissioners headed by Mr. Philip K.B. Kinisu. In August 2016, Philip Kinisu resigned following a probe instituted on him by Parliament on his possible tax evasion through one of his private companies, Esaki Limited Source <http://www.eacc.go.ke> accessed in 30th August 2016.

⁶² Cap 65 of 1956.

number of ranking public officials from the Kenya Revenue Authority for the non-collection of Ksh230 million in taxes, its director was dismissed by the President. When KACA sought to prosecute other corruption cases under a new director the High Court intervened, declaring that the authority's statutory power to conduct prosecutions was unconstitutional.⁶³ *Stephen Mwai Gachiengo v. Republic* was a Constitutional Reference brought pursuant to the Provisions of S.67 (1) and S.84 (3) of the Constitution of Kenya. Stephen Mwai Gachiengo (first applicant) was charged in the Chief Magistrate's Court Nairobi with nine (9) counts of abuse of office c/s 101(1) of the Penal Code Cap 63 Laws of Kenya. Albert Muthee Kahuria (second applicant) also faced four (4) charges relating to the same offence of abuse of office. Before their appearance in court the Attorney General sanctioned the prosecution of both applicants under section 101(3) of the Penal Code. The case was referred to the Constitutional court for determination of four constitutional issues, among them being whether the provisions establishing KACA were in conflict with the Constitution, and especially S.26 thereof. The main contention was that it was only the Attorney General who had the Constitutional mandate to prosecute the cases facing the accused and that KACA did not have such powers. The establishment of KACA came about by the enactment of S.11B of Cap.65. This was done vide Legal Notice Number 10 of 1997. The functions of the Authority are set out in S.11B (3). These are:-

- (a) To take necessary measures for the prevention of corruption in the public, parastatal and private sectors.
- (b) To investigate, and subject to the directions of the Attorney General, to prosecute for offences under this Act and other offences involving corrupt transactions; and

⁶³ In *Stephen Mwai Gachiengo v. Republic* (unreported), High Court Miscellaneous Application No. 302 of 2000.

- (c) To advise the Government and the parastatal organizations on ways and means of preventing corruption.
- (d) To inquire and investigate the extent of liability of any public officer in the loss of any public funds and to institute Civil proceedings against the officer and any other person involved in the transaction which resulted in the loss for the recovery of such loss.
- (e) To investigate any conduct of a public officer which is connected with or conducive to corrupt practices and to make suitable recommendation thereon.
- (f) To undertake such further or other investigations as may be directed by the Attorney General.
- (g) To enlist members of the public in fighting corruption by the use of education and outreach programmes.

When S.11B was inserted into Cap.65 the provisions of S.26 of the Constitution remained un-amended. Under S.26 of the Constitution the Attorney General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings against any person and to take over or discontinue criminal proceedings instituted or undertaken by any person or authority. Under S.26 (4) the Attorney General may require the Commissioner of Police to investigate a matter as relates to any offence. S.11B (4) of Cap.65 stipulates that in the performance of their functions the members of KACA shall have all the powers of a police officer of or above the rank of Assistant Superintendent of Police. S.11B (5) provides that the Director of KACA may assume responsibility for any investigation or prosecution commenced by the police. S.10 of Cap 65 gives powers to the Director of KACA to cause a police officer to investigate any bank account, share account or purchase account of any person. Based on these submissions, the judge upheld the submissions that the provisions in Cap.65 establishing KACA were

unconstitutional and in conflict with the spirit and provisions of the Constitution especially section 26 thereof. The Judge also found it unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court Judge; and finally that the sanction by the Attorney General to this prosecution was declared not valid under the Constitution.⁶⁴

In the intervening period the High Court delivered another decision, in December 2001, discharging a cabinet minister from prosecution for corruption on the grounds that there had been undue delay in commencing the prosecution. In arriving at the decision, the High Court interpreted a provision of the Constitution of Kenya requiring that criminal prosecutions, once started, should be concluded quickly and where there had been along intervening period before a person was charged, irrespective of when the offence was discovered, such a prosecution would be unconstitutional.⁶⁵ The two decisions, rendered a year apart, built a body of jurisprudence that was hostile towards the fight against corruption. Following declarations by the judiciary that the existing anti-corruption legislation was unconstitutional, the National Assembly, after several unsuccessful attempts, finally enacted two pieces of legislation that represented a fresh basis for the fight against corruption. These are the Anti-Corruption and Economic Crimes Act,⁶⁶ and the Public Officer Ethics Act.⁶⁷ These two statutes are of significant relevance to the development of anti- money laundering laws in Kenya. The Acts however have certain limitations including the lack of prosecutorial powers, which could equally affect the effectiveness of the Proceeds of Crime and Anti Money Laundering Act of 2009.

⁶⁴ <http://kenyalaw.org/caselaw/cases/view/11143/> accessed on 30th August 2016.

⁶⁵ In *Republic v. Attorney General ex parte Kipngeno arap Ngeny* (unreported).

⁶⁶ Act 3 of 2003.

⁶⁷ Act 4 of 2004.

2.2.1 The Ethics and Anti-Corruption Act of 2011

The Ethics and Anti-Corruption Commission Act (EACC) was enacted in 2011⁶⁸ and the EACC was established on 5th September 2011. The Act repealed the Anti-Corruption and Economic Crimes Act which came into force in May 2003. The Act established the Ethics and Anti-Corruption Commission (hereafter the Commission) as an independent body in charge of the fight against corruption.⁶⁹ The commission powers as outlined in the Act are aligned to Article 6(3) of the Constitution. This cross reference to the Constitution was informed by the judicial decision in *Stephen Mwai Gachiengo v. Republic* which rendered the powers of KACA under the Anti-Corruption and Ethics Crimes Act unconstitutional. The Article requires a national State organ to ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

The Commission has power Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.⁷⁰ This is similar to the powers set out under the Proceeds of Crime and Anti Money Laundering. However the commission's powers are heavily curtailed as they have to be exercised within the premises of the constitution. The Commission also has fewer powers than KACA which could for instance carry out investigations to trace and freeze property even if the property was outside Kenya.⁷¹

⁶⁸ Act No. 22 of 2011.

⁶⁹ Section 3.

⁷⁰ Section 11 (j)

⁷¹ Anti- Corruption and Economic Crimes Act of 2003; Section 7 (1) (h).

The prosecution powers of the new commission were neutralised following the decision in *Stephen Mwai Gachiengo v. Republic* which also had the effect of declaring the prosecution powers that were vested in the original KACA unconstitutional. Under the 2011 Act, the commission can only investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution. The argument behind conferring the KACA with prosecution powers was that the office of the Attorney-General had exercised its power to prosecute offences of corruption in an unaccountable manner, leaving deserving cases not prosecuted. Under the new Act, investigation and prosecution have been segregated, the former being conferred on the Commission and the latter on the Attorney-General. Under the Anti- Corruption and Economic Crimes Act of 2003, as a check on his exercise of this power, the Attorney-General is required to make annual reports to the National Assembly explaining his decisions on the cases referred to him for prosecution.⁷²

The poor record of the judiciary in enforcing the previous anti-corruption legislation led to the creation of special magistrates' courts with exclusive jurisdiction to try offences under the Anti- Corruption and Economic Crimes Act of 2003. This was requirement was repealed and now the prosecution and appeal powers lie within the normal judicial system which poses a potential threat to the enforcement of the legislation.⁷³

⁷² The Anti-Corruption and Economic Crimes Act, Section 37.

⁷³ *Ibid*, Section 3.

2.2.2 The Public Officer Ethics Act

The Public Officer Ethics Act came into force in May 2003.⁷⁴ The Act establishes a Code of Conduct and Ethics to which all senior public officials must subscribe.⁷⁵ The Code prohibits public officials from engaging in improper enrichment and from accepting any personal benefit in the performance of public duty and requires officials to declare personal interests if these conflict with official duty.⁷⁶ The Act further requires that every public officer, to whom it applies, shall annually submit a declaration of the income, assets and liabilities of himself, his spouse and dependent children under the age of 18.⁷⁷ Declarations received from public officials are to be held in confidence and should not be disclosed to the public. Information contained in the register of declarations may only be disclosed to law enforcement agents or for purposes of judicial proceedings.⁷⁸ A competent Authority may investigate, whether on its own initiative or after a complaint, if a public official has contravened the code of conduct and ethics. After investigation the authority may take disciplinary action or refer the matter to another Authority for its action.⁷⁹

The Public Officer Ethics Act provisions requiring the declaration of assets and liabilities was meant to provide law enforcement agencies with invaluable financial intelligence regarding the assets of public officers, which is crucial from the point of view of money-laundering control. Further, if properly enforced the provisions will act as a deterrent against economic crime since it establishes a framework that consistently questions the sources of wealth of public officers.

⁷⁴ Act No. 4 of 2004.

⁷⁵ Ibid Section 5.

⁷⁶ Ibid Section 11 & 12.

⁷⁷ Ibid Section 26 (1).

⁷⁸ Ibid Section 30.

⁷⁹ Ibid Section 35.

A number of weaknesses however exist on this legislation. The Public Officer Ethics Act requirements exclude the public from accessing information contained in the register of declarations, thus severely undermining the purposes of the legislation. Without public involvement it is unlikely that the legislation lacks independence and the checks and balances that would enable it to be enforced with the requisite robustness. Also the Act lacks provisions that obligate the authorities responsible for receiving the declarations, to make adequate administrative arrangements for processing the information declared. It is therefore unlikely, that enforcement of the legislation will be hampered by administrative inadequacies. There is also no requirement or provision for the training of public officials who will be responsible for the enforcement of the legislation.

2.2.3 The control of narcotics and psychotropic substances

The other possible source of dirty money in Kenya is drug trafficking. Arrangements for the control of drug trafficking are based on the Narcotic Drugs and Psychotropic Substances Act, enacted in 1994.⁸⁰ The Act prohibits the possession of and trafficking in narcotic drugs and psychotropic substances and the cultivation of certain plants. It provides stiff sentences for offences in relation to these prohibitions.⁸¹

Any land on which a prohibited plant is cultivated is to be forfeited to the state, as are machinery, equipment, implements, pipes, utensils or other articles and conveyances (aircraft, vehicles and vessels) used for the commission of any offence under the

⁸⁰ Act 4 of 1994.

⁸¹ For example, the penalty for possession of prohibited substances for own use is imprisonment up to 20 years (section 3(2)(b)) and in every other case it is a fine of not less than Ksh1 million or three times the value of the prohibited substance, whichever is the greater, or imprisonment for life, or both such fine and imprisonment.

Act.⁸²The Attorney-General is empowered to apply to the High Court for an order restraining the property of any person who has committed an offence under the Act.⁸³The transfer of any property after the granting of such an application by the Attorney-General is void. The Court may direct the respondent to submit, within a reasonable time, a statement of his assets and liabilities and failure to do so is itself an offence. The Court is empowered to make any interim orders that would secure the ends of justice. The forfeiture of property is, however, subject to the claims and interests of innocent third parties against such property.⁸⁴

The Act empowers the government to enter into any arrangement with the government of any other country for the recovery and handing over of possessions to the government of Kenya of any property in respect of which an order of forfeiture has been made and which is in that country, and for tracing and preserving any property in that country owned or under the control of any person who has, or is suspected to have, committed an offence under the Act.⁸⁵The government of Kenya may similarly enter into any arrangements, on a reciprocal basis, with the government of any other country in respect of recovery and handing over of possession to the government of that country of any property in Kenya which is confiscated by or forfeited to the government of that country in consequence of any commission of an offence against a corresponding law of that country.⁸⁶

Section 49 of the Act had provisions against the laundering of the proceeds of drug trafficking. This was repealed in 2009 by the Proceeds of Crime and Anti- Money

⁸² Section 20(1).

⁸³ Section 20 (2).

⁸⁴ Proviso to Section 20 (2).

⁸⁵ Section 59 (1).

⁸⁶ Section 59(2).

laundering Act. The Section made an offence for any person to conceal or disguise any property which, in whole or in part, directly or indirectly, represents his proceeds from drug trafficking. It was also an offence for any person to convert or transfer any property or revenue from Kenya which was the proceeds of drug trafficking for purposes of avoiding prosecution and to be in possession of such property for which no or inadequate consideration had been paid. These offences were to be punished by imprisonment for up to 14 years, and such punishment was in addition to, and did not derogate from, any other punishment for related offences already provided in the Act.

To oversee the enforcement of the Act, the government has established the Inter-ministerial Drug Co-ordinating Committee (IDCM), an informal committee bringing together law enforcement personnel from various government departments. The IDCM is responsible for amongst other functions; the development and implementation of a national plan of action for drug control, implementation of provisions of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁸⁷ and updating and implementing drug control laws and regulations. A workshop convened to review the Guidelines for Kenyan Drug Control Master Plan held in 1999, noted that large numbers of suspects released on bail while awaiting trial, absconded. As a result, an amendment was included in the Constitution taking away the right to bail for drug-related offences, as a specific derogation from the right to bail. Regarding the IDCM, the workshop remarked that its establishment had noble intentions. However, it noted that the ICDM was only a committee and it

⁸⁷ Adopted on 19th December 1988.

had no statutory existence, no executive authority, no budgetary allocation and no visible public presence.⁸⁸

Notwithstanding the problems noted above, the Narcotics Act has been enforced relatively successfully against offenders who possess or use the drugs prohibited under the Act. Enforcement in relation to the confiscation of the proceeds or instrumentalities of drug trafficking has, however, been largely absent. During the nearly ten years in which the Act has been in force, not a single case for confiscation of the proceeds of drugs has been presented. Even instances charges have been brought for growing a prohibited plant; these have not been accompanied by an application for the forfeiture of the land on which such a plant was grown, as provided for in the Act.

The first case to be presented in an attempt to enforce the anti-money laundering provisions under Section 49 of the Act⁸⁹ was *R vs. Crucial Properties Limited* after Charter House Bank filed a suspicious transaction report to the CBK, the receipt of US\$25 million into the account of a company called Crucial Properties. Following this notification, the fraud investigation unit (hereafter the unit) of CBK applied for a magistrates order freezing the account of Crucial Properties and for warrants of search to enable the unit to investigate the account. The unit stated in its application that it believed the money to be proceeds of a theft. After the account was frozen the head of the unit wrote to Charter House Bank asking to be furnished with all the information relating to transactions that had taken place through the account. Charter House Bank, however, declined the request, claiming it had no legal obligation to co-operate with

⁸⁸ Unpublished report on the workshop on legal and institutional arrangements in guidelines for the Kenya Drug Control Master Plan, held at the Kenya College of Communication and Technology, Mbagathi, Nairobi, on 12 May 1999.

⁸⁹ *Republic vs. Crucial Properties Ltd*; 2001 (unreported)

the unit. The bank further asserted that it was bound by the requirement to keep its customers affairs confidential. The unit continued with its investigation, notwithstanding this setback.

The directors of the accused could not comprehensively account for the source of those funds. The Unit then applied to the High Court for an order to restrain the money under the Narcotics Drugs and Psychotropic Substances Act. The High Court initially granted this order. Section 49 of the Act provided that the High Court may make such an order to freeze money if it was suspected to be the proceeds of a specified offence. A specified offence is defined to include all the serious offences in relation to drugs trafficking under the Act, with a provision that the Attorney-General may add to the list of specified offences.

Money laundering, although an offence under the Act was not a specified offence at the time the money was received in Kenya. Since the unit claimed to be investigating the offence of money laundering, it sought a restraint of the money, only to then realise the legal deficiency which it sought to cure through a belated notice in the *Gazette* declaring money laundering a specified offence, so that it could avail itself of the power to restrain the money through a court order. The High Court grew impatient over the failure by the unit to substantiate its claim that the money was proceeds of drug trafficking. The judge, rather spectacularly, declared that money laundering was, after all, not an offence in Kenya due to the previous failure to declare it a specified offence. He concluded that, in any case, he had no reason to believe that these highly reputed international banks can engage in money laundering, and ordered the money to be released to Crucial Properties. With the money gone, the unit had no strong incentive to go on with the case and closed its investigation.

This case shows the difficulties encountered in enforcing the anti-money laundering provisions, which was also compounded by other factors such as the secrecy provisions that were enshrined in corporate contractual arrangements. In the *Intercom Services Case*,⁹⁰ The High Court held that (i) the bank was entitled to make inquiries into the payment especially, since it was unusually large, had been made into a new account, and, further, since there were queries about the proper payee of the cheque (Intercom or Interstate); (ii) the fundamental question, however, was the extent to which a bank could be allowed to go to establish the truth. It is not the role of a banker to assume the role of an investigator of its customers' affairs or to turn itself into a policeman;(iii) the report to the CBK went far too far out of the bank's remit of reasonable inquiries and directly led to the suffering which the customer subsequently underwent and hence the report to the CBK was a breach of the confidentiality that the bank owed the customer. Standard Chartered Bank subsequently appealed⁹¹ this decision and the following was the judgement was set aside in a judgement delivered on 19th November 2004. The following were the comments of Justice E.M. Githinji who presided over the matter;

“From the foregoing analysis, the inevitable conclusion is that the appellant Bank, as a collecting bank, did not breach the contractual duty of confidentiality; that in any case the duty of confidentiality was owed only to Intercom for whose account the cheque was collected and that financial losses claimed are too remote and irrecoverable from appellant Bank having not been caused by the alleged breach of contract but by a new and independent intervening force. For those reasons, I would allow the appeal with costs to the appellant Bank; set aside the judgment on liability entered against the appellant Bank on 18th November, 2002, and would dismiss the suit with costs to the appellant Bank.

⁹⁰ *Intercom Services Limited v Standard Chartered Bank* (unreported), High Court Civil Case No.761 of 1985.

⁹¹ *Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others*; Civil Appeal No. 37 Of 2003.

2.3 Anti-Money Laundering Legal framework in Kenya.

It is against this back ground that the journey towards setting a local framework to combat money laundering started in 2003 when the government formed the National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF).⁹²The Task Force comprised two representatives from the Ministry of Finance, Ministry of Trade and Industry, Ministry of Foreign Affairs, Central Bank of Kenya, Police Department, Criminal Investigations Department, National Security Intelligence Service, Banking Fraud Investigations Department, Kenya Bankers Association, Capital Markets Authority, Insurance Regulatory Authority, Kenya Revenue Authority, and the Immigration Department. The Task Force's mandate was to sensitise the public on dangers of money laundering and financing of terrorism and to prescribe measures to combat the money laundering, to develop a national policy framework on anti-money laundering and financing of terrorism, and to make appropriate recommendations through the policy framework to the relevant Government agencies on the national strategy to combat money laundering and terrorism.

Many stop gap measures were put in place by many institutions pending the enactment of a substantive legislation against money laundering. The Central Bank of Kenya released a guideline against money laundering in January 2006,⁹³ which set the minimum standards that banks should follow while on boarding customers. The guideline also required banks to set up policies and put in place internal control measures to prevent money laundering, such as the appointment of a Money Laundering Reporting Officers.⁹⁴ The 2002 Capital Markets Licensing Regulations

⁹²NTF was gazetted on 25th April 2003 by Hon. Minister for Finance (G.N.No.2702).

⁹³CBK/PG/08; Guideline on the Proceeds of Crime and Money Laundering (Prevention) issued on 1st Jan 2006.

⁹⁴CBK/PG/08 of 2006 Section 6-8.

for capital markets intermediaries required licensees to carry out customer due diligence and collect customer information on their identity, nature of business, and origin or source of funds and obtain a written declaration that the information from the customer was accurate.⁹⁵

It took Kenya Seven years after the establishment of the Task Force to formally enact the Kenya's Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) of 2009,⁹⁶ which came into effect in June 28, 2010. The Act was fully operationalised in 2013 when the Money Laundering Regulations⁹⁷ were issued and the Financial Reporting Centre was commissioned in April 2013. To support the main legislation, the Central Bank of Kenya revised its 2006 Prudential Guideline on Money Laundering for the banking sector in 2013.⁹⁸ The enactment of POCAMLA meant that the country had now joined its other three EAC members, Tanzania, Rwanda and Burundi who had already enacted anti-money laundering legislation.

POCAMLA is the key anti-money laundering legal framework in Kenya which contains the core provisions regarding the definition of the offence of money laundering and measures for tracing and confiscating proceeds of crime. Prior to the enactment of the Act, money laundering was not a crime in Kenya. The Act criminalises and defines money laundering as; entering to an arrangement to conceal or disguise the nature, source or location of proceeds of crime.⁹⁹ It makes it an offence to acquire, use or possess property that one knows that it is or forms part of proceeds of crime.¹⁰⁰

⁹⁵Legal Notice 125 of 19th July, 2002 on the Capital Markets (Licensing Requirements) (General) Regulations, 2002; Section 80 on Prevention of Money Laundering and other illicit activities.

⁹⁶Act No. 9 of 2009, Cap 59B.

⁹⁷Legal Notice 59 of 2013.

⁹⁸Guideline on Proceeds of Crime and Anti-Money Laundering- CBK/PG/08.

⁹⁹Ibid Section 3(i).

¹⁰⁰Ibid Section 4.

In addition to defining and criminalising money laundering, the Act creates several ancillary offences related to money laundering. These offences were created out of the realisation that money laundering is not an offence in situ; it's an offence that is in motion. Also the Act seems to take cognisance the fact that to facilitate the offence of money laundering requires a network for transmission which results in the comingling of criminal funds with other clean funds making it difficult to separate the clean funds and the dirty funds. These ancillary offences are therefore aimed at reporting institutions and include tipping off a suspect in a money laundering investigation,¹⁰¹ and transmitting or transferring proceeds of crime or money that is intended for criminal activities.¹⁰² Failure to file a report as required under the Act, or making a fictitious or fraudulent report to a reporting institution established under the Act is also an offence, and so is malicious reporting.¹⁰³ Failure to observe ongoing customer due diligence, reporting and record keeping requirements is also an offence under the Act.¹⁰⁴ Reporting institutions established under the Act are required to establish to the furthest extent the identities of the customers they deal with, to monitor all large and unusual customer transactions and to also retain such customer records for a period of seven years from the date the business transactions were completed.¹⁰⁵ Failure to cooperate during investigations with any officer or any other person in the exercise of their duties under the Act, failure to produce documents or to respond to a request made under the Act, or misuse of information such that any investigation under the Act is prejudiced, is an offence under the Act.¹⁰⁶

¹⁰¹Ibid Section 8.

¹⁰²Ibid Section 7.

¹⁰³Ibid Section 9 &10.

¹⁰⁴Ibid Sections, 44, 45 and 46.

¹⁰⁵Ibid Sections 5&11.

¹⁰⁶Ibid Sections 13, 14, 15.

The only challenge with this approach is that it creates a lot of administrative work for the financial institutions which could defeat the spirit of the law of detecting the offence of money laundering. Reporting institutions will comply for the sake of complying and to avoid regulatory penalties. The Act also prescribes stiff penalties which include, a maximum sentence of 14 years and or a maximum fine not exceeding 5 million shillings or the value of the property in the offence of money laundering for a natural person and a fine not exceeding 25 million shillings or the value of the property that is involved, whichever is higher for a body corporate.¹⁰⁷

The obligation to report suspicious transactions and cash transaction reports also creates an administrative night mare for both the reporting institutions and the financial reporting institutions. The Act also seems to encourage reporting to avoid penalties as opposed to encouraging analysis and objective reporting. If a person is charged with committing an offence under Sections 3, 4 or 5 of the Act, that person may raise as a defence the fact that he had reported a suspicion under the terms and conditions set forth in section 44 or, if the person is an employee of a reporting institution, that he has reported information pursuant to section 47 (a).¹⁰⁸

The Act also overrides all obligations as to secrecy imposed by any law or statute and gives immunity against any criminal liability under any statute or common law so long as the information relates to the investigation of an offence under the Act.¹⁰⁹ However the Act seems to retain the advocate-client privilege and therefore, advocates cannot be compelled to disclose any information exchanged in the course of giving advice to the customer or in the course of conducting any legal proceedings on

¹⁰⁷ Ibid Section 16.

¹⁰⁸ Ibid Section 6.

¹⁰⁹ Ibid Sections 17 and 123.

behalf of the client.¹¹⁰The exclusion of advocate client relationship from the ambit of the Act is big loophole that criminals can exploit. This is because money laundering operations often employ the services of professionals with high technical knowhow in creating complex structures that are used as vehicles for laundering criminal funds.¹¹¹

The Act also seems to put a lot of reliance on financial institutions, which have been defined to include institutions that conduct business in any of the thirteen categories listed under Section 2 of the Act. These categories include, deposit taking, lending, funds transfer, financial guarantees and commitments, safe keeping and administration of cash on behalf of someone else, portfolio management, offering securities, trading in various money market instruments, insurance, and money and currency changing. The Act further provides for six designated non-financial business institutions and professions. These include, casinos, real estate agencies, dealing in precious metals, practicing accountants and non-governmental organizations.¹¹²The Act also identifies various supervisory bodies and imposes upon them the obligation to report any suspicious transactions or activities that the supervisory body or its staff may encounter during the normal course of their duties and obligations.¹¹³These bodies are the Central Bank of Kenya, Insurance Regulatory Authority, Betting & Licensing Control Board, Capital Markets Authority, Institute of Certified Public Accountants of Kenya, Estate Agents Registration Board, Non-Governmental Organizations Co-ordination Board and the Retirement Benefits Authority.¹¹⁴

¹¹⁰ Ibid Sections 18.

¹¹¹ A good example is the Malaysian IMDB fraud where approximately \$4Billion was stolen from the Government and layered and placed in multiple investment vehicles and legal structures. The IMDB probe showed that the suspects employed the services of lawyers and investment bankers to create structures that enabled them siphon billions of Dollars from the Government of Malaysia. <http://www.wsj.com/articles/swiss-attorney-general-expresses-concern-over-halt-of-malaysian-1mdb-probe-1454083061>

¹¹² Ibid Section 2.

¹¹³ Ibid Sections 36 (1).

¹¹⁴ Ibid First Schedule.

Whereas POCAMLA makes it an offence for a “person” i.e. legal or natural person to commit the offences mentioned above,¹¹⁵ the continuing money laundering reporting obligations only apply to reporting institutions which include financial institutions and designated non business institutions.¹¹⁶ This imposed reliance on private sector creates a one-way partnership between the law enforcement agencies and the private institutions in the detection of the offence of money laundering. The reporting institutions which are often set up with an objective of profit making also pay taxes to enable the government pay law enforcement agencies. It may therefore seem unconstitutional to curtail the rights and freedoms of private institutions by imposing a law enforcement burden on them with serious consequences of non-compliance. The law enforcement agencies also do not have a reciprocal responsibility to continually update the reporting institutions on the progress made on the reported cases. The financial reporting centre that is established under the Act is administrative in nature that relies on other agencies to carry out investigations. At the very least the FRC should be mandated to publish reports and trends on the outcomes of investigations following the reports made by private reporting institutions.

The Act appreciates that having the proper identification of an individual at the inception of a customer makes it easier to facilitate an investigation on the same whenever a suspicion arises. The Act places a primary obligation of carrying out the necessary customer due diligence to the reporting institutions. Due diligence includes identifying the identity of the customers using reliable and verifiable documents,¹¹⁷ establishing the ultimate beneficial owners, ownership structures and controlling

¹¹⁵ Ibid Section 2.

¹¹⁶ Ibid 11 - Makes it an offence for a reporting institution to fail to observe the requirements of Section 44-46 which have specific money laundering obligations for reporting institutions.

¹¹⁷ Ibid Section 45 (1) (a &b).

persons behind institutions such as trusts, NGOs.¹¹⁸ This provision of the Act follows FATF Recommendation 10 that financial institutions should be prohibited from keeping accounts that are anonymous, accounts belonging to companies whose nature of business is not immediately verifiable and accounts in obviously fictitious names. This requirement to conduct the necessary customer due diligence applies retrospectively, and institutions are required to obtain the necessary customer identification documents even on existing customers that were in their database before the Act came into force.¹¹⁹ This requirement also creates an administrative burden on private institutions especially because the Act prescribes the same set of requirements without making leeway for institutions to require less documentation for less risky customers. The Act should calibrate the due diligence requirement to allow for institutions to give more focus on more risky customers. The Act should provide a risk categorization matrix and guidance that institutions can use in assigning risk levels to their customers.

The Act further requires that once the proper customer details and information are in place, the reporting institution should put in place measures to check against any deviation from the indicated account or customer profile and, instantly, the institution should seek an explanation from the customer. In this regard, the Act requires a reporting institution to monitor, on an ongoing basis all complex, unusual, suspicious, large or other transactions as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, to insignificant, but periodic, patterns of transactions that have no apparent economic or lawful purpose.¹²⁰ To be able to fully comply with this requirement, an institution is required

¹¹⁸Ibid Section 45(3).

¹¹⁹Ibid Section 45(2).

¹²⁰Ibid Section 44 (1).

to put in place robust internal controls and internal reporting procedures and designate necessary personnel who shall be responsible for monitoring and reporting of suspicious transactions.¹²¹ The Act goes ahead and lifts the veil of incorporation on the compliance obligations for a body corporate, by placing personal responsibility on a director, manager, secretary or any other officer of the body corporate, such as employees, of reporting institutions who fails or allows or gives consent for the non-compliance with the provisions of the Act.¹²² Reporting institutions are also required to maintain customer and transaction records that make it possible to establish the details of the person conducting the transaction, the dates, nature and currency of transactions for a period of seven years.¹²³ This requirement means that institutions have to invest in technology and personnel to be able to satisfy the requirement. The law should then be collaborated with provisions for allowing digital evidence and electronic storage of information, to further mitigate the impact of additional records retention requirements.

The Act further requires that upon suspicion that any transaction or activity could constitute or be related to money laundering or the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Financial Reporting Centre. This report has to be in the prescribed format and should be made immediately or within seven days of the date the transaction or activity that is considered to be suspicious occurred. In addition, reporting institutions are required to file reports on all cash transactions equivalent to or exceeding the amount of USD 10,000 as prescribed in the Fourth Schedule of the Act, whether they appear to be

¹²¹Ibid Section 47.

¹²²Ibid Section 16(6).

¹²³ Ibid Section 46.

suspicious or not.¹²⁴ Specific reporting obligations are further placed on accountants involved in the preparation and advice of clients in the following sectors, namely buying and selling of real estate, managing of client money, securities or other assets, management of banks, savings or securities accounts; organisation of contributions for the creation, operation or management of companies, creation, operation or management of buying and selling of business entities.¹²⁵ The Act, notably, leaves out the lawyers and other professionals involved in the aforesaid transactions, creating a huge loop hole that can be exploited by criminals.

The Act creates institutions to coordinate and help in the realisation of its aims and objectives. These institutions are the Financial Reporting Centre (FRC),¹²⁶ the Anti-Money Laundering Advisory Board,¹²⁷ the Assets Recovery Agency,¹²⁸ and the Criminal Assets Recovery Fund.¹²⁹ The FRC is the main operational institution for assisting in the identification of the proceeds of crime. Its mandate includes receiving suspicious transactions from reporting institutions, training reporting institutions with respect to the requirements of the Act, creating a database of all reports and suspicious transactions, carrying out investigations and request for such other information from reporting institutions. In addition, the FRC can enter into reciprocity agreements with any foreign financial intelligence units to enable it discharge its functions.¹³⁰

The FRC is only administrative in nature and has little or no ability to expedite the investigation and prosecution of suspected cases of money laundering. These two key functions mainly lie with the police and Office of Directorate of Public Prosecutions.

¹²⁴Ibid Sections 44 (2&3).

¹²⁵Ibid Section 48.

¹²⁶Ibid Part III.

¹²⁷Ibid Part IV.

¹²⁸Ibid Part VI.

¹²⁹Ibid Part XI.

¹³⁰Ibid Section 24.

There are four models of FIUs: judicial, law enforcement, Administrative, and hybrid.¹³¹

- The Judicial Model is established within the judicial branch of government wherein “disclosures” of suspicious financial activity are received by the investigative agencies of a country from its financial sector such that the judiciary powers can be brought into play e.g. seizing funds, freezing accounts, conducting interrogations, detaining people, conducting searches, etc.
- The Law Enforcement Model implements anti-money laundering measures alongside already existing law enforcement systems, supporting the efforts of multiple law enforcement or judicial authorities with concurrent or sometimes competing jurisdictional authority to investigate money laundering.
- The Administrative Model is a centralized, independent, administrative authority, which receives and processes information from the financial sector and transmits disclosures to judicial or law enforcement authorities for prosecution. It functions as a “buffer” between the financial and the law enforcement communities.
- The Hybrid Model serves as a disclosure intermediary and a link to both judicial and law enforcement authorities. It combines elements of at least two of the FIU models.

It is not clear why Kenya chose to have an administrative FIU, but in my view it is the weakest of all the models presented above, considering the specialised skill and intricate evidence required to successfully prosecute a case of suspected money laundering.

¹³¹ <http://www.egmontgroup.org/about/financial-intelligence-units-fius>

The Anti Money Laundering Advisory Board is mandated to advise the Director of the FRC in the execution of his duties.¹³² The Assets Recovery Agency (ARA) has the other important role of tracing, confiscating, executing court orders and basically recovering any property that has been declared as proceeds of crime under the Act.¹³³ The Criminal Assets Recovery Fund which shall be comprised of all the funds that are realised by the agency in the course of fulfilling its mandate.¹³⁴ The lack of a recovery agency has for far too long allowed the corrupt to flaunt their ill-gotten wealth and afforded them enough time to hide and launder it, effectively undermining any legal processes against them. However the ARA has had several successes in the recent past, in 2015 the ARA traced and froze assets suspected to be part of the KES 791 Million fraud at NYS.

Notably POCAMLA neither gives prosecution powers to the FRC nor to the ARA, as such the investigation and prosecution of money laundering and related offences under the Act is still vested on the police and the director of public prosecution's office. The nature of proceedings is two-fold, the FRC hands over suspicious transactions reports received under this Act to the appropriate law enforcement authorities and criminal proceedings are instituted.¹³⁵ Where the court finds the defendant guilty of an offence of money laundering, it may, on the application of the Attorney-General, the ARA Director or on its own motion, inquire into any benefit which the defendant may have derived from the offence.¹³⁶ In seeking to confiscate that property which the defendant is suspected to have benefited from, or obtain restraining orders to stop the defendant from transferring the property, civil

¹³²Ibid Section 49.

¹³³Ibid Part VI.

¹³⁴Ibid Section 110.

¹³⁵Ibid Section 24(b).

¹³⁶ Ibid Sections 61.

proceedings apply.¹³⁷ Deterrence as out of 1,000 corruption cases that were reported in 2015, only 50 were recommended for prosecution according to a report released by the Public Service Commission. There was not a single conviction.¹³⁸

To further give effect to the provisions of POCAMLA, several other Acts were amended to include money laundering in the scope of their mandates. These were the Extradition (Contiguous and Foreign Countries) Act,¹³⁹ Extradition (Commonwealth Countries) Act,¹⁴⁰ Narcotic Drugs and Psychotropic Substances (Control) Act.¹⁴¹ This resulted in the inclusion of the offence of Money Laundering amongst the offences committed by a person guilty of handling any prohibited substances under the Act. This essentially enabled the state not only to jail the offender but also to confiscate any proceeds/gains from the sale of such substances.

POCAMLA gives the Attorney General¹⁴² and the FRC¹⁴³ the power to enter into agreements that allow for international cooperation with financial intelligence units and enforcement agencies. Specifically, the Attorney General may request another authority in another country to allow for evidence to be taken, issue a warrant of seizure of property from that country, request for assistance in arranging for a person to come and attend proceedings.¹⁴⁴ Similarly, Kenya is also required to assist and avail such information as maybe requested by another country in respect of an investigation in a money laundering offence.¹⁴⁵ All the requests received from outside

¹³⁷Ibid Section 56.

¹³⁸ <http://www.businessdailyafrica.com/Opinion-and-Analysis/Asset-Recovery-Agency-must-target-past-corruption/539548-3024968-pex54yz/index.html>

¹³⁹ Cap 76.

¹⁴⁰ Cap 77.

¹⁴¹ Act No. 4 of 1994.

¹⁴² Ibid Section 118.

¹⁴³ Ibid Section 24 L.

¹⁴⁴ Ibid Section 116.

¹⁴⁵ Ibid Section 118.

shall be registered in a court of law by the Attorney General and such as other local processes to authenticate and give effect to such orders and requests, shall be followed.¹⁴⁶ The Act provides for further regulations to be made by the Minister for Finance with regard to several specific sections of the Act to fully operationalise them.¹⁴⁷

In 2012, the Proceeds of Crime and Anti Money Laundering Act was amended to expand the definition of "monetary instruments" to include cheques and other negotiable instruments. The Act was also amended to allow reporting institutions and their authorised officers to carry out investigations into suspicious activities.¹⁴⁸ In 2015, the Act was further amended to strengthen the role of the financial reporting centre by introducing further obligations on reporting entities to provide further information and file reports on compliance with the FRC from time to time. The amendments did not however provide the FRC with prosecution powers but mandated the director to refer any confirmed cases of money laundering to the appropriate law enforcement agencies for further handling.¹⁴⁹

The Act provides for the detection of proceeds of crime by focussing on institutionalised remittances. However, Kenya is vulnerable to money laundering due to a number of other factors among them being the fact that there is prevalent bribery and corruption in Kenya.¹⁵⁰ Kenya is still largely a cash economy which is characterised by a high volume of cash based transactions and the existence of

¹⁴⁶ Ibid Section 119&120.

¹⁴⁷ Ibid Section 134.

¹⁴⁸ The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2012.

¹⁴⁹ Finance Act No. 14 of 2015, Sections 50 & 51.

¹⁵⁰ According to the East African Bribery Index 2012 released in August 2012, indicated that bribery levels remain high in Kenya. The country moved from fourth place recorded in 2011 to third place in the East African Bribery Index(WABI) with an aggregate index value of 29.5% up from 28.8% recorded last year- source: www.transparency.org.

alternative remittance channels and informal systems which are not adequately envisaged under the Act.

The Act also seems to shift the burden of proof to the accused in a potential case of money laundering which is quite unprecedented. Section 65 of the Proceeds of Crime and Anti- Money Laundering Act, it is prima facie evidence that the defendant handled proceeds of crime, if it is found that the defendant had without sufficient cause failed to disclose the facts or source of the property/funds being suspected to be laundered, the funds/property are therefore presumed to have originated from an illegal sources or criminal activities. Whilst this may be logically viable, legally it, the burden of proof has often rested with the prosecution in a criminal case, for them to prove the particular offence the defendant has committed beyond reasonable doubt. This could subject this provision of the Act to judicial review as was in the case of *Christopher Ndarathi Murugaru vs. Kenya Anti- Corruption Commission & Another*.¹⁵¹ In 9th January, 2006, Mr. Justice Aaron G. Ringera, the Director and Chief Executive Officer of the Kenya Anti Corruption Commission, sent out a notice to the Hon. Dr. Christopher Murungaru, M.P. pursuant to the provision contained in Section 26 of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003. The notice indicated that Dr. Christopher Murungaru was reasonably suspected of Corruption and Economic Crime, and was required to furnish to the Director, Kenya Anti-Corruption Commission, and a written statement enumerating all his property.

The statement was to include, but not limited (sic) the following details:

1. List of all property owned, including money, and date of such acquisition.
2. Detailed particulars of the property, location, and with regards to money details of account(s) held.

¹⁵¹ H.C. Misc. Civil Appl. No. 54 of 2006 eKLR.

3. Detailed particulars specifying how the property was acquired, state further whether it was purchase, a gift or inheritance and what consideration, if any, was given for the property including source and mode of financing applied.
4. List of any other property where you have direct or indirect details through a spouse, relative, friend, trust or business associate and provide details of the nature of interest held.
5. Particulars of any corporations, partnerships, businesses, or bodies in which you have a direct or indirect interest and the nature of such interest.
6. Particulars of capital or money market investments (i.e. bonds, stocks, T. Bills, shares fixed deposits etc.).
7. Details of his current employment and income.

Failure to comply with this notice was punishable by a fine of up to Kenya shillings Three Hundred Thousand (KES 300, 000) or imprisonment for a term not exceeding three (3) years or both. In order to issue a notice under this section the Commission and its Director were required to be in possession of some material from which it is “reasonably suspected” that the person to whom the notice was being issued had been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the Commission and its Director would have no power to issue a notice under Section 26 of the Act. The relevance of what we are saying here will become apparent in due course.

When the Applicant received the notice, he and his lawyer, took the view that the Applicant was not obliged to comply with the notice because he was protected from such demands by certain sections of the Kenya Constitution. Section 82 of the Constitution was raised and the Director was asked whether apart from the Applicant, similar notices had been sent to other Kenyans suspected of corruption. Secondly, the

Applicant raised the issue that Section 26 of the Act upon which the notice to him was based was unconstitutional as it, "... sought implicitly to negate the constitutional presumption of innocence and seeks to impose an obligation on a citizen to investigate himself/herself and provide you with evidence of such self-investigation and indeed for a citizen to potentially incriminate themselves ..."

The Applicant did not comply with the requirements of the notice. On 1st February, 2006, the Applicant moved to the High Court by way of an Originating Summons pursuant to Sections 3, 67, 70 (a) and (c), 74, 76, 77 (a), of the constitution. The complainant argued that:

*The burden of proof lies on the state and the burden is not achieved by requiring the suspect to provide incriminating evidence as they have the right to silence". In the case, of Proceeds of Crime and Anti-Money Laundering Act, the absence of an explanation as to the source of funds is presumed to be evidence that the defendant acquired the property from an unknown illegal source, which clearly conflicts with Section 77 (2) of the constitution.*¹⁵²

The court granted a stay of the implementation and enforcement of the notice dated 9th January, 2006 issued by the Director of the Commission to the Applicant and of Criminal Case No. ACC 11 of 2006, filed by the commission against the applicant in the Magistrate's court which had been instituted pursuant to that NOTICE.

The fight against money laundering through funds transfer should be two fold i.e. establish the source of funds and the use of funds. The Act has given the primary responsibility of collecting evidence and screening transactions to privately owned regulated entities and requires designated institutions to put in place mechanisms and controls to verify the source of funds. The Act is silent on mechanisms that

¹⁵²Christopher Ndarathi Murugaru vs. Kenya Anti- Corruption Commission & Another (No 2) [2006] eKLR at pp. 63.

institutions should use to verify the use of funds. Most accounts and funds transfers are subject to privacy requirements enshrined in the constitution that would make it impossible to realise the spirit behind Section 7 of the Act. This Section makes it an offence for person to, knowingly transport, transmit, transfer or receive or attempt to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence. In instances where large amounts of funds from legal sources are transmitted legally for illegal purposes, its very difficult to ascertain the use those funds would be into just by scrutinizing a funds transfer, unless one has independent information of the use those funds would be put into. The reporting of suspected money laundering transactions, depends on the good will of these institutions and the defences availed to them under the act, could easily lead to collaboration and concealment of reportable money laundering instances.

The POCAMLA leans heavily towards regulated and formalised sectors and places onerous reporting obligation on these sectors, but daily, there are emerging alternative ways of carrying out financial transactions. This is facilitated by new technologies and alternative remittance channels which are widely accepted such as Hawala banking. The Act therefore would require to be continually revised to remove any redundant provisions and put in measures to enforce against money laundering through developing technologies and alternative funds remittances channels.

The Proceeds of Crime and Anti Money Laundering Regulations of 2013 ¹⁵³were promulgated to give force to most of the provisions of the Act. Specifically, the Regulations provide the format and frequency of filing of the weekly cash transaction

¹⁵³ Legal Notice 59 of 28th March 2013.

reports which was not previously provided for under the Act.¹⁵⁴ The Regulations also require reporting institutions to carry out annual risk assessments of the money laundering risk, consistent with the nature and size of the organisation.¹⁵⁵ Risk assessments assist the reporting institutions and the FRC to be able to put focus on risky sectors and customers, and at the same time reduce the pressure on low risk areas to enable the businesses to run. From the Regulator's perspective, it is a management tool that helps them prioritise on how resources and effort will be distributed.¹⁵⁶ The Regulations also require reporting institutions to continually include or consider the impact of money laundering risks while developing new processes, products or deploying new technology.¹⁵⁷

Another major step in the development of anti-money laundering legislation in Kenya, is The National Payment System (Anti-Money Laundering Regulation for the Provision of Mobile Payment Services) Regulations, 2013 were also drafted and given to the public for comments. E Money Regulations were also released to the public for comments. Specifically these once gazetted will require mobile payment services and E-money issuers to ensure that they and their agents comply with the applicable provisions of the Proceeds of Crime and Anti-Money Laundering Act and the regulations issued in terms of the said Act.¹⁵⁸

2.4 Conclusion

The foregoing chapter analysed the provisions of key legislation that criminalises money laundering and the institutional framework set up under the Act. The Act can

¹⁵⁴ Ibid note 58 Section 34.

¹⁵⁵ Ibid Section 6.

¹⁵⁶ Owen Martin, 2005. "Enforcing anti money Laundering Defences", Central Banking Publications, Tavistock House, London.

¹⁵⁷ Ibid Note 58 Section 7.

¹⁵⁸ Regulations made under the National Payment System Act; No. 39 Of 2011.

be described as a step in the right direction in that it criminalises the offence of money laundering. The Act also has gaps that would need to be addressed to enhance its relevance and effectiveness.

Key gaps that have been discussed under the Act include lack of an effective investigation and enforcement mechanism and as result there has not been a successful money laundering prosecution in Kenya since the inception of the Act. Similarly, this chapter has discussed a trend of failed prosecutions of suspected corruption and economic crimes cases due to unconstitutional provisions contained in the previous anti- corruption legislations. In my view, this gap can be closed by giving the FRC prosecution powers aligned to the constitution. This will shorten the time taken to conclude a case of suspected money laundering since the investigation and prosecution will be done by the same agency. Alternatively, Kenya can consider adopting a judicial model which consists of having a specialised judicial section, to deal with economic crimes and suspected money laundering cases. This will then mean that suspicious financial activity reports are received directly by the investigative agencies such as the police and the Ethics and Anti Corruption Commission and handled by the specialised judicial unit. This will eliminate the need to have independent administrative FRC and also reduce the cost to the tax payers of having to maintain an independent FRC.

In my view, enforcement is very difficult within the current fragmented framework where a suspicious transaction report, is lodged with one the FRC, the investigations are done either the police or the EACC and then prosecuted by a the directorate of public prosecutions. This might result in the suspects moving the funds suspected to have been laundered resulting in the trail of money laundering growing cold.

Another downside of the Act is that it places onerous reporting obligations on reporting institutions such as banks. This may weaken the effectiveness of the Act because the reports are bound to be many and some may have no substance at all. This could then divert attention to the real suspicious cases, if an institution decides to be selective in its reporting. The law provides a defence to reporting institutions in that they are exempt from liability as long as they prove that they filed a suspicious transaction report with the FRC.¹⁵⁹ An institution could therefore choose to report low amounts suspected to be laundered by a customer and leave out higher amounts suspected to be laundered by the same customer.

Kenya has taken major steps towards establishing and improving its anti-money laundering legal and policy frameworks. This has been through the enactment of the Proceeds of Crime and Anti-Money Laundering Act, the promulgation of regulations there- under. This in principle addressed deficiencies identified in the past regarding the failure to criminalise money laundering however, despite Kenya's high-level political commitment to work with the FATF and ESAAMLG to address its strategic anti-money laundering policy and legislative deficiencies, Kenya has not made sufficient progress in the implementation of an adequate enforcement mechanism to deter the commission of the offence of money laundering. The POCAMLA leans heavily towards regulated and formalised sectors and places onerous reporting obligation on these sectors, but daily, there are emerging alternative ways of carrying out financial transactions and these loopholes would need to be sealed through legislative mechanisms for them to be fully efficient.

¹⁵⁹ Section 6 POCAMLA

CHAPTER THREE

ROLE OF INTERNATIONAL ORGANISATIONS AND REGIONAL BODIES IN ADDRESSING MONEY LAUNDERING

3.1 Introduction

In response to the growing threat of money laundering worldwide and its adverse consequences on the social and economic development of countries, various international and regional organisations enhanced their efforts to combat money laundering. These organisations played, and continue to play, an active role in developing the international standards to combat money laundering and are working hard to promote awareness. They have also developed certain soft law principles and directives to assist countries develop effective anti-money laundering regimes within their jurisdictions in accordance with the international standards.

Whereas these standards were adopted worldwide, it is also worthwhile to consider the soft law influences to law making. It must be stressed that international rules and standards do not necessarily enshrine best practice. International agreements emerge from an inherently political process in which national actors are seeking to protect perceived national competitive interests, often regardless of whether these may be reconciled with the stated goals of increasing efficiency and promoting stability in the larger market.¹⁶⁰

This chapter discusses the role of various international and regional legal frameworks in addressing the problem of money laundering. This chapter, therefore looks at international and regional conventions and various recommendations by international and regional bodies on money laundering. In conclusion, the chapter discusses whether

¹⁶⁰ Edwards, F.R. and Patrick, H.T. eds 1992. *Regulating International Financial Markets, Issues and Policies*. Dordrecht: Kluwer Academic Publications. p 40.

international legal frameworks and policies form the ‘best practice’ on which countries should model their local money laundering frameworks, or whether countries should define their own methods to combat money laundering.

3.2 Development of international concern about money laundering.

The realisation that fighting money laundering required governmental intervention was made in 1970s in the United States due to the early connection of money laundering to illegal trafficking in narcotic drugs and the social harms it brought.¹⁶¹ Prior to the 1970s, governments focused their efforts on fighting against predicate crimes directly, with little or no success as criminal gains still found themselves in the financial system; worse still large amounts of cash that were not necessarily from an illegal source could be transferred for illegal purposes. This two-fold aspect of funds transfer is what made legislation focus on combating money laundering through the scrutiny of funds transfers. Funds transfer was not harmful on its own, however, since it was discovered that it facilitated illegal activities, measures had to be imposed on the external agents involved, such as banks, insurance companies and real estate agents, to carry out certain scrutiny of funds despite the social harms caused by predicate crimes being external to them.¹⁶²

In response to the growing threat of money laundering worldwide and its perceived adverse consequences to the social and economic development of countries, various international and regional organisations joined in the fight. These organisations played, and continue to play, an active role in the development of international standards to combat money laundering and were among the first campaigners to

¹⁶¹ Michael Levi and Peter Reuter. Eds 2006. *Essay on Money Laundering*. Published by the University of Chicago; p 290.

¹⁶² UK Cabinet Office, June 2000. *Recovering the Proceeds of Crime*. A performance and Innovation Unit Report. Available at <http://www.gov.uk/+/...cabinetoffice...uk/.../cabinetoffice/.../crime> last accessed on 25th August 2013.

promote worldwide awareness about money laundering threats and risks. Initially, they aimed at assisting countries worldwide to develop effective anti-money laundering regimes within their jurisdictions in accordance with the international standards.¹⁶³ With these initial good intentions, the international organisations later started applying pressure on countries for them to comply or domesticate these standards, failure of which they would face serious repercussions from the international community. These organisations included the United Nations Office on Drugs and Crime (UNODC),¹⁶⁴ Financial Action Task Force (FATF), International Organisation of Securities Commission (IOSCO), the World Bank, the Basel Committee on Banking Supervision, and the International Monetary Fund.

The United Nations played the greatest role in shaping policy and legislation on money laundering. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in 1988 (herein after the Vienna convention),¹⁶⁵ was the first convention that identified and addressed the issue of proceeds of crime and was also the first international instrument that required countries to criminalise money laundering.¹⁶⁶ Although this Convention focused on proceeds from drug trafficking, other Conventions have expanded this definition and today's definition of the offence of money laundering includes funds generated through a vast range of criminal activities, referred to as predicate offences, which include robbery, human trafficking, drug trafficking, arms trafficking, corruption and

¹⁶³ United Nations Institute for Training and Research 2009. *Fundamentals of Anti-Money Laundering International Standards and Compliance Issues*; Page 5.

¹⁶⁴ UNODC's law enforcement, organised crime and Anti-money laundering Unit is responsible for carrying out the global programme against money laundering, Proceeds of crime and the financing of terrorism, was established in 1997 in response to a mandate given through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

¹⁶⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Adopted on 19th December 1988 and opened for signature on 20th December 1988. Kenya acceded to the Convention on 18th October 2000.

¹⁶⁶ *Ibid* Article 3.

bribery, fraud, kidnapping, smuggling, extortion, forgery, piracy, insider trading and market manipulation, counterfeit currency, racketeering.

International bodies, such as the World Bank and the IMF, presented statistics that demonstrated that money laundering and the related predicate offences had significant economic and social consequences for countries world-wide. The IMF estimated the amount of laundering at 2-5 percent of the world's gross domestic product, almost USD 600 billion even at the lowest end of the scale. One of the most devastating effects of money laundering is its effect on government revenues as money laundered effectively represents income that evades tax. Misreporting and underreporting income is one of the most common methods of conducting money laundering. Consequently the increase of predicate offences and money laundering demands public enforcement expenditure which draws further on public revenues.¹⁶⁷ However, there are no estimates of how much of these amounts are immediately spent by criminals and their organisations and how much is laundered.¹⁶⁸ To this end, the international community concluded that if unchecked, money laundering could have very devastating effects on the social and economic development of a country.¹⁶⁹

The pressure from the international community to criminalise the offence of money laundering increased across borders as the offence was presented as a transnational offence in nature. In 1989, various countries across the world joined hands to establish the foremost international body to combat money laundering, namely, the Financial Task Force (herein referred to as FATF). FATF is an inter-governmental

¹⁶⁷ United Nations Office on Drugs and Crime; October 2011. *Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Crimes*. Research Report by UNDOC Pg.19.

¹⁶⁸ William F. Wechsler, July/August 2001. *Follow the Money*. Report by US Foreign Affairs Office Pg. 45.

¹⁶⁹ Quirk, Peter J. 1997. *Money Laundering: Muddying the Macro economy*, International Monetary Fund Working Paper, pg. 9. Quirk 1996, p 9.

body that was established by G-7 countries¹⁷⁰. Its mandate included examining money laundering techniques and trends, establishing international standards, and developing and promoting policies, both at national and international levels, to tackle money laundering.¹⁷¹ FATF issued forty recommendations with nine special recommendations to provide countries with the basic framework for preventing, detecting and suppressing both money laundering and terrorist financing, among them the recommendation that countries should criminalise money laundering on the basis of the Vienna Convention.

Countries were urged to apply the crime of money laundering to all serious offences with a view to including the widest range of predicate offences. The recommendation stated that these offences should extend to conduct that occurred in another country, which constitutes an offence in that country and which would have constituted a predicate offence had it occurred domestically.¹⁷² This formed the basis for calls to enact special legislation to combat money laundering across all the countries in the world.

FATF Recommendation Two identified the financial system as the main avenue for channelling the proceeds of crime and it urged that the unchecked use of the financial system had the potential to undermine individual financial institutions and, ultimately, the integrity of the entire financial sector. Some writers have also supported FATF by arguing that failure to take measures on financial institutions could also have adverse

¹⁷⁰ G-7 Countries are France, Canada, Germany, Italy, Japan, United Kingdom and United States.

¹⁷¹ www.fatf-gafi.org; The Financial Task Force is the first intergovernmental body that was established by G-7 countries i.e. France, Canada, Germany, Italy, Japan, United Kingdom and United States. Currently the membership of FATF consists of 32 countries and 2 regional organisations.

¹⁷² Recommendation 1- FATF.

macroeconomic effects and affect the exchange rate, through large transfers of capital flows, and could lead to rent seeking and distorted resource allocation.¹⁷³

3.3 International Policy and Legal Frameworks to Combat Money Laundering

The first international agreement that attempted to address the growing threat of money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances of 1988.¹⁷⁴ The Convention concentrated its efforts on the freezing and seizure of proceeds of drug trafficking. It provides comprehensive measures against drug trafficking and urges international cooperation to counter drug trafficking through for example, extradition of drug traffickers, mutual assistance, controlled deliveries and transfer of proceeds from drug trafficking.¹⁷⁵ Although the Convention did not use the term ‘money laundering’, it was the first international agreement that obliged states to criminalise money laundering. Article 3 of the Convention provides that:

“If any person knowingly conceals, disguises, acquires, uses, possesses, converts or transfers a criminal property, he is committing a criminal offence and the states should establish it as a criminal offence within the domestic law”.

Further, Article 5 of the Convention requires party states to adopt appropriate measures that would enable their competent authorities to identify, trace and freeze or seize such illegal proceeds of crime for the purposes of eventual confiscation.

The Convention had, however, limited the scope of offences that could result into money laundering to drug trafficking only and did not address the preventive aspects of money laundering. This maybe because at the time the Convention was adopted, there

¹⁷³ Combating Money Laundering and Terrorist Financing; a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses; Second Edition; Commonwealth Secretariat, 2006.P6.

¹⁷⁴ Vienna convention;Dec 19, UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Adopted on 19 December 1988 and opened for signature on 20th December 1988 and came into force on 11th November 1990).

¹⁷⁵ Ibid Article 10.

was lack of awareness about the magnitude of the problem of money laundering. In the subsequent revisions, other predicate offences were added to the definition of money laundering related offences in addition to the drug trafficking offences identified under Article 3 of the Convention. The Convention, therefore, required parties to criminalise, law the production, manufacture, extraction, preparation and offering for sale, distribution, dispatch and brokerage, dispatch in transit of any narcotic drug or psychotropic substance under their domestic laws.¹⁷⁶

Further, in its efforts to address the threat of money laundering, the UN adopted the International Convention for the Suppression of the Financing of Terrorism in 1999.¹⁷⁷ The Convention criminalised any acts intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict when the purposes of such act by its nature is to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any act.¹⁷⁸ Specifically with regard to money laundering, each state party to the Convention is required to take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purposes of committing the offences set forth under Article 2.¹⁷⁹

The Convention also calls the states to take appropriate measures for the forfeiture of funds used or allocated for the purpose of committing the offences under the

¹⁷⁶ The General Assembly at its 17th special session in 1990, by resolution S-17/2, adopted the political Declaration and Global programme of Action on international cooperation, against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances. The General Assembly at its 20th special session in 1998 broadened the mandate of the political declaration and the measures for countering money- laundering to cover all serious crime, not just drug related offences.

¹⁷⁷ Adopted by the General Assembly Resolution 54/109 of 9th December 1999. The Convention came into force in April 2002. Source UN Treaty Collection, <<http://treaties.un.org>.

¹⁷⁸ Article 2.

¹⁷⁹ Article 8(1).

Convention.¹⁸⁰ The Convention gives due consideration to the sharing of the proceeds of crime with the countries where the crime was committed or the funds originated from. To this end, the Convention calls for states to give consideration to concluding agreements that allow for the sharing of such proceeds on a regular basis of funds that have been forfeited.¹⁸¹ States are also required to consider mechanisms whereby funds derived from the forfeitures referred to in this Article are utilised to compensate victims of offences referred to under the Convention or their families. This should be done while not prejudicing the rights of third parties.¹⁸²

The offences under this Convention shall be included as extraditable offences.¹⁸³ State parties are required to afford one another the greatest measure of assistance in connection with criminal investigations or criminal extradition proceedings in respect of the offences under the Convention. Parties may not refuse a request for mutual assistance on the ground of bank secrecy.¹⁸⁴

Parties are required to take all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories.¹⁸⁵ Such measures include requiring financial institutions, and other professionals involved in financial transactions, to utilise the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened and to pay attention to unusual or suspicious transactions and report such transactions suspected of stemming from a

¹⁸⁰ Article 8(2).

¹⁸¹ Article 8(3).

¹⁸² Articles 8(4 & 5).

¹⁸³ Article 11.

¹⁸⁴ Article 12.

¹⁸⁵ Article 18 (1).

criminal activity.¹⁸⁶ States are also required to adopt regulations prohibiting the opening of accounts where the ultimate beneficial owners are not identifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions.¹⁸⁷

State parties are required to license all money transmission agencies, adopt measures to monitor the cross-border transmission of cash and cooperate with the rest of the countries in the investigation of crimes identified under Article 2 of the Convention.¹⁸⁸

This Convention also focused sharply on countering terrorist financing and specifically called on states to criminalise terrorist financing,¹⁸⁹ and establish mechanisms to detect and report any evidence of financing of terrorist acts.¹⁹⁰ The Convention has a strong link to money laundering in that, it established a uniform, detailed and thorough framework for international cooperation to combat terrorism financing similar to that of money laundering in order to enhance international cooperation in both areas.¹⁹¹

The UN also felt the need to turn its attention to cross-border cooperation and specifically adopted the Palermo Convention Against Transnational Organized Crime.¹⁹² The Convention was adopted in response to the growing threat of transnational offences, and decided that if a crime crossed borders, so must law enforcement. The Convention represents a major step in the fight against transnational organised crime, including money laundering, and signifies the growing need to

¹⁸⁶ Article 18(1b).

¹⁸⁷ Article 18(1b,i).

¹⁸⁸ Article 19 & 20.

¹⁸⁹ Article 4.

¹⁹⁰ Article 18.

¹⁹¹ Article 13 & 14.

¹⁹² The UN Convention against Transnational Organised Crime (Adopted by the General Assembly Resolution 55/25 of 15th November 2000 and entered into force on 29th September 2003).

enhance international cooperation to tackle the issues. With respect to money laundering, the Palermo Convention requires states parties to take certain measures. State parties are required to institute a comprehensive domestic regulatory and supervisory regime to deter and detect all forms of money laundering for banks and non-bank financial institutions and, where appropriate other bodies particularly susceptible to money laundering. The Convention requires parties to place special emphasis on customer identification, record-keeping and reporting suspicious transactions.¹⁹³

The Convention also obligates each state party to establish money laundering as a criminal offence and to include the widest possible range of offences within the definition of predicate offences, whether committed within or outside the jurisdiction.¹⁹⁴ State parties were required to set up administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering, including domestic law, judicial authorities. Specifically, the Convention requires the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering. Further, state parties are required 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. Such measure should require that states report cash and appropriate negotiable instruments.¹⁹⁵ State parties are also required to adopt measures to enable the confiscation of the proceeds of crime, or of the property, equipment or other

¹⁹³ Art 7.

¹⁹⁴ Art 6.

¹⁹⁵ Art 7.

instrumentalities derived from committing the offence of money laundering. These are to be accompanied by measures to identify, trace, freeze or seize any items derived from or used in committing the offence of money laundering.¹⁹⁶

The Palermo Convention is important because it has extended the offence of money laundering to include a range of offences that can give rise to money laundering, and strongly urges state parties to cooperate at international level to combat money laundering.¹⁹⁷ Similar to the Financial Action Task Force (FATF), it requires states to include all serious crimes within the range of predicate offences and, hence, provide for a wider definition of money laundering.¹⁹⁸

The UN also adopted the Convention Against Corruption,¹⁹⁹ primarily as an instrument aimed at fighting corruption but regarding money laundering, parties are required to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank institutions. It also requires the establishment of means to detect and deter all forms of money laundering, emphasizing on customer identification, record keeping, and the reporting of suspicious transactions.²⁰⁰ The Convention additionally requires state parties to put in place measures to ensure that certain information was captured during money remittances, including providing useful information on the originator of the transaction, to maintain such information throughout the payment chain and to

¹⁹⁶ Art 12.

¹⁹⁷ Art. 13.

¹⁹⁸ Art.6 (2) provides that the offence of money laundering shall be applied, “to the widest range of predicate offences”.

¹⁹⁹ The UN Convention against Corruption, 31 October 2003, A/58/422 (adopted by UN General Assembly on 31 October 2003, entered into force on 14th December 2005 in accordance with Article 68(1) of Resolution 58/4 of 31st October 2003.) available at: <http://www.refworld.org/docid/4374b9524.html>, last accessed on 24th August 2013.

²⁰⁰ Ibid Art14 (1).

enhance scrutiny to transfers of funds that do not contain complete information on the originator.²⁰¹

As the UN was formalising its message against money laundering in these three main conventions, it made several declarations along the way to address the needs that the UN General Assembly identified as immediate. In 1994, the UN General Assembly adopted the Naples Political Declaration and Global Action Plan Against Organised Transnational Crime.²⁰² The declaration was adopted by the world ministerial conference on organised transnational crime held at Naples, Italy, in 1994, to promote international cooperation between countries to prevent and control organised transnational crime, which included money laundering. The UN, in doing, so was extending full support to the work of the world ministerial conference by approving and urging all entities in the UN system to recognise and implement it within their systems.

After the Naples declaration, the UN General Assembly adopted the political declaration and Action Plan against Money Laundering at its twentieth special session at New York, in 1998.²⁰³ This was in recognition of the fact that the problem of money laundering had spread to global levels and was threatening the integrity, reliability and stability of financial institutions and government structures. The Declaration required states to actively participate in international and regional initiatives designed to promote the implementation of effective measures to combat money laundering. This would involve the establishment of effective legislative frameworks to criminalise the laundering of proceeds derived from serious crimes. The frameworks were to prevent

²⁰¹ Art 14 (3).

²⁰² Naples Political Declaration and Global Action Against Organised Transnational Crime. UNGA Res. GA/49/159 (23 December 1994) UN Doc. A/Res/49/149

²⁰³ Political Declaration and Action Plan Against Money Laundering, UNGA Res.S20/4D (10 June 1998).

criminal and other illicit funds from accessing the national and international financial systems. The Declaration called on states to implement efficient and effective law enforcement measures to provide tools for effective detection, investigation and prosecutions of criminals involved in money laundering, extradition procedures and information sharing mechanisms.²⁰⁴

After the adoption of the Political Declaration and Action Plan Against Money Laundering by the General Assembly, the mandate of the UN Global Programme Against Money Laundering, Proceeds of Crime and Financing of Terrorism²⁰⁵ was strengthened to include all serious crimes, besides drug related offences. The programme was mandated to offer support to the member states in the implementation of the declarations and conventions and, specifically, in the development of policies and enactment of legislation that would give effect to international standards or legal instruments against money laundering. The programme was also mandated to provide technical assistance to member states to implement national legislation and provisions contained in the 1998 declaration to combat money laundering. The unit was also mandated to encourage member states to cooperate at national and international level in combating money laundering by exchanging information and providing mutual assistance.

To achieve its objective of assisting member states in combating money laundering, the UN Global Programme developed and printed two model laws, both for common law and civil law legal systems,²⁰⁶ to help states set up their national anti-money laundering

²⁰⁴ Ibid.

²⁰⁵ Established in 1997 in response to the mandate given to the United Nations on Drugs and Crime (UNDOC) through the Vienna Convention- Ibid note 15 (n2).

²⁰⁶ For Common law systems, see the 2003 UN Model Law on Money-Laundering, Proceeds of Crime and Terrorist Financing at<<http://www.imolin.org/imolin/rn/poctf03.html>>. For Civil systems, See the 2005

regimes in accordance with the international legal instruments, particularly the FATF recommendations, the Vienna Convention and the Palermo Convention. These model laws have been continuously updated to incorporate any amendments in the international standards.

In addition to the above Resolutions and Conventions, the UN General Assembly adopted various other resolutions to combat money laundering, including the Political Declaration and Global Programme of Action, adopted at the Seventeenth General Assembly Special Session on Drugs,²⁰⁷ General Assembly Resolution 45/123²⁰⁸ which encouraged the reporting of suspicious or unusual transactions to a national organisation in each state, and the development of effective communication among competent authorities to facilitate the investigation and prosecution of money laundering activities²⁰⁹.

To reinforce the UN's efforts in issuing principles against money laundering, The Basel Committee on Banking Supervision also issued a statement titled; the Prevention of Criminal Use of the Banking System For The Purpose Of Money in December 1988, referred to as the Basel Statement.²¹⁰ This statement of contained five principles that bank's management should ensure are observed within their institutions with a view to assisting in the suppression of money-laundering through the banking system, national and international. Banks are to maintain the integrity of the banking institutions and the

UNODC and IMF Model-Legislation on money laundering and financing of terrorism. at<<http://www.unodc.org/documents/money-laundering/2005> assessed 12th Oct 2013.

²⁰⁷ UNGA Res. 17/13 (23rd February 1990) UN Doc A/S-17/1 Available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/S-17/13, accessed on 23rd August 2013.

²⁰⁸ International Cooperation in Combating Organised Crime, UNGA Res. 45/123 (14 December 1990) UN Doc; A/Res/45/123.

²⁰⁹ Measures to Improve Co-ordination and Co-operation in the International Struggle against Illegal Production of Drugs, Illicit Drug Traffic and Drug Abuse; A/ Res /38/680.

²¹⁰ The Basel Committee was established in 1974 by the central bank governors of the G 10 countries. Its main objective is to improve supervisory understanding and the quality of banking supervision worldwide by promoting international cooperation on banking supervisory matters.

confidence of the public in the banking sector, by putting in place appropriate systems and procedures to deter and detect money laundering, and to cooperate with law enforcement agencies.²¹¹ The principles primarily set out to reinforce existing best practices among banks by stressing on, having efficient and effective procedures in place to determine the identity of all its customers and to observe the laws and regulations pertaining to financial transactions.²¹² The Basel principles are restricted to banks only and have not extended to any other money transfer service provider and therefore cannot form the basis of a comprehensive legal framework to combat money laundering.

The main international policy measures, which form the framework for international cooperation in the fight against money laundering, are the FATF recommendations. FATF is an intergovernmental body established in 1989 by G-7 countries²¹³ to enable them to work jointly towards tackling the problem of money laundering. FATF was given a mandate to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorism and the financing of proliferation and other related threats to the integrity of the international financial system both at national and international levels. In collaboration with other international stakeholders, the FATF also works to identify national level vulnerabilities with the aim of protecting the international financial system from misuse. Currently, the membership of FATF consists of 32 countries and territories and 2 regional organisations.²¹⁴ FATF also works in close cooperation with other international and regional organisations, including, for example, the World Bank, the

²¹¹ Ibid Principle III and IV.

²¹² Basel Committee on Banking Supervision, The Prevention of the Criminal Use of the Banking System for the purpose of money laundering (December 1998) available on <http://www.bis.org/publ/bcbasc>.

²¹³ Group 7 countries were France, Canada, Germany, Italy, Japan, United Kingdom and United States.

²¹⁴ List of membership countries and jurisdictions is available at < <http://www.fatf-gafi.org>.

IMF, Eurasian Group, Eastern and Southern Africa Anti-Money Laundering Group, to adopt recommendations to combat money laundering. So far, FATF has issued forty Recommendations to combat money laundering and nine to fight against terrorist financing.²¹⁵

Recommendation 1 requires states to carry out risk assessments by identifying, assessing and taking action, including establishing an authority or mechanism to coordinate actions to assess risks, and apply resources aimed at ensuring that risks are mitigated successfully. These authorities should further require financial institutions and designated non-financial businesses to identify, assess, and take action to mitigate money laundering risks associated with their businesses. The recommendation also provides for extraterritorial jurisdiction in that, predicate offences should extend to conduct that occurred in another country, which constituted an offence in that country and which would have constituted an offence if it had occurred domestically. This dual criminality where the offence must be recognised in both countries could be viewed as restrictive but in instances where the conduct is an offence in one country only, FATF encourages countries to provide mutual assistance.

Recommendation 2 requires every state to establish a national coordination mechanism concerning the development and implementation of policies and activities to combat money laundering. These policies should be informed by the risks identified nationally, and states are required to establish money laundering as a criminal offence within their national legal systems in accordance with the Vienna Convention and the Palermo Convention.²¹⁶ However, because the Vienna Convention primarily deals with the

²¹⁵ Information about the FATF and its efforts to combat money laundering is found at <http://www.treasury.gov.za> and <http://www.gafi.org>, Accessed on 23rd August 2013.

²¹⁶ FATF Recommendation 3.

offence of drug trafficking, it defines money laundering from the view point of drug trafficking only. The only money laundering predicate offences provided under Article 3 of the Vienna Convention are conversion or transfer of property, knowing that such property is derived from an offence of drug trafficking; concealment or disguise of the true nature, source and location of property, knowing that such property is derived from an offence of drug trafficking; and the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from an offence of drug trafficking.²¹⁷

The definition of money laundering under the Palermo Convention, is however wider than the one under the Vienna Convention, and includes a range of predicate offences that can give rise to the offence of money laundering. The Convention generally uses the word, “proceeds of crime” and without limiting it to the offence of drug trafficking and requires states to apply the offence of money laundering to the widest possible range of predicate offences.²¹⁸ Thus, under both the Vienna Convention and Palermo Convention states are required to criminalise the offence of money laundering within their legal systems. States can describe the predicate offences by making reference to all offences or use a criterion in selecting the offences which is either based to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence.

For states not having a minimum threshold of offences within their legal system, the predicate offences should include all offences punishable with the maximum of more than one year’s imprisonment. However, whichever approach a state may take, the

²¹⁷ Art. 3 Vienna Convention.

²¹⁸ Ibid Art 6(2).

FATF recommendation requires it to include, at the minimum, the following twenty offences within the range of predicate offences within their legal systems, that is participation in an organised criminal group and racketeering; terrorism, including terrorist financing, trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; bribery and corruption; fraud; counterfeiting currency; piracy of products; environment crime; murder; serious bodily harm; kidnapping; illegal restraint and hostage taking; robbery or theft; smuggling; extortion; forgery; piracy; insider trading and market manipulation.²¹⁹

Recommendation 4 provides for the mental element of the offence of money laundering. The recommendation requires that the legal systems of a state should provide that the intent and knowledge required for committing the offence of money laundering can be inferred from the objective, as provided under both the Vienna Convention and the Palermo Convention. Each state has been given the discretion to decide the form of intent or knowledge that would be necessary to constitute the offence of money laundering. A state has, therefore, to decide whether that mental element will be the ‘actual knowledge’ or if it will be ‘mere suspicion’ that the property is the proceeds of crime; also it can adopt the ‘should have known’ or ‘should be suspicious’ standard for culpability. According to the model legislation on money laundering for civil law experts, all three elements namely, actual knowledge, suspicion or should have known that the property is the proceeds of crime, constitute the required mental element of money laundering.²²⁰

²¹⁹ See, FATF list of designated categories of offences <http://www.fatf-gafi.org>.

²²⁰ UNODC, ‘Model Legislation on Money Laundering and Financing Terrorism’ (1st December 2005).

Recommendation 5 requires that states adopt appropriate measures within their legal systems to enable competent authorities to confiscate the proceeds of crime derived from committing money laundering, together with the property, equipment or other means used or intended to commit money laundering. Such measures would include making provisions within the legal system that will enable law enforcement authorities to identify, trace and evaluate property that is subject to confiscation or is suspected of being proceeds of crime.

Recommendation 6 and 7 require states to implement targeted financial sanctions to comply with the United Nations Security Council resolutions relating to the prevention and suppression of terrorism and terrorist financing.²²¹ These resolutions require states to freeze without delay the funds or other assets and ensure that such funds are not available to any person who is designated under the resolutions cited above as a terrorist, international criminal or a person listed in the UN Security Council (UNSC) for fraud, bribery or any other serious offence.

Recommendation 8 requires states to review the adequacy of laws and regulations relating to entities that can be abused for the financing of terrorism. These entities include non-governmental organisations whose source of funding is easy to obscure or divert into other clandestine activities.

Recommendation 9 requires states to ensure that the financial institution secrecy laws do not inhibit the implementation of FATF Recommendations. Recommendation 10

²²¹ These Resolutions include, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267(1999) and its successor resolutions; or pursuant to Resolution 1373(2001).

requires states to ensure, as far as possible, the identity of persons establishing business relationships and carrying out monetary transactions at the financial institutions is established through the necessary due diligence process. The requirement to carry out due diligence should be set out in the law or other enforceable procedures. Further, under Recommendation 11, states are required to ensure that financial institutions retain customer and transaction records for at least five years. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currencies involved) so as to provide, if necessary, evidence for the prosecution of criminal activity.

FATF also recommends that additional due diligence measures are taken for certain activities and individuals. Recommendations 12- 16 give examples of specific customers and activities where additional due diligence would be required. These include politically exposed persons(PEPs),²²² where institutions are required, in addition to the ordinary due diligence, to take additional measures to mitigate the risk by, for example obtaining, senior management approval for establishing such relationships. These requirements for PEPs should apply to family members or close associates. Other activities where additional measures should be taken are in correspondent banking relationships.²²³ Particularly the respondent institution should fully understand the nature of the respondent's business and to determine from publicly available information the reputation of the institution. With regard to money or value transfer services (MVTs),²²⁴ states are required to additionally ensure that natural or legal persons that provide money or value transfer services are licensed or registered and subject to effective systems for monitoring and ensuring compliance with the

²²² Rec 12.

²²³ Rec 13.

²²⁴ Rec 14.

relevant due diligence steps, such as identifying natural or legal persons that carry out MVTs without a license or registration, and apply the appropriate sanctions. New technologies and wire transfers have also been identified as activities where states and institutions should employ additional due care when carrying them out.

In addition to carrying out due diligence with their own resources, states are allowed to rely on information available from third parties, provided the responsibility of determining if such an activity meets the FATF requirements remains with the financial institution. Where financial institutions have branches and subsidiaries in other jurisdictions, states are required to ensure that such institutions apply due diligence measures consistent with the home state requirements. FATF also designates some countries, individuals, relationships as high risk. In this regard, financial institutions are required to apply a higher standard of due diligence when dealing with them, and other counter-measures as will be prescribed from time to time by FATF.²²⁵

Further measures to prevent money laundering by FATF include reporting suspicious transactions to the necessary authorities, where an institution has reasonable grounds to suspect that funds are proceeds of a criminal activity or are related to terrorist financing. In reporting suspicious transactions, financial institutions, their directors, officers and employees should be protected by law from criminal and civil liability, if they report their suspicions in good faith, even if they did not know precisely what the underlying criminal activity was, regardless of whether illegal activity actually occurred. Upon filing report institutions, employees and their directors are equally

²²⁵Rec 17-19.

prohibited by law from disclosing the fact that a suspicious transaction report has been filed.²²⁶

The Recommendations also spin the net wider in terms of businesses and professions that should observe these FATF guidelines, besides financial institutions. The customer due diligence and record keeping requirements set out in Recommendations 10,11,12,15 and 17 apply also to designated non-financial businesses including, casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, trust and company service providers. These categories, in addition to carrying out due diligence on their customers and transactions, are also required to report suspicious transactions.²²⁷ All these financial institutions and professions are required to establish the ultimate beneficial ownership (UBO) of all those they deal with. These legal arrangements where UBO has to be established include trusts, issuers of bearer bonds or shares, nominee accounts. In this regard domestic laws should provide or allow for the querying of such arrangements in order to establish the UBO without being in breach or conflict.²²⁸

FATF Recommendations require that states set aside institutions to carry out adequate supervision and regulation of these institutions. These supervisors should be able to vet institutions before licensing them and should have powers to monitor, compel the production of documents, and impose sanctions for failure to comply. Each state is required to establish a specific financial intelligence unit to serve as a national centre for the receipt and analysis of suspicious transaction reports and other information relevant to money laundering and associated offences. The unit should be able to

²²⁶ Rec 20-21.

²²⁷ Rec 23.

²²⁸ Rec 24-25.

investigate, identify, trace and initiate actions to freeze and seize property that is or may become subject to confiscation or is suspected to be from the proceeds of crime.²²⁹

FATF recommendation 36 requires states to take immediate steps to become party to and implement fully the Vienna Convention, 1998, the Palermo Convention, 2000 and the United Nations Convention against Corruption, 2003 and the Terrorist Financing Convention, 1999. Where applicable states are encouraged to ratify and implement other relevant international conventions, such as Council of Europe Convention on Cyber Crime, 2001,²³⁰ the Inter American Convention against Terrorism, 2002,²³¹ and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.²³² This is to enable states provide each other with rapid, constructive and effective widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences, and terrorist financing investigations, prosecutions and related proceedings. Such mutual assistance includes freezing and confiscation, extradition of individuals charged with money laundering offences, and entering into bilateral or multilateral agreements or arrangements that provide a legal basis within which to cooperate.

Kenya is a party to the following International Instruments, Convention on Psychotropic Substances, date of accession 18th October 2000. United Nations Convention against illicit trafficking in Narcotic Drugs and Psychotropic Substances, date of accession 9th February 1973. Kenya is an associate member of FATF through the Southern African Anti-Money Laundering Group (ESAAMLG) which was formed

²²⁹ Rec 29-35.

²³⁰ CETS No: 185; 23.XI.2001 Done at Budapest, this 23rd day of November 2001.

²³¹ AG/RES. 1840 (XXXII-O/02); The Inter-American Convention Against Terrorism was adopted by the member countries of the [Organization of American States](#) (OAS) at its [General Assembly](#) held in [Bridgetown, Barbados](#), on 3 June 2002.

²³² Opened for signature at Warsaw, 16.V.2005; CETS No: 198; Source: Treaty Office on <http://www.conventions.coe.int>, accessed on 29th August 2013.

in 1999 in Arusha, Tanzania.²³³ Similarly, in the West African sub-region, the Intergovernmental Action Against Money Laundering in Africa (GIABA) was established in 2000 by the leaders of Economic Community of West African States (ECOWAS) to coordinate FATF's efforts to combat money laundering.²³⁴ The decisions made at the regional fora are communicated back to the international FATF fora. FATF then tracks these decisions, such as the progress of the enactment of legislation and operationalisation of these laws to combat money laundering. Failure to attain the various commitments made to FATF, makes the participating countries vulnerable to losing international support and cooperation towards their economic and social development.²³⁵

3.4 Regional Policy and Legal Frameworks Addressing Money Laundering

In addition to the efforts by the international organisations to combat money laundering, various regional organisations and relevant groups also play a crucial role in the fight against money laundering. These bodies are either organised according to their geographical region or by specific purpose of the organisations.

The Asia/Pacific Group on Money Laundering (herein after 'APGML) is an autonomous international organisation established in 1997 in Bangkok, Thailand, to

²³³ESAAMLG was launched at a meeting of Ministers and high-level representatives in Arusha, Tanzania, on 26-27 August 1999. A memorandum of understanding (MoU) based on the experience of the FATF and other FATF-style regional bodies was agreed to at that meeting. ESAAMLG became an Associate Member of the FATF in June 2010. Following the signature of the MoU by seven of the potential member countries; (Tanzania, Uganda, South Africa, Botswana, Kenya, Lesotho and Seychelles), ESAAMLG came into formal existence. Currently, all members (Angola, Botswana, Comoros, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia, Zimbabwe) are Commonwealth countries which have committed to the FATF Forty Recommendations. The group held its first meeting on 17-19 April 2000 in Dar es Salaam, Tanzania. Following the events of 11 September 2001, ESAAMLG expanded its scope to include the countering of terrorist financing.

²³⁴The Inter-Governmental Action Group against Money Laundering in West Africa (**GIABA**) was established by the Economic Community of West African States (**ECOWAS**) Authority of Heads of State and Government in the year 2000 through decision A/DEC.9/12/99 of the ECOWAS Authority of Heads of State and Government establishing the Inter-Governmental Action Group against Money Laundering in West Africa. Through decision A/DEC.6/12/00, the statutes of GIABA containing its mandate regarding money laundering was adopted and later amended through decision A/DEC.3/01/05 amending Articles 8 (ii), 9 (ii) and 9 (iii) of the Statutes of GIABA to extend its mandate to cover financial terrorism.

²³⁵Referenced from, FIN-2012-A003- The Financial Crimes Enforcement Network (United States Department of the Treasury) issue of March 6, 2012. Under that publication, the following jurisdictions were published in an advisory to all Banks as being deemed as having strategic deficiencies in their anti- money laundering regimes for which each jurisdiction had provided a high level political commitment to address within certain timelines. These countries included Angola, Morocco, Algeria, Namibia, Sudan and Zimbabwe.

raise awareness and assist member states in the Asia/Pacific region to fight against money laundering. APGML consists of 40 member states and a number of international and regional observers including the United Nations, International Monetary Fund (IMF) and the World Bank.²³⁶ Its main functions are to assess compliance by its members with the global anti-money laundering and anti-terrorism standards through a robust mutual evaluation programme, and to contribute to the global policy development of anti-money laundering and counter-terrorism financing standards by active associate membership status in the FATF.²³⁷

The Caribbean Financial Action Task Force (CFATF)²³⁸ was established in 1992 as a result of meetings convened by 20 states of the Caribbean basin in Aruba in May 1990, and in Jamaica in November 1992. Currently, CFATF consists of 30 states, and has issued 19 Recommendations with specific relevance to the needs and problems of the region and to complement the FATF 40 Recommendations.²³⁹ CFATF aims to achieve the effective implementation of its recommendations and it monitors and assesses the progress of member states through various methods, including the self-assessment programme and an ongoing programme of mutual evaluation of members.

²³⁶ Membership and observers list can be found on, <http://www.apgml.org>.

²³⁷ The establishment of APG and its secretariat was by the Commonwealth Secretariat in conjunction with the FATF. They began 'awareness raising' in the Asia/Pacific region in the 1990's as part of its global strategy. A number of symposia were held: the first in Singapore in April 1993. A second symposium was held in Kuala Lumpur, Malaysia in November/December 1994, at which time 16 Asia-Pacific jurisdictions and regions endorsed and agreed to implement the FATF's 40 Recommendations. In order to achieve more concrete results, a regional Secretariat named, the "FATF Asia Secretariat", was established in 1995, funded by Australia. In co-operation with other international bodies, the FATF Asia Secretariat continued to work to consolidate support for anti-money laundering measures. Its primary objective was to obtain wide regional commitment to implement anti-money laundering policies and initiatives and secure agreement to establish a more permanent regional anti-money laundering body. Typologies Workshops were held in Hong Kong, China in October 1995 and November 1996, and the Third Asia Money Laundering Symposium was held in Tokyo, Japan in December 1995. At the Fourth (and last) Asia/Pacific Money Laundering Symposium (in Bangkok, Thailand) in February 1997, the APG was officially established as an autonomous regional anti-money laundering body by unanimous agreement. A Secretariat was also established to serve as the focal point for APG activities. It is located in Sydney, Australia and its funding, as well as funding for all APG activities, is provided by all APG members in accordance with a specific funding formula based upon the individual GDP for each member. This information is available at <http://www.apgml.org/>, last accessed on 30th August 2013.

²³⁸ www.cfatf.org accessed on 23rd August 2013.

²³⁹ CFATF 19 Recommendations <<http://www.cfatf.org/eng/recommendations/cfatf/>> accessed on 23rd August 2013.

CFATF also participates in training and technical assistance programmes, biannual plenary meetings for technical representatives, and annual ministerial meetings.²⁴⁰

The Council of Europe on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism was established in 1997. Currently it has 28 permanent members and 2 temporary members. The main objective of the Council is to ensure that its member states have in place effective anti-money laundering policies and procedures to combat money laundering and to comply with the international standards. It assesses the members' compliance with international money laundering standards, prepares documentation for mutual evaluation, conducts studies on money laundering trends and where appropriate makes recommendations to the evaluated countries, with a view to improving the efficiency of their anti-money laundering measures.

In expression of their efforts towards the fight against money laundering, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime referred to as the Strasbourg Convention, which opened for signature on 8th Nov 1990.²⁴¹ The Convention aims at strengthening the cooperation of its members in the fight against money laundering. Article 6 of the Convention defines money laundering as;

- a. The conversion or transfer of property, knowing that such property is proceeds, 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 the predicate offence to evade the legal consequences of his actions;
- b. 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 proceeds; subject to its constitutional principles and the basic concepts of its legal system;

²⁴⁰ CFATF Mutual Evaluation; <http://www.cfatf.org/news/news.asp> accessed on 23rd August 2013.

²⁴¹ Convention of the Member States of the Council of Europe, done at Strasbourg on the 8th Day of November 1990. Official Gazette, International agreements, 14/1997, Act on the Ratification of the Convention on laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

- c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;
- d. Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The Convention requires each party to adopt such legislative and other measures to enable confiscation of proceeds or property of such value which would correspond with such proceeds and adopt measures that enable international cooperation and investigative assistance between states.²⁴² This Convention restricts its membership and jurisdiction to the member states of Europe. However, some non-member states have since signed the Convention, but the immediate obligations are for the Council members of Europe²⁴³. The scope of the Convention is also restricted to confiscation and cooperative measures amongst member states.

To supplement the Council of Europe's efforts, the council of European Communities (CEC) also put efforts in combating money laundering which are reflected in two directives adopted in 1991 and 2001 on prevention of the use of the financial system for the purpose of money laundering, referred to as the CEC directives.²⁴⁴ The Directives represents the first stage in combating money laundering at a community level and they recognised that the effectiveness of efforts to eliminate money laundering was particularly dependent on the close coordination and harmonisation of national implementing measures. In defining money laundering, the Directives, take over the definition given in the 1988 United Nations Vienna Convention. The Directives sharply focus on the conduct of Credit and financial institutions, and require them to properly identify their customers by means of obtaining supporting and verification

²⁴² Ibid Article 6.

²⁴³ Non-members include, Australia, Canada, Colombia, Kazakhstan, United States of America.

²⁴⁴ Council Directive 91/308/of 10th June 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering [Official Journal L166 of 28th June 1999]. Amended by the Council Directive 2001/97/EC of 28th December 2001.[Official Journal L 344 of 28th December 2001].

evidence of their customers and to cooperate fully with the authorities responsible for combating money laundering. The European community revised the original Directive of 1991 in 2001 by adding a requirement, for its Member States to ‘prohibit’ the laundering of funds derived from drug offences.

These two directives were replaced by another Directive in 2005,²⁴⁵ in an effort to find a harmonized approach towards money laundering across the European Union. However, application of the CEC Directive was difficult and member states were unable to agree on a broad list of criminal activities to which the Directive would apply. For instance, criminal activity under the Directive was defined as a crime specified in Art 3 (1) (a) of the Vienna Convention which basically covered drug trafficking and any other activity designated as such for the purposes of this Directive by each member state. However Article 15 of the Convention entitled member states to adopt stricter provisions. In July 1998, the European Community announced plans to extend the scope of the Directive in an attempt to make it more effective.²⁴⁶ The proposals included the extension of the criminal activities already covered in the Directive to activities by and professionals outside the financial services sector for example auditors, lawyers and real estate agents and to extend the definition of suspicious transactions to cover other proceeds of crime other than drug trafficking. However the commission recognised that many member states especially the UK, has already gone beyond the requirements of the directive and established measures that covered most crimes including crimes outside the financial sector.

²⁴⁵ (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. Source; Official Journal of the European Union OJ L 309/15.

²⁴⁶ ‘Money Laundering, EU Directive to be extended’ The European Commission. www.europa.eu.int, accessed on 23rd August 2013.

The main shortcoming with the EC Directive was that, it was difficult to harmonise its provisions with those of the UN Conventions. The international conventions required jurisdictions to enact new legislations criminalising money laundering and determine the predicate offences that would result in money laundering. The existence of separate related offences in the UK created potential anomalies. The defences availed in the Directive and under the conventions made it possible for someone to file a report concerning one suspected offence and leave another, creating thus creating a huge loophole.²⁴⁷

The Financial Action Task Force on Money Laundering in South America is a regional intergovernmental organisation established by 10 South American states in 2000.²⁴⁸ Its main objective is to assist member states in combating money laundering by continuously improving their national anti-money laundering policies in accordance with the international standards, and to strengthen cooperation between member states. Similar to the other organisations discussed above, the Task Force conducts assessments of member states to evaluate their compliance with international standards against money laundering, provide training and technical assistance to members to develop effective anti-money laundering regimes and to comply with the international standards, monitor the new trends and techniques on money laundering, and to spread awareness about the same among member states.

The Middle East and North Africa Financial Action Task Force,²⁴⁹ is an autonomous organisation established on 30th November 2004 by 14 Middle East and North Africa states at a meeting held in Manama, Bahrain. Currently it has 18 member states and

²⁴⁷ Stessens, G. 2005. *Money Laundering A New International Law Enforcement Model*. Cambridge University Press, New York.

²⁴⁸ www.gafisud.org last accessed on 23rd August 2013.

²⁴⁹ <http://www.menafatf.org>, accessed on 23rd August 2013.

has many international bodies and groups participating in its activities as observers.²⁵⁰ The Task Force main mandates are; adopting the recommendations of FATF on money laundering; implementing the relevant UN treaties and agreements and United Nations Security Council Resolutions dealing with money laundering; and building effective arrangements throughout the region to combat money laundering and terrorist financing effectively in accordance with the particular cultural values, constitutional frameworks and legal systems in the member countries.

The Americans, in the recognition of the serious threat that money laundering posed throughout the hemisphere, held a ministerial conference in Buenos Aires, Argentina on December 1-2, 1995. This was attended by representatives of 29 of the 34 states of the hemisphere.²⁵¹ At the end of the conference, the Communiqué of the Summit of the Americas Conference Concerning the Laundering of the Proceeds and instrumentalities of crime was adopted by those in attendance. The stated committed themselves to establish effective anti-money laundering programmes in their jurisdictions. All the requirements mirrored the 40 FATF requirements, and the implementation of the communiqué was to be done within the framework of the Organisation of American States, which consists of 35 members from the Western hemisphere,²⁵² who have joined together to strengthen cooperation and democratic values and defend common interest and debate the major issues facing the region and the world. In 1999 the Organisation established its anti-money laundering unit (AMLU) to provide technical assistance and training on judicial and financial measures to law-enforcement agencies of member states to combat money laundering. AMLU has developed special courses and training programmes on anti-money

²⁵⁰ The organisations objectives are outlined at <http://www.menafatf.org/topiclist>, accessed on 23rd August 2013.

²⁵¹ www.imolin.org/imolin/badecl95.html. Accessed on 30th August 2013.

²⁵² www.oas.org/documents/eng/members, last accessed on 30th August 2013.

laundering based on the principles laid down by the FATF and the Communiqué, for bankers, regulators, judges and prosecutors, financial intelligence units and law enforcement agencies.²⁵³

3.5 Conclusion

Kenya is bound by the provisions of the Vienna Convention and the FATF recommendations by virtue of being part of ESAAMLAG. The international instruments require states to take a number of steps to ensure that their legal and institutional frameworks are adequate enough to combat money laundering within their jurisdictions. States are required to adopt and implement laws that are consistent with their cultural circumstances, legal precepts and constitutions as well as international standards, to combat money laundering. This thesis has looked at how Kenya has domesticated these provisions and identified some gaps. These gaps are as a result of pressure to domesticate which resulted in the adoption of these international instruments without much consideration to the local and cultural circumstances in Kenya. Chapter 5 of this thesis will give recommendations on steps Kenya could possible take to close these gaps and still achieve the spirit of these international instruments.

²⁵³http://www.cicad.oas.org/Lavado_Activos last accessed on 30th August 2013.

CHAPTER FOUR

CASE STUDY: A REVIEW OF THE ANTI-MONEY LAUNDERING LEGAL FRAMEWORKS IN SEYCHELLES

4.1 Introduction

Effective Management of money laundering cannot be adequately confined within one jurisdiction because the world has now become a global village. Whilst the FATF recommendations call upon all countries to criminalise money laundering within their borders,²⁵⁴ the legal dilemma is often how to regulate funds stored away in offshore jurisdictions which have less stringent legal frameworks and controls. It has been noted that, “for any attempts to regulate against money laundering to be successful, then the crime of money laundering must be a relatively serious offence and the anticipated harm must be something other than complicity. The regulatory framework must aspire to be universal and water tight. Prevention of laundering must become one of the driving forces of international cooperation in criminal justice.”²⁵⁵

One starting point would be in streamlining the legal frameworks adopted by the jurisdictions designated as off shore centre. It has been argued that offshore financial centres (OFCs)²⁵⁶ have played a significant role in shaping the economies and the lives of those who live in developed and developing countries. OFCs play a key role in facilitating the growing mobility of finance and in shaping complex webs of interactions and relationships involving the nation-states, multinational corporations, wealthy elite and ordinary citizens.²⁵⁷ This process is facilitated by states which offer shelter to finance and to “footloose” capital. These micro states use their sovereign

²⁵⁴ FATF Recommendations 1&2.

²⁵⁵ Alldridge, Peter. 2008. “Money Laundering and Globalization”. *Journal of Law and Society* 35 (4). Wiley: 437–63. <http://www.jstor.org/stable/40206861>.

²⁵⁶ AAPP. 2006. “*The other side of the coin: the UK and corruption in Africa*”, a report by the Africa All Party Parliamentary Group, March.

²⁵⁷ Hampton, M.P. 1994. “*Treasure islands or fool's gold: can and should small island economies copy Jersey?*” *World Development*, Vol. 22 No. 2, pp. 237-50.

legislative power to enact “light” regulations and to have low tax or no tax regimes in order to persuade companies and wealthy elite to establish structures in concealing their illicit activities by avoiding or evading the payment of taxes.²⁵⁸ Thus, “footloose” capital seeks out locations that offer political and economic stability, secrecy, confidentiality and the same locations can also be used for illicit activities (such as money laundering, tax evasion, tax avoidance). The system thus facilitates the transmission of illicit funds through the banking system by opening accounts in specially incorporated companies and other complex legal entities such as trusts in order to disguise the origin or ownership of the funds and hence making it difficult for the law enforcement agencies, beneficial owners (in the case of stolen funds) to identify or trace the funds for whatever reason.

I chose this jurisdiction because it’s one of the African jurisdiction where the effectiveness of the anti money laundering framework has been tested and proven through successful prosecutions and seizures of laundered funds.

4.2 Country Profile- Seychelles

An island nation, Seychelles is located in the Indian Ocean, northeast of Madagascar and about 1,600 km (994 mi) east of Kenya. The archipelago consists of more than 116 islands with an estimated population of 90,000 people. Seychelles gained Independence in 1976 and earned the status of a republic within the Commonwealth.²⁵⁹

²⁵⁸ Stark, S.A. (2009), *Hidden True hand: How Corporations and Individuals Hide Assets and Money*, Universal-Publishers, Boca Raton, FL.

²⁵⁹ United States Department of State; Seychelles 2015 Investment Climate Statement, June 2015.

The Seychelles has a mixed legal system based on English Common Law, the Napoleonic Code, customary law and the amended 1993 Constitution.²⁶⁰ The Civil Code covers contractual and tort matters while Criminal law is substantially based on British criminal law. Procedural law is based on British common law. Seychelles has several magistrate courts and the highest court is the Court of Appeal. Seychelles does not maintain a specialized commercial court. The Seychelles president, who is head of state and head of government, is elected by popular vote for a five-year term of office. The cabinet is presided over and appointed by the president, subject to the approval of a majority of the legislature. The Seychellois parliament, the National Assembly consists of 34 members, of whom 25 are elected directly by popular vote, while the remaining nine seats are appointed proportionally according to the percentage of votes received by each party. All members serve five-year terms.²⁶¹

4.3 Historical Development of the Anti Money Laundering Legal Framework in Seychelles.

The FATF is without significant enforcement powers over jurisdictions that do not live up to its standards. It conducts mutual reviews and supervision over jurisdictions, thus exercising its mandate of global supervision but has no powers to sanction non-compliant jurisdictions. In 1996 the FATF issued a statement critiquing the inaction by Seychelles to take steps to enact legislation to criminalise money laundering. Seychelles was a non-FATF jurisdiction by then. The FATF specifically invoked an old recommendation 21 that called upon other financial institutions to scrutinize closely business relations and transactions with persons and companies and financial institutions from countries that did not or insufficiently apply the forty

²⁶⁰ Source: European Commission (Development) - Country Strategy Paper and Indicative Programme 2002-2007.

²⁶¹ <https://en.wikipedia.org/wiki/Seychelles>. Retrieved 10 October 2015.

recommendations. Their aim was to force the Seychelles to repeal the Economic Development Act, ²⁶²a law that offered broad immunity from prosecution and extradition to any foreign national who invested at least \$10 million in the local economy. The provisions of the Act also made it impossible for any amendments to be made on it, as any bill seeking to amend or repeal this Act was not to be presented to the National Assembly unless approved of by a referendum with not less than sixty per cent of the vote. Such a bill shall not be passed by the National Assembly unless two-thirds of its members are present and voting at all stages of the approval process. Seychelles repealed the Act on 2nd August 2000.

Additional pressure for the Seychelles to put in place a proper anti money laundering regime came from the International Monetary Fund (IMF). In 2000, the IMF responded to calls from the international community to expand its work in the area of anti-money laundering (AML) through the establishment of the Offshore Financial Centres (OFCs) Program in July 2000. The purpose of the program was to offer a voluntary assessment of the level compliance with Anti- Money Laundering standards by OFCs. It was also aimed at assessing vulnerabilities and threats to financial stability and the potential for contagion of offshore risks to relevant onshore economies. The IMF was especially concerned about the possible consequences of money laundering, terrorist financing, and related crimes, on the integrity and stability of the financial sector and the broader economy. In their view, this could discourage foreign investment, and distort international capital flows as in an increasingly interconnected world, the negative effects of money laundering and terrorist financing related activities are global, and their impact on the financial integrity and stability of

²⁶² Economic Development Act, Act No. 20 1995.

countries is widely felt.²⁶³ In 2000, the International Monetary Fund expressed concern that the economic conditions in Seychelles had steadily deteriorated since their last assessment in 1998. This was largely due to growing macroeconomic imbalances and persistent structural problems witnessed in Seychelles. In addition the real GDP had declined, the public debt had continued to grow at an unsustainable rate, inflation had picked up, and official foreign exchange reserves had declined.

It is against this backdrop that the IMF urged the authorities to implement a credible and comprehensive package of reforms that could lead to a sustained recovery of the economy. Key amongst them was for Seychelles to put in place a robust anti-money laundering controls and Counter Terrorism procedures to prevent the inflow of dirty funds whilst the country was in this vulnerable state.²⁶⁴

4.3 The Anti Money laundering legal and Institutional framework in Seychelles

4.3.1 The Anti-Money Laundering Act of 1996.

The Seychelles adopted the Anti-Money Laundering Act (AML Act) in 1996²⁶⁵; the Act addressed inter alia, the criminalization of money laundering, forfeiture of proceeds of crime, special police powers and suspicious transactions reporting. It also empowered the Central Bank of Seychelles (CBS) to determine identification and record keeping procedures for financial institutions. The obligation to file suspicious transaction reports extended to a broad range of entities such as financial institutions (banks, branches of foreign banks, foreign exchange bureaus) and other persons conducting activities as listed in the schedule attached to the AML Act (such as

²⁶³ IMF, Offshore Financial Centres- The Role of the IMF (23 June 2000).

²⁶⁴ Article IV Consultation with Seychelles; Public Information Notice (PIN) No. 00/111; December 26, 2000.

²⁶⁵ Act No. 8 of 1996, repealed by the Anti Money Laundering Act of 2006 (Act No 5 of 2006).

insurance companies, investment businesses, finance leasing companies, real estate businesses or casinos).²⁶⁶The Act had several gaps including failure to establish an autonomous agency/institution to investigate money laundering and oversee the enforcement of the sections of the Act. The Act designated the Central Bank of Seychelles to oversee the administration of the Act yet the CBS's mandate and power was limited to Financial Institutions only.²⁶⁷The Act also did not have seizure, forfeiture and extradition provisions. The Act had 14 Sections which did not provide the minimum client identification and verification due diligence procedures which are key in control of money laundering these provisions were instead contained in the non-binding Anti- Money Laundering Guidelines issued by Central Bank as explained below.²⁶⁸

4.3.2 Central Bank of Seychelles; Anti- Money Laundering Guidance Notes of 1998.

These legally non-binding Guidance Notes were issued to supplement the provisions of the Anti-Money Laundering Act of 1996 and specifically set out customer identification requirements and record keeping procedures which were not contained in the Act and applied to commercial banks only. The Guidance Notes were quite specific regarding the identification requirements for resident customers opening individual accounts, and to a large extent, regarding corporate accounts by domestic companies.²⁶⁹ However, the provisions concerning identification of non-resident individuals, non-resident companies, and International Business Companies, in particular, were not sufficient because of the heavy reliance placed on third party identification.²⁷⁰ In cases where an account was opened or a transaction was carried

²⁶⁶ Seychelles Anti – Money Laundering Act of 1996 (Act No.8 of 1996) Schedule 1.

²⁶⁷ Central Bank Act, Cap 26 of 1982, repealed in 2004 by the Central Bank Act – Act no 12 of 2004.

²⁶⁸ International Monetary Fund Report; Review of the Financial Sector Regulation and Supervision of Seychelles, October 2004.Pg.20

²⁶⁹Section 7.2 of the CBS Guidance notes of 1998.

²⁷⁰ Eastern and Southern Africa Anti-Money Laundering Group, Seychelles Mutual Evaluation Report issued in August 2008. Pg 81

out for another person, the Guidance Notes stipulated that measures needed to be taken to obtain information on the identity of such person. It is required that identification procedures be repeated when significant changes were observed and that wire transfer requests contain originator information.²⁷¹ The Guidance notes further required that Reports of suspicious transactions were reported to the Banking Supervision Department of the Central Bank.²⁷² These reports were analysed by officials at the Central Bank and then forwarded to the Police for further investigation and prosecution if warranted. The Central Bank was able to monitor compliance with the Anti-Money Laundering Act and the guidelines by on-site inspections of financial institutions. The Guidelines further provided for training of employees of financial institutions in identification and record keeping procedures and emphasises the obligation to make reports to the Central Bank.²⁷³ The Guidance Notes established satisfactory retention periods of seven years concerning customer identification documents and transaction records of financial institutions.²⁷⁴

The main weakness with the CBS guidelines was that they were unenforceable; they were also more lenient than the AML Act of 1996 and therefore created a lacuna whereby commercial banks choose to adopt the less stringent guidelines when on boarding customers. The guidelines were specific to banks and did not apply to other designated entities under the AML Act and to Forex Bureaus who are also licensed by the CBS. Another major weakness was that the guidelines failed to recognise the risk posed by non- residents(offshore customers) by With respect to non- Seychelles

²⁷¹ Appendix II of the CBS Guidance Notes of 1998.

²⁷² Section 7.5 of the CBS Guidance notes of 1998.

²⁷³ Ibid Section 7.8.

²⁷⁴ Ibid Section 7.3.

Resident personal customers the Guidance Notes provided for verification procedures similar to those for residents.²⁷⁵

Banks continued making reference to these guidelines until June 2015 when the Financial Intelligence Unit issued the updated Anti- Money Laundering and Prevention of Terrorism Guidelines.

4.3.3 Seychelles Anti- Money Laundering Act of 2006.

This Act repealed the 1996 Act and made provision to cover the gaps previously identified in the AML Act of 1996.²⁷⁶ The 2006 AMLA²⁷⁷ applies the same money laundering controls as the 1996 Act, but extended its provisions to other institutions, such as exchange houses, stock brokerages, insurance agencies, lawyers, notaries, accountants, and estate agents. Offshore banks are specifically addressed by the 2006 AMLA. The gaming sector is also recognised under the Act and is obliged to report suspected cases of money laundering.²⁷⁸

The 2006 Act also required reporting entities to take “reasonable measures” to ascertain the purpose of any transaction in excess of Seychelles rupees 100,000 (approximately U.S. \$8,333), or, in the case of cash transactions, rupees 50,000 (approximately U.S. \$4,100), and the origin and destination of the funds involved in the transaction.²⁷⁹ Whilst its prudent to require that reasonable scrutiny is applied to transactions above a certain threshold, this leaves a gap which can be exploited by a

²⁷⁵ Eastern and Southern Africa Anti-Money Laundering Group, Seychelles Mutual Evaluation Report issued in August 2008. Pg 85

²⁷⁶ Appendix II of the International Monetary fund country Report No. 04/381 of December 2004, page 38. The Government of Seychelles committed to strengthen its legal framework and supervisory regime in line with international standards on anti-money laundering and combating the financing of terrorism. In the area of anti-money laundering, they agreed to amend the existing legislation.

²⁷⁷ Act No. 5 of 2006, commenced in May 2006.

²⁷⁸ Second Schedule of the AML Act of 2006.

²⁷⁹ Section 9 of the AML Act of 2006.

customer with an existing and regular business relationship who has already produced satisfactory evidence of identity at the onset to structure their funds and introduce them in tranches of under Rupees 50,000 to avoid being scrutinised.

The AML Act of 2006 also tightened the Anti- Money Laundering reporting controls key of them being the establishment of the Financial Intelligence Unit (FIU), therefore removing the mandate of investigating suspected cases of money laundering from the Central Bank of Seychelles to a more autonomous body-FIU.²⁸⁰ The Act created provisions protecting the officers of the reporting institutions and the officers of the FIU who reported suspected money laundering Activities in good faith from any liability or prosecution.²⁸¹ The law also criminalized the disclosure of to any person that may prejudice any investigation under the AML Act.²⁸² The IMF observed that only banks were reporting suspicious transactions but they were few and inclusive, this was attributed to a lack of protection requirements under the AML Act of 1996 to complement the prevailing secrecy/confidentiality provisions under Section 49 the Financial Institutions Act.²⁸³ The introduction of the tipping off and protection requirements for reporting officers was meant to accord them protection from civil or criminal proceedings from aggravated customers for reporting suspected money laundering activities.

The Act made provision for reporting institutions to carry out the necessary customer identification and verification due diligence as would be stipulated under the

²⁸⁰ Section 16 of the AML Act of 2006.

²⁸¹ Section 14 of the AML Act of 2006.

²⁸² Section 12 of the AML Act of 2006.

²⁸³ Section 49 of the Seychelles Financial Institutions Act. (Act No. 14 of 2004) An Act of Parliament governing the banking activities in the Seychelles.

Regulations.²⁸⁴ This section of the Act was not operationalized until 2012, when the Anti Money Laundering Regulations were issued.²⁸⁵ This in essence meant that reporting institutions which were required to set their own Anti- Money Laundering policies²⁸⁶ could stipulate the minimum due diligence requirements as it suited them. The only due diligence requirement that was set out in the Act was for reporting institutions to maintain accounts in their true names and not to hold accounts in anonymous, fictitious, false or incorrect names.²⁸⁷ The Act did not have express provision for financial institutions to identify the beneficial owners as defined under the FATF Recommendations and to take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source.²⁸⁸

The Act despite being unsupported by regulations, introduced freezing and confiscation provisions that enabled the Financial Intelligence Unit to freeze customers accounts for a period of 180 days after any suspected money laundering activity was reported to the FIU without a court order.²⁸⁹ This power to freeze assets without a court order has been challenged once in a court of law in Seychelles in *Hans Hackl v/s The Financial Intelligence Unit*.²⁹⁰ The Petitioner challenged, inter alia, the constitutionality of the anti-money laundering laws with regards to whether the definition of criminal conduct in AMLA, which includes criminal conduct outside of the Seychelles jurisdiction, is constitutional. The Petitioner also challenged the constitutionality of Proceeds of Crime (Civil Confiscation) Act, 2008 (“**POCA**”) with

²⁸⁴ Section 4 & 5 of the AML Act.

²⁸⁵ Anti-Money Laundering Regulations of 2012. Subsidiary Legislation No. 18 of 2012.

²⁸⁶ Section 15 of the AML Act required Reporting Institutions to establish procedures and systems to implement the customer identification requirements under Section 4 of the Act.

²⁸⁷ Section 7 of the AML Act of 2006.

²⁸⁸ FATF Recommendations 24 & 25.

²⁸⁹ Section 10(4) of the AML Act.

²⁹⁰ *Hackl v Financial Intelligence Unit* (2012) SLR 225.

regards to his right to a fair hearing and right to property. The petition was based on the constitutionality of the inter parties proceedings under AMLA and POCA, the Constitutional Court of Seychelles ruled that they were and the Seychelles Court of Appeal (which is the highest and final appellate court in Seychelles) upheld the Constitutional Court's decision. Although this is the first and only case so far to challenge the constitutionality of AMLA, it only challenged the constitutionality of inter parties proceedings and did not touch upon the FIU's powers to freeze funds held in a bank account without the requirement of a court order. As such, there is no local jurisprudence challenging the constitutionality of the 180-day freeze regime without a court order. Regarding the case, Judge Twomey however noted that; *"This case is without doubt one of the most comprehensive attacks on the constitutionality of laws, specifically the provisions of the Anti-Money Laundering Acts of 2006 and 2008 (hereinafter AMLA) and the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA), as against the right to property guaranteed in the Constitution of Seychelles."*

Section 10 (4) of the 2006 AML Act was further amended in 2008 to introduce the draconian 'indefinite freeze' and then further amended in 2011 to the present position of 180 days through an ex parte court order, with unlimited further extensions.²⁹¹ The Seychelles provisions that give the FIU power to freezing assets for 180 days has been described as unique as and far longer than most other countries²⁹²

4.3.4 The Anti-Money Laundering (Amendment) Act 2008.

²⁹¹ Section 10 of the AML Act was repealed and substituted in the AML Act (amendment) Act No.24 of 2011 with effect from 27 December 2011.

²⁹² Divino Sabino; *The Constitutionality of the FIU's Power to Freeze Bank Accounts without a Court Order under the Anti-Money Laundering Act*; 2nd July 2015- Published by the Bar Association of Seychelles. Page 3.

Three additional pieces of legislation were passed unanimously by the national legislature in August 2008. The Anti -Money Laundering (Amendment) Act 2008 which significantly enhanced the AML Act of 2006, providing a much more comprehensive definition of money -laundering and creating an enhanced Financial intelligence Unit (FIU) function, no longer with simple administrative powers, but with the powers to investigate suspicious transactions, liaise with equivalent international agencies and bring cases for AML to court.²⁹³ In addition, a new Proceeds of Crime (Civil Confiscation) Act 2008²⁹⁴ was passed by the legislature which introduced a lawful regime for the freezing and civil confiscation of criminal assets where the predicate offence takes place outside the jurisdiction. This section was to enable the Financial Intelligence Unit, seize and confiscate frozen criminal funds from offshore customers. Finally, a National Drugs Enforcement Agency (NDEA) Act²⁹⁵ was passed in 2008 which established an independent agency for confronting drug-trafficking and narco-terrorism. These three laws were deemed necessary to address the obstacles that had hindered the enforcement of the AML Act of 2006 and also to directly address the offence of drug trafficking which was becoming prevalent in Seychelles.

The 2006 and 2008 Acts enhanced the monetary penalties for the crime of money laundering and made it an alternative to imprisonment. A person guilty of money laundering under the 2008 Act was liable to a fine of SRC 5,000,000 (approximately 416,666 USD) or 15 years imprisonment or both. A person other than a natural person was liable to a fine not exceeding SRC 15,000,000 (approximately 1,250,000).²⁹⁶ The burden of proof lies with the accused person to prove the funds in question were not

²⁹³ Part 3 of the AML (Amendment) Act of 2008.

²⁹⁴ Act No.19 of August 2008.

²⁹⁵ Act No. 20 of August 2008.

²⁹⁶ Section 5 of the AML (Amendment) Act; 2008.

derived from criminal activities or from any of the predicate offences mentioned in the Act.²⁹⁷ The standard of proof is similar to that used in civil cases even if the proceedings under the Act are criminal in nature.²⁹⁸ Part IV of the Act contain the Retrain, seizure and forfeiture provisions which give the FIU extensive powers to obtain court orders for seizure and forfeiture of any proceeds suspected to be generated out of crime.²⁹⁹ The FIU which essentially reports to the president is empowered to sell and liquidate any asset suspected to be part of proceeds of crime.³⁰⁰

These extensive provisions of the Act were challenged in *Attorney General vs. Podlipny*³⁰¹ and were upheld in by the court of appeal. The facts of the case are as follows;

The FIU appealed against a decision of the Supreme Court in which Renaud J ordered that cash amounting to €100,000 found in the possession of the respondent at Mahé International Airport on 14th March 2009 and forfeited by the Financial Investigation Unit (FIU) be released to the respondent pursuant to section 35(6) of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008 (AMLA).

On the 14th March 2009, the respondent, Lubomir Podlipny, a Czech citizen, arrived in Seychelles. His ticket indicated that he had initially departed Prague en route to Mahé via Paris to stay overnight in Mahé and return to Prague via Paris the following day. He was routinely stopped and checked by customs officials. In the course of a search of his luggage, €100,000 made up 200 x 500 Euro notes were found concealed in his wash bag. The respondent's version is that he had not concealed the money and had volunteered the information about the money to the officials. He had however not declared the money when he entered Seychelles as he is obliged to when the sums exceeds US\$10,000 or its equivalent in any currency under section 34A (1) of AML Act. Agents from the FIU and the NDEA (National Drugs Enforcement Agency) were notified and Mr. Podlipny was interviewed at the airport. Further searches were undertaken and documents were seized from the respondent. These documents included a plan of land at Takamaka which he wished to purchase, receipt of payment of a deposit he had made to one Martin Vlk and a written agreement for the proposed sale of the land. He was asked where he had obtained the €100, 000. His explanations varied - that he had withdrawn the money six months before from the bank and had kept the money in a family safe, that he had recently obtained money as he had just sold a company and he kept the proceeds from the sale of the business in a safe in his house in Prague or that his father gave him money from the family safe to secure a deposit on the land. He was however unable to explain how some of the money came to be wrapped in bank

²⁹⁷ Ibid Section 11 (b).

²⁹⁸ Ibid Section 10 (c).

²⁹⁹ Ibid Section 35.

³⁰⁰ Ibid Section 44.

³⁰¹ SCA 32 of 2011.

wrappers which bore 2007 and 2009 date stamps and how and where he had changed the money from Czech koruna to Euro. In explaining how he had come to learn about the land for sale in Takamaka, Mahé, Seychelles, he claimed that he had previously seen documentary programmes on Seychelles and earlier in the year in 2009 had met Martin Vlk, a Czech national living in Seychelles at a party. On expressing his interest to Mr. Vlk to purchase land in Seychelles, he had been introduced to another Czech national living in Seychelles, one Jan Poupa. Subsequent to this meeting, he claims that he had a further meeting with Mr. Vlk who had then sent him plans of land belonging to a Mr. and Mrs. Kuehn, Czech and German nationals also living in Seychelles. He had then paid a deposit of €30,000 for the purchase of the land to Mr. Vlk.

The respondent further confirmed in his affidavit that when asked to explain the provenance of the money in his luggage, he requested that the officers not contact the Czech authorities as he had been recently convicted of attempted tax evasion. Subsequent to the find by the officials and their interview with the respondent, the money was seized pursuant to section 34 (1) of the AMLA. Both parties made applications for forfeiture and for release of the money were made pursuant to provisions of Section 35 of AMLA at various occasions during the life of the case. No hearing ever took place, only oral arguments from Counsel were heard on 6th May 2010 at which point Renaud J adjourned the matter for ruling on the motions and applications of the parties on 10th June 2011.

In his decision, the learned judge found in favour of the respondent's application under section 35 (5) (6) and (7) of AMLA, releasing the funds detained. He also found that the application for a forfeiture order was premature as the Court had not yet ruled on previous applications for detention and/or release of the money. He stated that the statutory time set out in the Act for the appellant to apply for a forfeiture order would only start to run after the Court had delivered its ruling on the application dated 14th March 2009 for a detention of the money.

The FIU through the Attorney General appealed on several grounds amongst them that the learned trial judge erred in law in ruling in this matter without regard to the provisions of section 34(3) (b) of the Act of 2006/2008 which provides that where an application to the Court is made under section 35(1) as was the situation in this case), cash detained under section 34 shall continue to be so detained until the application is finally determined. Also the appeal was on the ground. The trial judge erred on the burden of proof as there was evidence that the respondent Lubomir Podlipny is a convict having been convicted of criminal conduct in the Czech Republic, where he had been sentenced to a term of imprisonment for six years to commence on 12 March 2009.

The FIU argued that the learned trial judge therefore laboured under the misapprehension that AMLA provided for interlocutory hearings followed by substantive hearings of detention applications. That was not the case as the FIU argued that they had in similar cases under the Proceeds of Crime Act (POCA) commented on the fact that interlocutory proceedings under these two pieces of legislation does not indicate that the proceedings and rulings are interim. They can in fact be the final proceedings between the applicant and the respondent (FIU v Mares Corp 92011) SLR 404,407). They are interlocutory only insofar as they are intermediate proceedings between seizure and forfeiture. FIU further argued that there was no issue of seizure of money before the learned judge. Seizure of the money was made by the FIU with written authorisation of Chief Superintendent M. Bastienne under section 34(1) of AMLA (supra). Seizure is therefore not subject to legal scrutiny by a judge. The provisions of AMLA make it clear that the Attorney General must apply for a section 34 detention order within 14 days of the seizure of money. In this case the money were seized at the airport on 14th March 2009 pursuant to section 34 (1) of AMLA. The provisions allow this seizure to remain in place for fourteen days after which time a detention application must be made before the Court. This was duly done on 27th March 2009 pursuant to section 34(2) of AMLA

(supra) and the order for detention of the money for six months was granted by Perera C.J. A further detention of the money was also granted on 26th October 2009. There was therefore no outstanding application for the detention of money before Renaud J. The only matters before him were an application for release of the funds erroneously made under section 35 (5) (6) (7) of AMLA and the application for a forfeiture order for the money being held. On the burden of proof, the FIU argued that the respondent made the case for the appellant both in his actions and in the documents he has produced as he kept on contradicting his accounts and the reasons why he was carrying the money varied. Section 35(5) of AMLA permits a forfeiture order to be made solely on the belief evidence of the Director or Deputy Director of the FIU. In *FIU v Sentry Global Securities and ors* (2012) SLR 331 in relation to the provisions of section 9 of POCA which is analogous to section 35 (5) of AMLA, the court agreed that when Section 35 is relied upon, the following guidelines should be followed:

1. “On an application by the designated officer of FIU, if it appears to the Court on prima facie evidence (or reasonable belief evidence) of the designated officer of the FIU that the property is the benefit of criminal conduct and the respondent neither appears nor contests the application, the Court must make the order.
2. Where, in response to the prima facie evidence or belief evidence the respondent engages in the court process, be it by filing an affidavit or by leading direct evidence and is able to show to the satisfaction of the court (on a balance of probabilities) that the specific property is not wholly or partly directly or indirectly the benefit of criminal conduct, the Court shall not make an order under section 4 of POCA.
3. Where the Court is not satisfied that the respondent has adduced evidence on a balance of probability that the property is not the proceeds of crime then the Court shall make the interlocutory order...”

An application for a forfeiture order under section 35(5) of AMLA follows the same procedure and is characterised by the same shift in the burden of proof. The burden of proof in section 35 (5) is neither one of a criminal case of ‘beyond reasonable doubt’ nor that of a civil matter ‘on a balance of probability’. It is the same burden of proof as contained in sections 3 and 4 of POCA which we described in *Sentry Global* (supra):

“All that is necessary is “a reasonable belief” that the property has been obtained or derived from criminal conduct by the designated officer of the FIU. That belief pertains to the designated officer and hence involves a subjective element. It is therefore only prima facie evidence or belief evidence. No criminal offence need be proved, nor mens rea be shown... As long as there are reasonable grounds for the belief by the applicant that the property is the proceeds of crime it is sufficient evidence to result in the granting of the order.”

Once the appellant has produced prima facie evidence or reasonable belief evidence, the burden of proof shifts onto the respondent who has, on a balance of probability, to prove that the money detained does not constitute directly or indirectly the benefit of criminal conduct or was not intended to be used in connection with criminal conduct. Even then, the statutory belief of the appellant is not conclusive of the matter and can be counteracted by the evidence produced by the respondent. In this case, the evidence of the respondent did not counteract that of the appellant but rather bolstered it. It is our view that the respondent has therefore failed to satisfy the Court that the money seized from him did not constitute benefit from, criminal conduct or was not intended to be used in connection with criminal conduct.

Based on the above grounds presented by the FIU the court allowed the appeal and quashed the order of dismissal pronounced by the learned judge and ordered the forfeiture by the Republic of Seychelles of the sum of €100, 000 presently detained, pursuant to section 35(1) of the Anti-Money Laundering Act 2006 as amended by the Anti-Money Laundering (Amendment Act 2008).

It is clear from the judicial precedent above that the AML Act has given the FIU such wide powers under Section 35 that are difficult to challenge even in the court of appeal. The FIU appears is empowered to make decisions such as freezing and confiscation and the courts role here seems to be implied as that of “rubber stamping “the decisions of the FIU.

4.3.4 The Anti-Money Laundering (Amendment) Act 2011.

This Act was enacted to amend the Anti- Money Laundering Act of 2006, last amended in 2008 ³⁰² . The amendments prescribed the exchange of information between the Financial Intelligence Units of other countries. They also prescribed CDD measures by Regulations and provided for a more structured process for the FIU to issue direction to reporting entities not to proceed with transactions.³⁰³

The Act also introduced the protective provisions for the legal profession whereby lawyers are not required to file suspicious transaction reports in the course of his duties to defend clients or when preparing a defence or advice on the avoidance of proceedings.³⁰⁴ The Act also enlarged the scope of the definition of reporting entities to include regulated businesses such as the insurance industry, Forex bureaus, corporate service providers³⁰⁵, that were obliged to report any suspected activity of money laundering. The scope of unregulated entities was further defined to include accountants, lawyers, estate agency services, high value dealers of single items worth USD 15,000 and above, casinos and other money service businesses.³⁰⁶

³⁰² Act No. 24 of 2011.

³⁰³ Ibid Preamble.

³⁰⁴ Section 5 (4) of the AML Amendment Act of 2011.

³⁰⁵ These are entities licensed by the Seychelles Financial Services Authority to act as business introducers of offshore business in the Seychelles. They assist in the setting up International Business Companies for offshore customers and assist in the opening of offshore bank accounts.

³⁰⁶ Ibid Part 1&2.

It is clear that whilst Seychelles was responding to pressure from international bodies to put in place robust AML regulations and institutional frameworks, one of the key achievements was the creation of a powerful Financial Investigation Unit (FIU) which has been transformed over time from an administrative FIU into a hybrid FIU with civil asset forfeiture powers as well as powers of arrest and confiscation by the 2006, 2008 and 2011 amendments. The FIU's powers - as seen in the few judicial precedents quoted above - exceeds those of the court of appeal and are very wide.³⁰⁷ The FIU is also an autonomous body corporate which reports directly to the president. This then curtails its independence, making it difficult to carry out investigations into suspected money laundering cases implicating the president or his associates.³⁰⁸

4.3.5 The Anti- Money Laundering Regulations of 2012.

The regulations³⁰⁹ are quite comprehensive and have incorporated most of the FATF Requirements on Customer due diligence and risk classification of customers. Regulation 3 sets out the meaning of CDD measures which is verifying the identity of person or an entity on the basis of data obtained from a reliable source. The regulation also requires institutions to verify the source of funds and the nature of business for ease of monitoring the account activity during the life of the account. Regulation 4 requires institutions to identify the ultimate beneficial owners who exercise management and control of institutions. For entities, institutions are required to verify the identity of holders of more than 25% of shares or voting rights. Section 6 requires institutions to carry out enhanced due diligence on politically exposed persons and

³⁰⁷ Finmark Trust; AML/CFT and Financial Inclusion in SADC Consideration of Anti-Money Laundering and Combating the Financing of Terrorism Legislation in Various Southern African Development Community (SADC) countries; Seychelles Country Report, March 2015. Page 5.

³⁰⁸ Extracts from <http://www.taxjustice.net/2014/06/10/corrupt-little-seychelles-became-paradise-dirty-money/>. Accessed on 30th October 2015.

³⁰⁹ The Anti-Money Laundering Regulations, April 2012 issued under Section 63 of the Anti-Money Laundering Act, 2006 (as amended).

their indirect associations. This is to ensure that funds by corrupt officials are detected and the FIU notified in good time.

Regulations 8-10 cover the timing application of customer due diligence measures, which is basically at the establishment of a customer relationship and during the life of the relationship. Institutions are required to monitor customer transactions on an ongoing basis and to notify the FIU on any transactions and activity that is out of business profile initially declared by the customer. Additionally institutions are required to refresh their customers' profile on an ongoing basis. Regulation 14 stipulates the level of due diligence institutions must carry out on correspondent banks. The regulations unfortunately also define correspondent banking relationships, therefore making it easier for reporting institutions to understand the full spectrum of correspondent banking relationships which includes, regulated local and international banking institutions, institutions that offer credit facilities, relationship managed accesses for swift keys exchange.

The Regulations which were issued 6 years after the AML Act of 2006 should have provided for transition requirements for reporting institutions to remediate their existing client base to align the identification and verification with the minimum requirements stipulated under the Act. The regulations should also have elaborated further on the kind of documents that are deemed to be reliable sources to ensure that there is uniformity in the verification methods being used by the reporting institutions. The ultimate beneficial ownership verification should drill down to the owner of 10% of the shares. The regulations should clearly make a provision for reporting entities not to onboard entities whose part of the shareholding is by bearer or nominee shares. The regulations should explicitly provide for prohibited customer relationships, this is

because there are some relationships and business activities that not illegal in some jurisdictions but are not permissible locally and this being an offshore centre, they could easily find their way into Seychelles.

4.4 The International bodies to which Seychelles is a member.

The Government of Seychelles is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), a Financial Action Task Force-style regional body. The biannual assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures in the Seychelles is normally conducted by ESAAMLG; however Seychelles is due for full evaluation from FATF in 2016. As a full member of the Egmont Group, Seychelles cooperates with investigations of other jurisdictions under the auspices of the United Nations Transnational Organised Crime conventions. Seychelles signed the UN Convention against Corruption³¹⁰ in February 2004 and ratified in March 2006. Seychelles is not party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Seychelles is a party to the Vienna Convention on Psychotropic Substances.³¹¹

4.5 Analysis of the Seychelles and Kenya's Anti- Money Laundering Legal and Institutional Framework.

Several factors make it difficult to draw a clear cut comparison in the anti money laundering legal and institutional framework in the two jurisdictions. Kenya is obviously a bigger geography with various economic activities. It is also a gateway to many neighbouring countries and hosts a large number of foreigners. The key economic drivers in Kenya are farming, tourism, manufacturing and technological

³¹⁰ Adopted by the General Assembly of the United Nations on 31 October 2003.

³¹¹ 21/12/71 (UNDCP) EF. Seychelles signed the Convention in February 1992.

innovation.³¹² Seychelles on the other hand is a smaller geography and being an island, has limited economic activities. The key economic drivers are fishing, tourism and provision of offshore services. As a result, each jurisdiction has a different driver of the risk of money laundering but nonetheless the offence of money laundering has been criminalised in both jurisdictions and a legal and institutional anti-money laundering framework put in place.

The key difference between Kenya and Seychelles is that Kenya is not an offshore centre. Kenya's Anti- Money Laundering regulations of 2012 require reporting institutions to file with the financial reporting centre cash transactions reports for every transaction above USD 10,000. Seychelles does not have a cash reporting requirement but institutions are required to verify transactions above SRC 50,000 (USD4, 150).

The Kenya's Financial Reporting Centre is administrative in nature while the Seychelles has an FIU that can be described as law enforcement model. It receives reported cases of money laundering, carries out investigations and seeks court orders directly to freeze and or confiscate assets. The Kenya FRC is more independent than the Seychelles FIU as it is accountable to the National Assembly while the director of the FIU in Seychelles reports to the president. Both models have shortcomings in that the Kenya FRC is highly administrative and takes no part in the investigation and prosecution of suspected cases of money laundering. The Seychelles FIU though empowered to make enquiries and interact directly with the courts; it lacks independence from the executive.

³¹² http://www.kenyarep-jp.com/business/key_sectors_e.html

The anti money laundering framework in the Seychelles has been subject to constitutional challenges but nonetheless the jurisdiction has had successful prosecutions against the offence of money laundering. Kenya has not had a successful money laundering prosecution and going by the challenges experienced in the prosecutions against corruption, the money laundering cases are likely to face similar constitutional debacles in court.

4.6 Conclusion

The foregoing case study of the legal and institutional anti-money framework of the Seychelles and the brief analysis of the same vis a vis the Kenya framework, demonstrates the need of developing an optimum law to combat money laundering.

Kenya could learn from the constitutional challenges experienced in the prosecution of money laundering offence in Seychelles and work towards revising the current anti money laundering law to make it more optimum by reduce duplications and possible conflicts with the existing laws. The next chapter explores some actions that Kenya could take in order to make the current framework less onerous and optimise it to ensure that its core objectives are met. As seen in the previous chapter, the current anti money laundering framework introduces lot of preventative obligations for reporting institutions which could easily remove the focus from enforcement and deterrence and end up failing to confiscate laundered funds and punish the perpetrators.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

From the preceding chapters in this thesis, it is clear that Kenya has taken significant steps towards criminalising the offence of money laundering through the enactment of an anti-money-laundering legal and institutional framework. The Act seems to have been modelled around European Directives, International Conventions and the 43 directives of the Financial Action Task Force with little or no domestication. The strict implementation of the law therefore creates such burdensome responsibilities on some private sectors such as banks, insurance companies and other reporting entities which ends up making them inwardly focused and reduces competitiveness over time. The imposition of criminal sanctions and heavy financial penalties on reporting institutions that fail to comply with the law, makes it clear that despite the law against money laundering being aimed removing the proceeds of crime from circulation, overreliance on reporting institutions not only seems like a misdirection of the law but also an intrusion into the private enterprises.

While there was considerable push and scrutiny on the implementation of money laundering requirements and suspicion reporting by banks and other regulated financial service providers, there is little evidence that the same vigor has been adopted on the “non regulated sectors” including lawyers advising on commercial transactions, accountants or tax advisers. As we anticipated at that stage, the perceptions of those within the strictly regulated sectors is that the costs of

compliance with the anti- money laundering regime in the are too high and there are continuing concerns over the effectiveness of the regime.³¹³

However, the spirit and the objectives of the anti-money laundering regime laudable: to reduce crime, by making it less profitable and cutting off its funding; to protect the reputation and integrity of business and to avoid economic and competitive distortions. Every honest person working in commerce or finance must support these objectives and every sober minded legislature, must legislate against any crime that is threatening the stability of the nation. Cumbersome and difficult as it may be, the anti-money laundering laws still need to be complied with, however the law actively need to be reviewed and administered in a manner that ensures effectiveness so as to ascertain that its objectives are being met.

The Government and the law enforcement authorities need to keep up the pace of reform, rigorously controlling requirements to ensure that no unnecessarily burdensome or onerous provisions remain present in either the legal background or the way it is applied. Perhaps even more important, communication with the regulated sector needs to be carried out in a manner that convinces them that their contribution is both important and effective. The effectiveness of the regime cannot be optimised without the positive and willing compliance of those within its scope. The title of the AML Legislation- Proceeds of Crime and Anti-Money Laundering Act implies that the Act covers proceeds from all manner of crimes that are committed on the Kenyan soil. However the implementation of the Act is therefore slow as Kenya remains vulnerable to money laundering and financial fraud due to its strategic positioning and

³¹³ Murithi Rosalind Rima, “The Effect Of Anti-Money Laundering Regulation Implementation on The Financial Performance Of Commercial Banks in Kenya”, 2013 (Unpublished).

weak controls across many enforcement sectors. For starters, Kenya is the financial hub of East Africa, and its banking and financial sectors are growing in sophistication. Money laundering and terrorism financing activity occurs in both the formal and informal sectors, and derives from both domestic and foreign criminal activity. Such activity includes transnational organized crime, corruption, smuggling, illicit trade in drugs and counterfeit goods, and wildlife trafficking. Although banks, wire services, and mobile payment and banking systems are available to increasingly large numbers of Kenyans, there are also thriving, informal, and unregulated networks of hawaladas and other remittance systems that facilitate cash-based, unreported transfers that the Government of Kenya cannot track. Foreign nationals, and in particular the large ethnic Somali resident and refugee populations, primarily use hawaladars to send and receive remittances internationally. Mobile payment and banking systems are increasingly important and make tracking and investigating suspicious transactions difficult, although they have the potential to facilitate investigations and tracking, especially compared to transactions executed in cash.

Kenya is also considered as transit point for international drug traffickers amongst other countries within Africa. This has been described to be caused by weak border and customs controls increasing the trade-based money laundering.³¹⁴ There is a black market for smuggled /counterfeit goods in Kenya, which serves as a major transit country for Uganda, Somalia, Tanzania, Rwanda, Burundi, eastern Democratic Republic of Congo, and South Sudan. Goods marked for transit to these northern corridor countries are not subject to Kenyan customs duties, but Kenyan authorities

³¹⁴ Drug Trafficking Patterns to and from Eastern Africa, January 2016. United Nations Office on Drugs and Crime. <https://www.unodc.org/easternafrika/en/illicit-drugs/drug-trafficking-patterns.html>

acknowledge that many such goods are often sold in Kenya. Many entities in Kenya are involved in exporting and importing goods, including non-profit entities.

Corruption also remains a major impediment to doing business in Kenya. Kenya ranked 136 of 177 countries on Transparency International's corruption perceptions index. Allegations of irregularities in public tenders are frequent. A recent PriceWaterhouseCoopers report lists accounting fraud, procurement fraud, tax evasion and bribery and corruption as areas of major concern, all of which affect over a quarter of businesses and some of which affect up to a third of the businesses in Kenya.³¹⁵

Kenya needs to adequately scrutinise the wealth of public officials wealth and bank accounts should be scrutinised to the extent allowed in the constitutions and the Public officers Ethics Act³¹⁶ Unconfirmed Business daily reports of November 13 2015 indicated that "Diplomats from 11 countries led by US and Britain have threatened to impose travel bans on Kenyans implicated in corruption amid reports of high-level graft in the country. Reports alleging theft of taxpayers' cash and purchase of goods and services by civil servants at inflated prices have raised pressure on President Uhuru Kenyatta, who has promised to tackle rampant corruption in his government. Donors and several other prominent individuals have voiced concerns about corruption in Kenya in recent days."³¹⁷ There are a few examples of countries in the world which restrict or prohibit specifically politicians or public officials from establishing and holding overseas bank accounts as a way to prevent corruption and

³¹⁵ PriceWaterHouseCoopers,2014."Economic Crimes, a threat to businesses globally". Pricewaterhousecoopers Global Economic Crimes Survey.

³¹⁶ Act No. 4 of 2004.

³¹⁷ <http://www.businessdailyafrica.com/Envoys-warn-of-travel-ban-on-corrupt-officials/-/539546/2954354/-/item/1/-/aet3rr/-/index.html>. Accessed on 20th November 2015.

money laundering. In Kenya the Article 76 of the 2010 Constitution prohibits State officers from maintaining bank accounts outside the country, but there are concerns that this provision is being largely ignored.³¹⁸ .

However, there is no publicly accessible documented account of how these various countries enforce these restrictions and more research/resources would need to be allocated to find out how these regulations are being implemented in practice and what their impact is on preventing money laundering or curbing corruption. A first step in this direction could be to create an amendment to Regulation 22 of the Proceeds of Crime and Anti- Money Laundering Regulations 2013 that states that Public officials shall remain PEPs for a further 5 years even after they cease to hold public offices. The FRC should be mandated to maintain and publish annually a database of all persons who fall under the definition of Politically Exposed Persons to further support the enforcement of Article 76.

The detection of the offence of money laundering is also greatly hampered by the various avenues availed to Kenyans for banking and money transmission. One of the most commonly used methods used by customers to avoid detection of money laundering is being multi banked. The AML Act should therefore empower banks to share information and exchange information amongst themselves for purposes of money laundering screening for money laundering purposes. The POCAMLA should create a requirement for private entities and individuals suspected of money laundering to declare their source of wealth to the financial reporting centre without the involvement of reporting institutions, to assist in the enforcement and shift the

³¹⁸ Allah.Jamah, 2011, Activists want Civil Servants with Foreign Accounts Probed, The standards for fairness and justice, 7th October 2011. <http://www.standardmedia.co.ke>.

burden of failing to verifying the source of funds and source of wealth from the reporting institutions to the individuals and the Financial Reporting Centre.

The following are the key recommendations that Kenya should consider in the improvement of the effectiveness of its Anti- Money legal and institutional framework.

5.2 Recommendations

1. The Need to establish a legal review and reform committee under the Act.

The Proceeds of Crime and Anti- Money Laundering Act needs to be amended to include a legal review committee that will be responsible for reviewing the effectiveness of the Act. The parameters of review could include, reviewing the number of reports made by the reporting institutions vis a vis the actual prosecutions under the Act. Reviewing the emerging methods of laundering money and suggesting amendments to the Act to relax the requirements on the old/traditional methods of money laundering that were recognised in the Act and are now obsolete and recommending more effective ways for monitoring for these emerging methods of money laundering. This committee will also collect the views of the reporting institutions and set new provisions or remove obsolete provisions under the prevailing country specific economic and social conditions as opposed to copying and pasting the international instruments and recommendations without due consideration of the country specific conditions. The committees work should be presented to a dedicated parliamentary committee for them comprehensively examine whether the benefits of the Anti-Money Laundering and Asset recovery laws that they have put in place

through the Proceeds of Crime and Anti-Money Laundering Act outweigh the burdens imposed on the private sector businesses designated as reporting entities. If the burden is found to outweigh the benefits, then the law should be revised and simplified to first reduce the burden on reporting entities and shift responsibility and criminal sanctions to the perpetrators of the crime and more responsibilities to conduct surveillance and investigations to the government agencies that have been set up to oversee the implementation of the Act.

2. Addressing corruption the key root cause of money laundering.

For as long as Kenya continues to feature prominently on the corruption index, any other efforts to fight the outcomes of corruption and other malpractices will continue to be hampered and will result in being mere window dressing efforts. Ewan Sutherland notes that, “Until effective controls are introduced, rent-seeking by government ministers through front companies created to “win” procurement contracts will continue. The frauds concerning the procurement of networks needed to support the police and army are especially serious, given the internal and external threats faced by Kenya. They contribute to the problems of ensuring the safety of citizens and require further analysis, beyond the ease of stealing money from the budget of the secret state.”³¹⁹

Using reflections from the defunct Kenya Anti-corruption Commission, it has been further shown that corrupt individuals exploit existing gaps in legislation to evade justice, a condition created by the very fluid nature of corruption in which it rests on varying interpretation.³²⁰ This therefore calls for the judiciary to take on the

³¹⁹ [Ewan Sutherland](#), (2015) "Bribery and corruption in telecommunications: the case of Kenya", info, Vol. 17 Iss: 3, pp.38 - 57

³²⁰ Amukowa, W. (2013), “The challenges of anti-corruption initiatives: reflections on strategies of the

prosecution of all corruption cases expeditiously and set sound legal precedents that can further be used to strengthen the enforcement against corruption and recover the stolen/misappropriated funds by invoking the provisions of the Proceeds of Crime and Anti Money Laundering Act. The first real test case where Kenya demonstrated the willingness to publicly cooperate in the fight against corruption was the case of Samuel Gichuru and Chris Okemo³²¹. By a letter dated 6th July 2011, Hon. Keriako Tobiko, the Director of Public Prosecutions in the exercise of the powers conferred on his office under section 7(1) of the Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya as read with Section 7 of the Sixth Schedule to the Constitution, while signifying that a request had been made to him by a competent Judicial Authority of the United Kingdom on behalf of the Island of Jersey, for the surrender of Samuel Kimuchu Gichuru and Chrysanthus Barnabus Okemo (the respondents), expressed no objection to the said request. He proceeded to authorize the Chief Magistrate to issue a warrant for arrest and detention of the respondents in accordance with Section 8 of the said Act. It is this letter that triggered the proceedings in Nairobi (Milimani) Chief Magistrate's Miscellaneous Application No. 9 of 2011, the subject of this revision. Jersey authorities on their end seized the cash that former Kenya Power & Lighting Corporation managing director Samuel Gichuru and ex-Energy minister Chris Okemo hid in the island. The Royal Court of Jersey³²² made a confiscation order to seize the £3.28 million and \$540,330.69 (totalling Sh520 million) held in the offshore account of Windward Trading Limited - the entity Mr Gichuru used to receive kickbacks in exchange for the award of lucrative tenders to foreign firms during his two-decade tenure at the helm of Kenya Power. The two

defunct Kenya's Anti-Corruption Commission", *Mediterranean Journal of Social Sciences*, Vol. 4 No. 2, pp. 481-504.

³²¹ Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Chrysanthus Barnabas Okemo Criminal Revision 926 of 2011 (From original order in Miscellaneous Criminal Application No. 9 of 2011 of the Chief Magistrate's Court at Nairobi).

³²² 2008 JLR 131 - Gichuru v Walbrook Trustees

accused persons made several efforts to block the extradition order and the extradition orders were temporarily halted in the court of appeal in January 2016 pending the substantive hearing of the appeal³²³.

3. Align the implementation of the Proceeds of Crime and Anti- Money Laundering Act with the provisions of the Competition Act.³²⁴

The key objectives of the Competition Act as provided for under Section 3 of the Act are to create an environment conducive for investment, both foreign and local, capture national obligations in competition matters with respect to regional integration initiatives; bring national competition law, policy and practice in line with best international practices; and promote the competitiveness of national undertakings in world markets. The rigorous implementation of international AMLR has had a pronounced negative impact on the financial service sector and has greatly impeded the way international financial institutions do business across borders. International firms which have subsidiaries in Kenya and Africa at large are slowly withdrawing from the region due to poor enforcement of these economic crimes laws and regulations which exposes them to fines and penalties in the jurisdictions such as the United Kingdom where these laws are enforced strictly.

In a report released by the Financial Services Authority in 2011³²⁵ recommendations were made for international firms domiciled in the UK and operating in other high risk jurisdictions to reduce the extent to which it is possible for a firm to be used for purposes connected with financial crime. This was borne out of the realisation that weak AML controls left firms vulnerable to becoming involved in money laundering, unwittingly or otherwise. Some of key objectives of the financial services regulators

³²³ Samuel Kimuchu Gichuru & another V Attorney General & 3 others [2015] eKLR

³²⁴ Act No. 12 of 2010.

³²⁵ <https://www.fca.org.uk/static/documents/fsa-aml-final-report.pdf> accessed on 10th January 2016.

in the UK are to maintain market confidence because the use of UK firms to launder money could adversely affect the reputation of the UK market.

Under current AML/CFT rules, banks are required to prevent sanctions violations and assess and mitigate money laundering and terrorist financing risks, or face penalties. However, regulators in different jurisdictions send mixed signals about whether and how banks and other entities should manage these risks. Some regulators offer no guidance at all whilst others like the UK Regulators offer strict guidelines, definitions and processes to be followed. The results in simplistic risk assessment methodologies being applied by some entities especially those domiciled in Africa only whilst others that are subject to multiple regulators have to comply with the higher standards failure of which they stand the risk of facing stiff penalties. Other than this poor enforcement mechanism encouraging anti- competitive behaviours, the chilling effect of the imposition of legitimate fines on some large banks for egregious contraventions of AML/CFT rules and, particularly, sanctions laws have made these firms show signs of divesting from Africa.³²⁶ These factors, along with others, have led banks to adopt an understandably conservative position. This includes exiting from providing services to firms, market segments and countries that are seen as higher risk, including money transmitters, banks in poor countries and non-profit organizations. Let us illustrate this with an example on 1st March 2016, Barclays Plc announced that it was divesting from its African subsidiaries³²⁷ and this wasn't the first time that a bank decided to withdraw nearly wholesale from the remittances sector — a process known as 'de-risking' nor will it be the last if we don't synchronise the enforcement efforts across all reporting entities.

³²⁶ Clay Lowery and Vijaya Ramachandran; *Are anti-money laundering policies hurting poor countries?* Dec 17, 2015- Published by the Council of African Security and Development, <http://www.casade.org/are-anti-money-laundering-policies-hurting-poor-countries>. Accessed on 30th December 2015.

³²⁷ <http://www.standardmedia.co.ke/business/article/2000194202/100-years-on-ghosts-of-past-policies-haunt-barclays>. Accessed on 20th March 2016.

4. Close the intentional regulatory gaps.

The effectiveness of AMLR could be significantly enhanced by closing regulatory gaps currently observed as being intentional under the Proceeds of Crime and Anti-Money Laundering Act. For instance, the AML Act is silent and exempts client/lawyer relationships from scrutiny yet it fully opens up the banker/client relationship to full scrutiny and has included in its provisions a section that overrides all the privacy laws and obligations that the reporting entities may have.³²⁸ No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by this Act except in the case of an advocate client relationship.³²⁹ This exempts clients' accounts which are opened in the names of law firms from the ordinary scrutiny that the normal customer accounts are subject to. Questions such as the source of funds, details of related parties and underlying transactions are difficult to ascertain from these client accounts.

This immunity under the Act also means that Legal practitioners can potentially assist individuals and firms wishing to launder money, structure their transactions, form trusts and other complex structures, use of bearer shares in such a way that the ultimate beneficial owners of those funds are not easily recognised. As technology advances, enterprise crime has become international and sophisticated, making use of improvements in software, telecommunications, online and cross border financial services. Many enterprise crime groups hire specialists for various aspects of each operation. These specialists have unknowingly or knowingly become money-

³²⁸ Section 17 of the Proceeds of Crime and Anti- Money Laundering Act.

³²⁹ Ibid Section 18.

laundering experts provide advice on how the formation of simple or complex structures, such as lawyers and accountants.

5. Resolving the Problem with investigation and prosecution as proposed under the Act

The Proceeds of Crime Act proposes various stages by different parties for the detection, investigation, prosecution and confiscation of suspected proceeds of Money Laundering. The investigation and prosecution proceedings are criminal with a standard of proof of beyond reasonable doubt as in all criminal cases. The confiscation proceedings are civil and can only be invoked after a successfully criminal prosecution. Faced with a nearly inexhaustible list of money laundering techniques and specialists, investigators and prosecutors therefore need to specialize and form teams of investigators who, together, can provide the necessary mix of skills. Often experienced police investigators need to have the ongoing assistance of lawyers, forensic accountants, technology experts, bankers and specialists in corporate practices, banking, and international money-transfer procedures. Depending on the case, other specialized expertise must be available as well. Typically it will be necessary to run parallel files: one aimed at a conviction for a crime predicate to a proceeds case; the other to identify and trace the assets of the criminal enterprise leading to an application to seize and forfeit. There will be variations on this in states that allow for civil forfeiture or in rem proceedings, but even where this is the case, parallel files may be advisable. Often the decision to proceed civilly will be made only after it is clear that evidence for a criminal prosecution is lacking. None of this is simple, nor is it inexpensive. Specialists cost money, running parallel files costs money and international investigations cost money. What is required now is to negotiate the priority that confiscating the proceeds of crime will have where it counts in the resourcing provided to investigate and prosecute money laundering cases

domestically and internationally. Successful prosecutions will form useful jurisprudence and precedent that will contribute greatly to the future amends to the Act and remove any onerous burdens imposed by provisions of the law that might be declared obsolete through such prosecutions.³³⁰ The Act requires each reporting institution to designate/appoint a money laundering reporting officer (MLRO). The duties of the MLRO as outlined in the Act are wide and are synonymous with the duties of a police officer. The qualifications of the MLRO are however not specified therefore leaving the option to reporting institutions who mainly hire accountants into these roles.

Often due to the nature of the money laundering predicate offences requires some skill in evidence gathering to ensure success in eventual prosecutions. If the regulators rely on the private sector to detect money laundering, then they must give confidence that enforcement of the regulations will be effective. One suggestion is for the law to provide for the FRC to appoint and second Money laundering reporting officers to financial institutions on the government payroll as a way of ensuring independence and reduced costs. Right now the role of the MLRO directly conflicts with his position in the firm, where he is directly answerable to superiors who can easily influence his ability to report.

6 Putting in place a formalised treaty signed approach.

It is clear that the current Anti- Money Laundering law is modelled around international /regional treaties and recommendations by the relevant bodies such as the Financial Action Task Force. The initial promulgation of the Act was essentially

³³⁰ Evans John L., Ph.D.1999; *The Proceeds Of Crime :Problems Of Investigation And Prosecution*”, International Centre for Criminal Law Reform and Criminal Justice Policy at The University of British Columbia 1822 East Mall Vancouver, B.C., Canada V6T 1Z1

out of pressure with subtle threats of sanctions being imposed upon non compliant countries. These bodies are continually calling for the improvement / tightening of the provisions of the existing money laundering Acts and therefore Kenya needs to put a platform in place to assist the Financial Reporting Centre in the evaluation and localisation of these proposed amendments. For instance, the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism (GPML) has developed, in collaboration with UNODC's Legal Advisory Section and International Monetary Fund (IMF), model laws for both common law and civil law legal systems. These laws are meant to assist countries in setting up their anti-money-laundering/countering the financing of terrorism (AML/CFT) legislation in full compliance with the international legal instruments. They focus particularly on the 40 + 9 FATF Recommendations, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 United Nations Convention against Transnational Organized Crime. These model laws, which serve as working tools for Member States, are in a continuous process of upgrading, encompassing new international standards.³³¹

Kenya is currently not on the FATF List of Countries that have been identified as having strategic AML deficiencies³³² and the FATF welcomes Kenya's significant progress in improving its AML/CFT regime and notes that Kenya has established the legal and regulatory framework to meet its commitments in its action plan regarding the strategic deficiencies that the FATF had identified in February 2010. Kenya is therefore no longer subject to FATF's monitoring process under its on-going global AML/CFT compliance process. Kenya is still required to continue working with

³³¹ <https://www.unodc.org/unodc/en/money-laundering/technical-assistance.html>. Accessed on 10th December 2015

³³² FATF statement issued on 27th June 2014.

ESAAMLG as it continues to address the full range of AML/CFT issues identified in its mutual evaluation report.

Treaties are concluded on various issues including commerce, trade, Science, environment and effective handing of treaty making and assent is necessary so that the proposals do not become un-enforceable or burdensome to the point of causing economic shut down on some important sectors of the economy.

The Treaty Making and Ratification Act of 2012³³³ applies to multilateral treaties; bilateral treaties which deal with, the security of Kenya, its sovereignty, independence, unity or territorial integrity; the rights and duties of citizens of Kenya; the status of Kenya under international law and the maintenance or support of such status; the relationship between Kenya and any international organization or similar body; and the environment and natural resources.

Section 7 of the Act provide the conditions precedent to entering a treaty which unfortunately were not in force by the time the Anti Money Laundering Act was being enacted in 2009. These requirements include preparing an impact analysis to the cabinet of such a treaty on the national interests which may be 'affected by the ratification of the treaty; including the obligations imposed on Kenya by the treaty; the requirements for implementation of the treaty including any expenditure; the policy and legislative considerations; the financial implications; ministerial responsibility and implications on matters relating to counties and the views of the public on the ratification of the treaty . Section 8 further requires that a treaty approved for ratification by the Cabinet under section 7 shall, depending

³³³ Act No. 45 of 2012

on its subject matter, be considered by both or the relevant House of Parliament paying due regard to Part 1 and Part 2 of Chapter Eight of the Constitution.

Kenya therefore needs to establish a strong treaty secretariat comprised of professionals with expertise in treaty negotiation and representatives from the impacted sectors depending on the nature of the treaty who can confidently negotiate the best position based on the country specific demographics, figures, statistics and economics. Without such a specialized secretariat, parliament – which is normally overwhelmed by other duties and obligations and lacks the necessary expertise on the impact on these treaties, will only be rubberstamping and legislating on these treaties based on undue considerations such as was seen in the case of Anti- Money Laundering Treaties. This professional approach to treaty entering will ensure that the eventual portions of the treaty that are assented to reflect or adequately balance with the competing pressures and allow Kenya to accommodate the significant difference between the internationally perceived threats of money laundering in Kenya and the domestic realities.

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