

**Cosmetic versus Substantive Compliance with the Global Anti-Money
Laundering and Terrorism Financing Laws: The Case of Nigeria**

by

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A Thesis Submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfillment of the degree of

MASTER OF LAWS (LL.M)

Faculty of Law

University of Manitoba

Winnipeg

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ABSTRACT

Nigeria has made considerable efforts to ensure that its anti-money laundering and combating financing of terrorism (AML/CFT) laws comply with global standards. Impressively, Nigeria recently managed to have its name removed from an international blacklist of countries whose record for money laundering compliance fell far beyond the standards. Despite the robust appearance of Nigerian legal frameworks, money laundering and terrorist financing remain endemic within domestic terrain. While global approach is indispensable to combating money laundering and the financing of terrorism, the dynamics of a developing country like Nigeria present an enormous challenge. Beyond elaborate laws, it is imperative that proper attention be focused on the substantive implementation and enforcement of those laws. Challenges that have plagued Nigeria for decades include corruption, political interference, weak domestic institutions, worsening socio-economic conditions, and a lax regulatory environment. Unless these problems are tackled, Nigeria's AML/CFT laws will only be strong on paper.

ACKNOWLEDGMENTS

My sojourn to Canada has been that of a divine providence. To this end, my deepest gratitude goes to the Almighty God who has been the masterminder and the pillar towards the accomplishment of this project against all odds.

In the course of this work, diverse people have played prominent roles. First, my unalloyed appreciation goes to my ever-supportive thesis advisor (Professor Michelle Gallant) for her scholarly touch, attention to details, guidance and objective criticisms in the course of this work. My intellectual engagement with her in the course of this work really demonstrates her depth of knowledge in the subject matter of this thesis. I also thank immensely Professor Jonathan Black-Branch, the Dean of the Faculty of Law University Manitoba and Professor Mary J. Shariff for their incisive comments and perspectives in the course of reviewing this work.

In the same vein, I will like to thank Mathew Renaud and other staff of the E.K. Williams Law Library for their support and assistance during my studentship at the Robson Hall, Faculty of Law University of Manitoba. My sincere appreciation also goes to Marie Jivan and Maria Tepper for making my graduate program experience worthwhile.

My debt of gratitude also goes to the Faculty of Law and the University of Manitoba for various fellowship and scholarship awards I received as follows: Schwartz/Reisman Scholarship, David T. Sgayias Graduate Fellowship, Adalsteinn (Steini) Fridrikson Kristjansson Fellowship and International Graduate Student Entrance Scholarship. Undoubtedly, these scholarships greatly impacted on my studies positively. Hence, I will forever be grateful to all the various donors for their generosity and kind gesture.

Beyond the four walls of the University of Manitoba, I am also indebted to prominent individuals for their unquantifiable support- morally and financially in the course of this work. I will like to specifically thank the following people Dr. Adesegun A. Akin-Olugbade (OON),

Mr. Ajibola Adebute, Mr. Abiodun Olatunji, SAN, Professor. Konyinsola Ajayi, SAN, Mr. Oluseye Opasanya, SAN, Dr. Khrushchev Ekwueme, Professor. E.A. Taiwo, Dr. John Akintayo, Professor. Yemisi Bamgbose, SAN, and Hon. Justice Dr. Nnamdi Dimgba amongst others. Indeed, you have all provided your shoulders for me to lean on in the course of my career growth and aspirations. You are all highly appreciated.

Most importantly, I acknowledge and appreciate my dear wife, Mercy and our wonderful sons Omodesireoluwa Paul and Omodesayooluwa Philip for their support and huge sacrifices while I am away for this program. Special thanks go to my mother, Deaconess (Mrs.) E.O. Olaoye for her love and prayers. May you live long in good health and sound mind so that you can witness more of greater things to come. Very warm thanks to all my lovely siblings and in-laws alike for their labour of love and support. Deserving of mention is my immediate elder brother, Mr. Sunday Olaoye and my nephew, Olujimi Bankole for watching my back while I am away. For your support, love and sacrifices, I say thank you all. God bless you all.

I would like to acknowledge with thanks, Joshua B. Akom (my first contact who welcomed me to the City of Winnipeg right from the Airport and accommodated me for close to a month). Thank you for welcoming me with open arms with your amiable flat mate, Dr. Abdul-Manan Sadck. I also thank immensely Pastor and Dr. (Mrs.) Temidayo Adewole and the entire members of the Deeper Life Christian Bible Church, Winnipeg for their warm reception and support. I will not fail to appreciate Dr. Samuel Adeniji who provided the needed contact to link up with Pastor Adewole. I thank you all.

My heart-felt gratitude also goes to my numerous friends and colleagues who have been part of this journey. Worthy of mention are Oluseyi Adebayo, Opeyemi Longe, Abayomi Okubote, Dr. Toby Moody, Nas Ogunsakin, Benjamin Omoruyi, Wasiu Omotosho, Abosede Oladiji, Kelechi Okorafor, John Tolorunse and host of others. I appreciate you all.

Lastly, I have gathered a poise of other men's flowers, and nothing but the thread that binds them is my own. So, I acknowledge with thanks the authors and writers of the books and journals I have consulted in the course of this work.

DEDICATION

This thesis is dedicated to the Almighty God. I also dedicate this thesis to my lovely mum, Deaconess (Mrs.) E.O Olaoye, my dearest wife, Mercy, our precious gifts from the Almighty God, Omodesireoluwa Paul and Omodesayooluwa Philip. Thank you for your immeasurable sacrifices.

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LIST OF ABBREVIATIONS

AGF	Attorney General of the Federation
AML	Anti-Money Laundering
BSA	Bank Secrecy Act
CBN	Central Bank of Nigeria
CDD	Customer Due Diligence
CFT	Combating the Financing of Terrorism
CFRN	Constitution Federal Republic of Nigeria
CTC	Counter Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
DFNBPs	Designated Non-Financial Business and Professions
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
FATF	Financial Action Task Force
FGN	Federal Government of Nigeria
FIs	Financial Institutions
FRN	Federal Republic of Nigeria
FSRBs	FATF-Style Regional Bodies
GFI	Global Financial Integrity
GDP	Gross Domestic Product

ICPC	Independent Corrupt Practices Commission
ICRG	International Co-operation Review Group
IMF	International Monetary Fund
KYC	Know Your Customer
LFN	Laws of the Federation of Nigeria
ML	Money Laundering
MLPA	Money Laundering Prohibition Act
NBA	Nigerian Bar Association
NCCTs	Non-Cooperative Countries or Territories
NFIU	Nigerian Financial Intelligence Unit
NDLEA	National Drug Law Enforcement Agency
OECD	Organization for Economic Cooperation and Development
PEPs	Politically Exposed Persons
RBA	Risk Based Approach
SAN	Senior Advocate of Nigeria
TPAA	Terrorism Prevention Amendment Act
TSA	Transportation Security Administration
UNCTOC	United Nations Convention against Transnational Organized Crime
UNCAC	United Nations Convention Against Corruption

UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council

INTRODUCTION

Nigeria is a country that is richly endowed with natural resources such as oil, mineral and gas.¹ In 2015, Nigeria emerged as Africa's biggest economy with an estimated GDP of \$1.1 trillion.² Nigeria is equally plagued by socio-economic problems. Of its estimated population of 193 million, 87 million Nigerians live in extreme poverty.³ Corruption and crime, particularly financial crimes are rampant. It has been referred to as the "money laundering centre of Africa."⁴

From the 1970s, the international law has been intent upon deterring money laundering and terrorist finance. This effort has led to the creation of international anti-money laundering and combating financing of terrorism standards (AML/CFT). Although Nigeria has adopted the global AML/CFT standards, the efforts have not yielded desired results. An examination of the international AML/CFT standards within Nigeria's socio-political and legal context reveals the domestic realities that militate against effective deterrence. Without sufficient account of the local context, this rich country is likely to remain a 'money laundering centre.'

It is not in doubt that Nigeria has a detailed AML/CFT legal framework on paper, yet it suffers profound difficulties in terms of implementation and enforcement. This calls into question if the said laws are not merely cosmetic. To this end, this thesis examines the implementation of international AML/CFT standards in Nigeria. Chapter one begins with an introduction to money laundering and terrorist finance. Chapter two delineates the international AML/CFT instruments. Chapter three evaluates the reception of international norms in Nigeria, its legal and regulatory frameworks. Chapter four identifies the socio-economic challenges confronting

¹ Charles O. Ofoche (2012), "Socio-Economic Problems in Nigeria : Causes and Remedy." United States Army War College, Strategy Research Project, pp. 1-34.

² Adeniyi N. M. et al., "Money Laundering: The Paradox of Deterrence Mechanism" (2016) 11:3, International Journal of Business, Economic and Law, p. 45.

³ Nigeria's Paradox of Poverty Amidst Plenty, Punch Newspaper of October 28, 2018. Available online at <https://punchng.com/nigerias-paradox-of-poverty-amidst-plenty/>.

⁴ Vanguard, Nigerian Daily News Paper, October 25, 2005.

the fight against money laundering and terrorist finance in Nigeria. The work concludes with useful policy recommendations.

CHAPTER ONE- THE MENACE, THE RESPONSE AND THE CHALLENGE

INTRODUCTION

The phenomenon of money laundering is not new. Criminals have long sought to disguise and launder their illicit criminal proceeds.⁵ From its earliest days, money laundering was primarily associated with drug trade. With the September 11, 2001 terrorist attacks on the United States, terrorist finance became fused with the money laundering menace. The antidote for this menace, an antidote that emerged firstly in the context of drugs and later gravitated into the terrorism context, is global anti-money laundering and anti-terrorist financing laws. As with any international strategy, implementation rests upon domestic law. In this, the implementation of the strategy in Nigeria presents an enormous challenge. This chapter provides an introduction to the money laundering and terrorist finance menace, the response to that menace and introduces the challenge the strategy poses to Nigeria.

1.1 THE RISE OF MONEY LAUNDERING AND TERRORISM FINANCING

1.1.1 DRUGS, CRIME AND MONEY

“The initial impetus for coordinated international action to combat money laundering arose out of growing concern within the world community about the problems of drug abuse and illicit trafficking”⁶

Historically, the development of global anti-money laundering law began with the war on drugs. At different stages in history, drug production, use and supply have all been presented as threats to human, national or international security.⁷ At the developmental stage of the global drug policy, the ‘drugs as a threat’ discourse focused on drug addiction or abuse by individuals.

⁵ Arowosaiye Y. I. “International and Regional Legal Response to Money Laundering and Financing of Terrorism”, Vol. 16, No 2, pp. 345-369.

⁶ W. Gilmore, “Dirty Money- The Evaluation of International Measures to Counter Money Laundering and the Financing of Terrorism,” Brussels: Council of Europe, 2004, p.51.

⁷ Emily Crick, “Drugs as an Existential Threat: An analysis of the International Securitization of Drugs” (2012) 23:5, International Journal of Drug Policy, p. 407.

Prevention of drug abuse was the primary concern of the UN Single Convention on Narcotic Drugs of 1961 (the Single Convention).⁸ The Single Convention prohibited the non-medical and non-scientific production and use of drugs and prohibited the trade in illegal drugs.⁹

By the 1980s, the global community came to the realization that the existing international instruments were inadequate in dealing with drug trafficking.¹⁰ Trafficking was a multibillion-dollar trade controlled by organized crime.¹¹ The attention shifted to the economic dimension, particularly to global economy. According to Naim, the global annual revenues of organized crime are a trillion dollars and illicit drugs accounts for the bulk of this amount.¹² Adverse effects of the drug trade on global economy and security caused the international community to seek the removal of the profits associated with the trade. A bedrock treaty of global money laundering- the 1988 United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substance (known as the Vienna Convention) criminalized the laundering of drug money.¹³

Drug trafficking has huge economic implications. In 1990, the Financial Action Task Force (FATF) estimated that sales of drugs amounted to approximately \$122 billion per year in the US and Europe, of which 50-70 percent or as much as \$85 billion per year could be available for laundering.¹⁴ In 1997, the FATF estimated global sales of illegal drugs to be US\$300 billion.¹⁵ In 2011, the United Nations Office on Drugs and Crime (UNODC) reported that

⁸ UNTS, Vol. 520, p. 151. The Single Convention was subsequently amended in 1972. See UNTS, Vol. 976, p. 106.

⁹ See the International Opium Convention, 1912, the Convention on the Limitation of Manufacture of Narcotic Drugs, 1931, and the Convention for the Suppression of Illicit Drugs, 1936.

¹⁰ William C. Gilmore, "Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (1991) 15:3 Marine Policy, p. 183.

¹¹ World Drug Report by UNODC (2017), The Drug Problem and Organized Crime, Illicit Financial Flow, Corruption and Terrorism, p. 21.

¹² Naim, M. (2005), "Illicit: How Smugglers, Traffickers and Copycats Are Hijacking the Global Economy" Anchor Books, p. 4.

¹³ United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna (Austria), December 20, 1988, no. 27627, E/CONF.82/15. As of February 2018, the membership of the organization has risen to 190 member states.

¹⁴ Van Duyne, (2005) "Drugs and Money: Managing the Drug Trade and Crime Money in Europe" Routledge Publishers, p. 108.

¹⁵ See Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crime (UNODC Research Report) available online

criminals, especially drug traffickers, may have laundered around \$1.6 trillion or 2.7 percent of the world's Gross Domestic Product (GDP) in 2009 alone.¹⁶ From the 1990s onward, coping with the global trade became principally a matter of eliminating the laundering of drug money.

1.1.2 TERRORIST AND FINANCE

International efforts to combat terrorism began as early as 1937.¹⁷ The League of Nations, a precursor to the United Nations prepared a draft convention for the prevention of terrorism.¹⁸ Terrorism became the epicentre of global attention following the US 9/11 attacks. The 9/11 attacks brought to fore the fact that terrorism transcends national borders. The horrendous nature of the attack was well captured by Crotty:¹⁹

“the horror of the 9/11 attacks on the Twin Towers of the World Trade Centre and the Pentagon changed everything. The collapse of buildings once recognized as among the most powerful symbols of the wealth of a great city and the might of a great nation was shattering to the nation's psyche. The televised pictures of the devastation; reports and pictures of people leaping to their death; and of technicians in morgues trying to identify victims from body parts; the heroism of firefighters and police who responded to the attacks; and most of all, the human face placed on the tragedy definitely brought home the dimensions of the international threat.”

A coordinated global response was prompt and decisive. On 12 September, 2001, the United Nations Security Council (UNSC) adopted Resolution 1368 which recognized the inherent right to individual or collective self defence and legitimized the use of force to fight terrorism.²⁰ A few days later, on 28 September, 2001, the UNSC passed Resolution 1373.²¹ Even though

at:<https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf>.

¹⁶ Illicit Money: how much is out there? Available online at: http://www.unodc.org/unodc/en/frontpage/2011/October/illicit-money_-how-much-is-out-there.html.

¹⁷ Javier Ruperez “The United Nations in the Fight Against Terrorism”, available online at: https://www.un.org/sc/ctc/wp-content/uploads/2017/01/2006_01_26_cted_lecture.pdf.

¹⁸ It should be noted that this Convention never came into existence but it did serve as a point of reference for a later discussion on terrorism by the United Nations.

¹⁹ William Crotty, (2016) “The Politics of Terror: The U.S. Response to 9/11” Northeastern University Press, pp ix-x.

²⁰ UN Security Council, Security Council Resolution 1368 (2001) [Threats to International Peace and Security Caused by Terrorist acts], 12 September 2001, S/RES/1368 (2001), available at: <https://www.refworld.org/docid/3c4e94557.html> [accessed 31 May 2019].

²¹ See UN Security Council, Security Council Resolution 1373 (2001) [on threats to International Peace and Security caused by terrorist act], 28 September, 2001, S/RES/1373/2001.

the Resolution fails to define ‘terrorism’, it calls on all States to ratify existing international conventions on terrorism. It requires every state party to criminalize and enact specific legislation on terrorism and ensure that terrorist acts are established as serious criminal offences and impose commensurate punishment.²² States are also required to desist from assisting or engaging in the acts of state sponsored terrorism.²³ The Resolution mandates state parties to freeze without any delay funds and other financial assets traceable to the terrorists and their supporters. In order to monitor state compliance, the Resolution established Security Council’s Counter Terrorism Committee (CTC).²⁴

Critically, Resolution 1373 called for a focus on the financial dimensions of terrorism. It drew attention to financial aspects of terrorist finance. It adopted the strategy applied to the global trade in illegal drugs. Thereafter, the collective response to the financial aspects of crime became known as global anti-money laundering and anti-terrorist finance laws.

1.2 THE GLOBAL ORDER OF THE PROBLEM

Money laundering and terrorist financing connote crimes of global dimensions that mandate a global response. Staggering estimates continue to be associated with the drugs trade. In 2000, Rotman put the annual retail sales of illegal drugs at \$500 billion, larger than the global trade in oil.²⁵ By the same token, staggering numbers are affiliated with the more generic phenomenon of transnational crime, or organized crime, inclusive of drug money laundering. In 2017, the Global Financial Integrity (GFI), a Washington DC-based think tank announced the size of the business of transnational crime to be an average of \$1.6 trillion to \$2.2 trillion annually.²⁶

22 See Clause 2(e) of the Resolution.

23 See Clause 2(a) of the Resolution.

24 See Clause 6 of the Resolution.

25 E. Rotman, “The Globalization of Criminal Violence” 10 Cornell Journal of Law and Public Policy (2000), p. 6.

26 See Global Financial Integrity: Transnational Crime; available online <<https://www.gfintegrity.org/issue/transnational-crime-terrorist-financing/>>.

Whether linked to drugs, to terrorism, or to any other species of serious crime, global financial crime reflects globalization. In the context of financial crime, the influence of globalization has at least two main components: geographical and political.²⁷ The geographical component is the involvement of the territory of more than one state. The political element of globalization has to do with huge economic resources at the disposal of criminal organizations in contrast to the resources of the state. According to Shelley, the impact of such economic power has been felt in countries such as Italy and Colombia where criminal organizations have deeply infiltrated the government.²⁸ In this, the economic power of crime wrestles the power of sovereign states.²⁹ This wrestling is particularly threatened in developing countries like Nigeria. Nigeria's ability to confront terrorism and money laundering is weakened by the country's porous borders and problems of domestic insecurity.³⁰

Global crimes are not amenable to local solutions when criminal power competes with sovereign power. This realization propels a global response.

1.3 THE RESPONSE

The transnational order of contemporary money laundering and terrorist financing mandated global legislative response. The United States spearheaded the earliest response to the menace of money laundering through the enactment of the Bank Secrecy Act (BSA) in 1970. The BSA established regulatory measures requiring the filing of currency transaction reports, measures principally designed to detect and enable the capture of laundered money.³¹ Subsequently, the

27 Heba Shams (2004), "Legal Globalization: Money Laundering and Other Cases" the British Institute of International and Comparative Law, pp 92-93.

28 L. Shelley, "Transnational Organized Crime: An Imminent Threat to the Nation-State?" 48 Journal of International Affairs (Winter 1995), p. 465.

29 See C. Guymon, "International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention" 18 Berkley Journal of International Law (2000) at p. 61.

30 Michael Leiter (Former Director of the National Counter Terrorism Center and an NBC News analyst) - NBC televised searchlight on Boko Haram Insurgency in Nigeria, 21st May, 2014.

31 Pub. L. 91-508, Oct.26, 1970, codified at 31 U.S.C. The Bank Secrecy Act gives the Treasury Department a substantial degree of discretion to define what counts as "financial institution" which current regulations have defined to include depository institutions such as state federally chartered commercial banks, money services businesses such as check cashiers, currency exchangers, and money transmitters, post offices, casinos, and securities firms. Some of the reporting obligations under the BSA have been

US enacted the Money Laundering Control Act in 1986 which made the laundering of proceeds derived from one of a list of offences a crime.³² Expectedly, these laws did not go far enough in curtailing the threat of drug trafficking posed to the global community because of their jurisdictional limits.³³

That which was beget in America gradually percolated into the international arena. A concerted global response to combat money laundering became imperative in the latter part of twentieth century. Following the conclusion of the 1988 drugs trafficking treaty, in 1989, the Financial Action Task Force (FATF) was established. Primarily, the FATF was created to enhance international cooperation and assess the results of anti-money laundering policies globally. The International Convention for the Suppression of the Financing of Terrorism was adopted in 1999 and the Palermo Convention, together with its attendant three protocols were adopted in 2000. In September 2001, through the intervention of the UNSC, money laundering law expanded to include terrorist financing.

1.4 THE CONCEPT OF MONEY LAUNDERING

Conceptually, money laundering falls within the realm of economic crimes.³⁴ It denotes classically non-violent financial acts associated with criminal activity.³⁵ It constitutes a significant threat to the stability of the global financial markets and national security.³⁶ It is defined as the process by which one conceals the existence, illegal source or illegal application

challenged on the ground of being invasive but the US Supreme Court has found those requirements constitutional. In *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 51 (1974), the SC held that the recording keeping requirements of the BSA constitutional on their face but determined that access to such records should not be arbitrary.

32 Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat 3207, codified at 18 U.S.C 1956, 1957, 31 U.S.C. 5324-26. The Act criminalizes structuring certain transactions to avoid filing currency reports and made civil and criminal procedures available to forfeit property involved in laundering offence.

33 Mugarura, N. (2012), "The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries" Ashgate Publishing Limited, p. 102.

34 *Supra* Note 5, p. 346.

35 Hill, C., "Money Laundering-A Work of Art". In B. Rider, & M. Ashe (Ed.), *Money Laundering Control*, (1996) London: Round Hall Sweet & Maxwell, pp. 28-47.

36 Ryder, N. (2012), "Money Laundering - An Endless Cycle? A comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada" Routledge, p. 8.

of income, and disguises that income to make it appear legitimate.³⁷ The United Nations Convention against Transnational Organized Crime (UNTOC) defines money laundering as:

“the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade legal consequence of his/her action; the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing at the time of receipt that such property is the proceeds of crime; participation in, association with or conspiracy to commit, attempt to commit and aiding and abetting, facilitating and counselling the commission of any of the offences established in accordance with this article”³⁸

This definition of money laundering is not without criticism. It fails to recognize that laundering does not always include actual money but can include any transaction that involves any form of property or benefit, tangible or intangible that is derived from criminal activity.³⁹ Moreover, this focus on ‘illicit earnings’ has been criticized on the ground that money laundering is a criminal business and as such to merely focus on the criminal elements involved significantly misses the point.⁴⁰ Turner adopts the concept of *zero-based budgeting* where each step in the process is built from ground up.⁴¹ In this wise, the concept of money laundering in a criminal sense involves the use of criminal or illicit funds and assigns criminal liability to otherwise legitimate business. Turner defines money laundering as the use of traditional business practices to move funds and describes the people who engage in this activity as doing so to make money.⁴² However, according to Cuellar, to launder money is to hide its illegal origin.⁴³

37 Guy Stessens (2000), “Money Laundering: A New International Law Enforcement Model” Cambridge University Press, p. 83.

38 General Assembly Resolution 55/25 of November 15, 2000 (New York: United Nations, 2004).

39 Hopton, D. (2016), “Money Laundering: A Concise Guide for All Business” Routledge Publishers, 2nd Edition, p. 2.

40 Turner, J.E. (2011), “Money Laundering Prevention: Detering, Detecting, and Resolving Financial Fraud” 1st Edition, John Wiley and Sons Inc., Chichester, p. 1.

41 *Ibid.* p. 3.

42 *Ibid.* p. 4.

43 Mariano-Florentino Cuellar, “The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance” *Journal of Criminal Law and Criminology* (2003) 93:2, p. 328.

Norman Mugarura defines money laundering as “a process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.”⁴⁴ In his definition, money laundering is not limited to illicit earnings because legitimate earnings can be put through laundering process.⁴⁵

Money laundering is often described as involving a three-stage process: placement, layering and integration.⁴⁶ At the placement stage, money launderers move the proceeds of their criminal spoil to an area where the proceeds could be changed to a less noticeable form or simply hidden from authorities’ inquiries. The layering stage involves the separation of the proceeds from their illegal source and concealing its source by using multiple and complex financial transactions device.⁴⁷ Upon achieving this, the capital is integrated into the financial system. The process of money laundering is completed at the integration stage.⁴⁸

While the three-stage model is convenient, it is also simplistic. According to Koningsveld, the classical final stage of money laundering should be divided into two separate parts, being justification and investment stages.⁴⁹ When integration involves some legal economic activity, there must be some justification for where the funds originated. According to Cuellar, justification is easy to accomplish where the layering process has done its work.⁵⁰ The

44 *Supra* Note 33, p. 3.

45 This is known as Reverse money laundering. It is defined as a process of conducting financial transactions with clean money for the purpose of concealing or disguising the future use of that money to commit a criminal act. See Cassella, Stefan D., “Reverse Money Laundering” *Journal of Money Laundering Control*, Vol. 7 No. 1 (2003), pp 92-93.

46 United Nations Office on Drugs and Crime: “The Money Laundering Cycle” Online: <http://www.unodc.org/unodc/en/money_laundering_cycle.html>.

47 Barry A. K. Rider, “The Practical and Legal Aspects of Interdicting the Flow of Dirty Money” (1996) 3 *Journal of Financial Crime* 234, 239.

48 It should be noted that the stages are not cumulative for the offence of money laundering to be established. The commission of any of them could be sufficient for guilt to arise. Where there are instances where all three stages are clearly discernible, the variability and complexity of the money laundering process can result in cases where only a number of these stages occur, where they occur simultaneously or where they overlap. See Savona, E.U. and De Foe M.A., “International Money Laundering Trends and Prevention/Control Policies” In Savona, E.U. (ed.), *Responding to Money Laundering: International Perspectives* (New York: Harwood Academic Publishers, 1997), pp. 27-8.

49 Jan Van Koningsveld, “Understand it: Rethinking the Stages of Money Laundering Process to make Enforcement More Effective” (2008), 435-441.

50 *Supra* note 43 at p. 328. According to Cuellar, one of the major reasons for layering is that it allows criminals to spread, transform, and reintegrate proceeds in a manner consistent with any number of legitimate justifications for the money, thereby making it easier for the hypothetical criminal to choose

justification of the criminal money is obviously the final act in the chain of fictitious transitions and financial movements. On the other hand, investing criminal money is the final step in the series of money laundering process.

Generally, money laundering might be summarized as the conversion of illicit cash to another asset, the concealment of the true source or ownership of the illegally acquired proceeds and the creation of the perception of legitimacy of the source and ownership.⁵¹ Conversely, legitimate funds could also be put through laundering through a process known as reverse money laundering. This occurs where legitimate funds are intended to be used for illegal purposes. The financing of terrorism is an obvious example.⁵² The financing of terrorist does not necessarily anticipate the use of resources of some illicit derivation. Lawfully earned moneys could be ‘laundered’, or concealed, to further terrorist aspirations.

While the concept of money laundering often tends to look to the source of the laundered money, reverse money laundering tends looks to what criminals intend to do with the money.

This view finds expression in the words of Cassella:

“For more than a decade, money laundering enforcement has looked backward asking what was the source of the laundered money, and how has the criminal tried to hide it? In the new age, it is essential to look forward: What is the criminal planning to do with the money that is going to such great length to conceal? Reverse money laundering is the new modality, and merits the attention of all.”⁵³

In this, while classic money laundering theory tends to anticipate the laundering of resources derived from crime, terrorist financing can contemplate the inverse.

between enjoying the proceeds through direct consumption, reinvesting them in illegal activity, or investing them in the legitimate economy for portfolio diversification purposes.

51 *Supra* Note 33, p. 7.

52 *Supra* Note 44. According to Cassella at p. 92, (*Supra* Note 45) “it is now known that the attacks of 11th September 2001 were financed with cash and wire transfers from abroad. It was reported that money from a money exchange in the United Arab Emirates passed through a correspondent account at a New York bank before being credited to the accounts of the hijackers at another bank in Florida. In other scenarios, the hijackers or their supporters simply carried bundle of cash into the country. The money may have had a legitimate origin-it could have come from someone’s personal fortune, from any other source- but its purpose was deadly”.

53 *Ibid.* Cassella at p. 94.

1.5 THE CONCEPT OF TERRORISM FINANCING

There is no universal accepted definition of “terrorist financing.” Understandably, this is due largely to the subjective nature of the term “terrorism” in an international context. There is no agreed international definition of ‘terrorism’ so there cannot be a universal definition of terrorism.⁵⁴

Although ‘terrorism’ may not be defined, article 2 of the United Nations Convention for the Suppression of the Financing of Terrorism 1999 defines ‘terrorist financing’ or the act of providing support for terrorist activities and operations especially financial support as:

“2(1) any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provide or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitute an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking any active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act.”⁵⁵

This definition leaves states in a dilemma as to what act actually constitutes the predicate act of terrorism.⁵⁶

54 Mu’azu, A.S., Babagana, K., “Terrorism in Nigeria: An Overview of Terrorism (Prevention), Act 2013, Amended” *Journal of Business, Economics and Law*, Vol. 8., Issue 4 (Dec.,) 2015. According to Ajileye, “the unalterable truth remains that there are hundreds of definitions of terrorism in existence. Given this scenario, it is acceptable to simply say that there can be as many definitions as there are people defining terrorism. By and large, the meaning ascribed to the word is a reflection of a person’s perspectives, background and philosophy. The definitional ambiguities embedded in the word ‘terrorism’ are encapsulated in the popular cliché: one man’s terrorist is another man’s freedom fighter, which immediately suggests the lack of consensus in determining who should be designated as a terrorist or which act should be considered terrorist act.” See Alaba Ajileye, “Legal Framework for the Prevention of Terrorism in Nigeria” (2015) ResearchGate Publication, pp. 11-12. See also Martini A., Njoku E.T. (2017) *The Challenges of Defining Terrorism for Counter-Terrorism Policy*. In: Romaniuk S., Grice F., Irrera D., Webb S. (eds.) *The Palgrave Handbook of Global Counterterrorism Policy*. Palgrave Macmillan, London, pp. 73-89.

55 UN General Assembly, International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, No. 38349.

56 *Supra* Note 5, p. 349.

1.6 THE INTERPLAY BETWEEN MONEY LAUNDERING AND TERRORISM FINANCING

To the extent that a certain synergy exists between money laundering and terrorist financing, that synergy connotes the adoption of harmonized global control. To the extent that the global community has sought to confront the financial dimensions of crime, *qua* to deter money laundering and terrorist financing, these have become part of a consolidated set of global standards. Of course, many of the techniques used to launder drugs money or other illicit resources are also used to conceal terrorist finance.⁵⁷ And both present threats to global order and security.

Notwithstanding, it is important to underscore two critical differences. First, unlike money laundering, terrorist financing may stem from legitimate funding sources. Legitimately acquired resources can readily be used to further terrorism.⁵⁸ Second, the primary goal of money laundering is to conceal criminal financial gains. By contrast, the primary goal of terrorist financing is to foment terror, not to profit or protect the profits of some unlawful enterprise.⁵⁹

1.7 THE CHALLENGE

The fulcrum of the interest in money laundering and terrorist finance has been the systematic development of a global anti-money laundering and anti-terrorist finance apparatus. That apparatus receives its strength through its incorporation and enforcement under the domestic law of the community of nations. Nigeria, as a member of that community, faces distinct and unique challenges in responding to the international call.

57 See Hickman, D. "Terrorism As a Violation of the Law of Nations: Finally Overcoming the Definitional Problem" *Wisconsin International Law Journal* (2011) 29:3, 452.

58 *Supra* Note 52.

59 The US Courts have had the opportunity to deal with so-called 'clean money' terrorist financing cases. In *US v Enaam Arnaout* 282 F Supp 2d 838 (Ill, 2003); the executive director of an Illinois-based charity known as Benevolence International Foundation used the Foundation as a conduit for collecting money for Al-Qaeda from unsuspecting donors. The accused was convicted under multiple counts, including money laundering and providing material support knowing it would be used for overseas terrorism. See also *Islamic American Relief Agency (IARA) v Gonzalez*, 477 F 3d 728 (DC Cir, 2007); *Holy Land Foundation for Relief and Development v Ashcroft*, 333 F 3d 165 (DC Cir, 2003).

Nigeria is a country richly endowed with natural resources. Unfortunately, this has not translated to material and human development. Part of this is a consequent of domestic money laundering and other financial crimes. In recognition of the negative impact of money laundering and terrorism financing on Nigeria, the Nigerian government has made significant strides in domesticating the international AML/CFT standards. In fact, the country has been adjudged as having the most elaborate legal framework on AML/CFT regime within the West Africa region.⁶⁰ Regardless, Nigeria is still experiencing upward swing in money laundering and terrorist financing activities due to socio-cultural, economic, political and legal challenges bedeviling the country. Nigeria is amongst the African countries that have recorded massive outflows of illegal funds between 1970-1980. Research maintains that Nigeria lost \$165 billion, representing 19% of the total \$854 billion outflows from Africa, to the developed market-economy countries.⁶¹ Nigeria was rated seventh out of the 20 largest exporters of illicit funds worldwide, with a total figure of \$129 billion from 2001 to 2010.⁶²

Within the context of Nigeria, the main challenge to the effective implementation of the AML/CFT global standards has been the suitability of the standards to the social-cultural, political and economic realities. Nigeria's domestic order is weak, subject to extreme corruption. Thus, while Nigeria has sought to comply with the international AML/TF standards, its domestic realities impose an enormous challenge.

In examining this challenge, the next chapter sets out the key features of the global anti-money laundering and anti-terrorist finance laws. This provides a template for the subsequent delineation of Nigeria's response and an analysis of the problem that domestic order presents to the realization of the global ambitions.

60 Anti-money Laundering, "Mutual Evaluation Report" (2008) May. at p. 14.

61 The National (Money Laundering & Terrorist Financing) Risk Assessment Forum, "Nigerian National Risk Assessment on Money Laundering and Terrorism Financing" (2016), online: <[https://www.giaba.org/media/f/1049_Nigeria - AML-CFT Nationa Risk Assesment2017.pdf](https://www.giaba.org/media/f/1049_Nigeria_-_AML-CFT_Nationa_Risk_Assessment2017.pdf)>.

62 *Ibid.*

CHAPTER TWO- THE INTERNATIONAL ANTI-MONEY LAUNDERING AND COMBATING FINANCING OF TERRORISM STANDARDS

INTRODUCTION

Money launderers and terrorism financiers exploit the complexity and inter-connectedness of the global financial system. They are attracted to jurisdictions with weak or ineffective control. Combating the menace requires a well-coordinated international cooperation. The international apparatus that has emerged is known as anti-money laundering and terrorist finance law (AML/TF). It is composed of series of treaties as well as the United Nations resolutions. Together with this apparatus, an international body, the Financial Action Task Force (FATF) emerged to oversee the evolution and implementation of the AML/TF laws.

This chapter sets out the key features of the global AML/TF control strategy. The first part delineates the main elements of international legal framework. The second part explores the emergence and significant role of the Financial Action Task Force (FATF) as foremost international standards setter in combating money laundering and terrorist financing. The role of the FATF is instructive given that it has been distinctly critical of Nigeria's response.

2.1 INTERNATIONAL LEGAL INSTRUMENTS

2.1.1 THE VIENNA CONVENTION 1988

The international framework consists of several treaties, the first of which is the Vienna Convention.⁶³ This Convention is the first international legal instrument to lay the foundation for coordinated international action to combat money laundering. The adoption of the Convention arose out of a growing concern within the world community about the problems of drug abuse and illicit trafficking.⁶⁴ It stands as the first international instrument to focus on the financial aspects of crime.

63 *Supra* Note 13.

64 See Article 2 of the Vienna Convention.

The Convention provides for the confiscation of criminal proceeds of drugs trafficking offences.⁶⁵ As the pioneer instrument in identifying counter-laundering measures at the international level, the Convention criminalizes the laundering of drugs proceeds. It is restricted to drugs crimes and does not explicitly use the term money laundering. Article 3 speaks directly of the criminalization of the conversion- ‘laundering’ resources linked to drugs.⁶⁶

2.1.2 THE UNITED NATIONS CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM (1999)

The next instrument is the Convention for the Suppression of the Financing of Terrorism.⁶⁷ This instrument focuses on the financial aspects of terrorism. Article 2 (1) provides that a person commits an offence of terrorism financing if that person by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that they should be used or with the knowledge that they are to be used, in full or in part, to carry out any of the offences described in the treaties listed in the annex to the Convention, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international

65 See Articles 5, 6 and 7 of the Convention.

66 Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
- (c) Subject to its constitutional principles and the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences
 - (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.

67 Signed in New York (USA), December 09, 1999, no. 38349, GA Resolution no. A/RES/54/109. As of October 2018, the treaty has been ratified by 188 states.

organization to do or abstain from doing any act. This provision covers both the mental and material elements of the offence of terrorism financing. The material element is the act of providing or collecting funds or financing terrorist acts. The mental element is the intent or knowledge of the funds being used for terrorist activities.

The Convention requires the detection and freezing, seizure or forfeiture of any funds used or allocated for the purpose of committing the offences described. These offences are deemed to be extraditable and parties are obligated to establish their jurisdiction over the offences, ensure the offences are punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings.⁶⁸

Taking into consideration the complex nature of the crime of terrorism and its political and ideological undertones, the Convention requires that state parties take appropriate measures through their domestic legislation to ensure that criminal acts within the scope of the Convention are under no circumstances justified on political, ideological, racial, ethnic, religious or other grounds.⁶⁹ However, the Convention does not define terrorism.

Article 18 of the Convention requires that state parties take preventive measures in their respective jurisdictions, including requiring financial institutions and other professions involved in financial transactions to utilize 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 special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity.

68 See Articles 4, 5, 8,9, 10 and 11 of the Convention.

69 See Article 6 of the Convention.

Notably, the Convention focuses on terrorist finance, in contrast to the Vienna Convention's focus on drugs money. Unfortunately, the Convention did not gain wide acceptance until the horrendous US 9/11 attacks which brought terrorist finance into global limelight.

2.1.3 THE PALERMO CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (2000)

Coming into force in 2003, the Convention against Transnational Organized Crime (otherwise known as Palermo Convention) and its attendant three protocols aims to stem the tide of organized crime.⁷⁰ The primary essence of the Convention is illustrated in the words of the former Secretary General of the United Nations:

“By signing this Convention, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings.”⁷¹

The Convention defines ‘organized crime’ as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences in order to obtain, directly or indirectly, financial or other material benefits.⁷² An offence is transnational in nature if ‘it is committed in more than one State; it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one state; and it is committed in one State

70 UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25, available at: <https://www.refworld.org/docid/3b00f55b0.html> [accessed 22 September 2019]. The protocols are (i) Protocol to prevent, suppress and punish trafficking in persons, especially women and children; (ii) Protocol against the Smuggling of Migrants by Land, Sea and Air; and (iii) Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.

71 See United Nations Convention Against Transnational Organized Crime and Protocols Thereto, available online at: <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

72 *Ibid.* Article 2.

but causes substantial effect in another State.’⁷³

In relation to money laundering, the Convention requires each state party to criminalize laundering of proceeds of crime whether committed within or outside its territory and permit the required criminal knowledge or intent to be inferred from objective facts.⁷⁴ In contradistinction with the Vienna Convention, the Palermo Convention supersedes the Vienna Convention in its definitional limits of money laundering. The Palermo Convention is not limited to finance in connection with drugs. Equally, it creates four additional specific crimes: participation in an organized criminal group, money laundering, corruption and obstruction of justice. It also establishes guidelines for the extradition of wanted criminals through mutual legal assistance, law enforcement and cooperation in the area of information exchange.⁷⁵

In relation to finance and crime, the Convention puts in place measures to combat money laundering by requiring state parties to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies that are susceptible to money laundering within its competence. It is perhaps the first instrument to begin to describe the extent of money laundering regulation. With respect to money laundering prevention, it emphasizes the need for customer identification, keeping of records and the reporting of suspicious transactions.⁷⁶

To optimize implementation, the Convention makes provisions for international cooperation on matters related to extradition, mutual legal assistance, transfer of proceedings and the conduct of joint investigations. In particular, in recognizing the limitations on the part of the developing countries and countries with economies in transition, State Parties are required to render necessary technical and financial assistance to developing countries with a view to strengthening their capacity to combat transnational crimes.⁷⁷ However, given the growing rate

73 *Ibid.* Article 3 (1).

74 *Ibid.* Articles 5, 6 and 7.

75 *Ibid.* Articles 5,7, 8 and 23.

76 *Ibid.* Article 7 (1) (a).

77 *Ibid.* Articles 16-31.

of organized crimes in developing countries like Nigeria, the impact of provisions for technical assistance is yet to be seen.

2.1.4 THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (2003)

The next treaty in this spate of anti-money laundering and terrorist finance laws consists of the Convention against Corruption (UNCAC).⁷⁸ Importantly, this instrument focuses on corruption and directs measures to five main areas: prevention, law enforcement, international cooperation, assets recovery, technical assistance and information exchange.

Corruption is not merely a crime but an enabler of many other criminal activities such as transnational organized crime, terrorism, money laundering and drug trafficking. According to James Wolfensohn, the former president of the World Bank, ‘corruption is the largest single inhibition of equitable development.’⁷⁹ It is estimated that up to \$40 billion US is stolen from developing countries every year, depriving citizens of better education, healthcare and good living. Corruption undermines good governance and rule of law. In addition, corruption leads to waste of resources and talents, keeping countries from achieving their full potentials and in worst case, leads to loss of lives.⁸⁰ In this, corruption is of a particular relevance to Nigeria, as discussed latterly, corruption is a bane of development in Nigeria.

The Convention aims to curb various types of corruption, to strengthen international law enforcement, enhance judicial cooperation and render technical assistance to developing countries. The Convention also attends to aspects not covered by the Palermo or the Vienna Conventions such as trading in influence, abuse of function and various types of corruption in the private, as opposed to public sector.⁸¹

78 UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at: <https://www.refworld.org/docid/4374b9524.html> [accessed 22 September 2019].

79 Osgoode Hall et al. “Keynote Speech: Global Corruption and the Universal Approach of the United Nations Convention against Corruption” (2015) 53:1 7.

80 *Ibid.*

81 See Articles 18 and 19 of the UNCAC.

In recognizing the prevention of corruption, the Convention devotes an entire chapter to public and private aspects.⁸² This includes institutional arrangements and establishment of specific anti-corruption bodies with a mandate to implement anti-corruption practices and policies.⁸³ The Convention calls for appropriate mechanisms to prevent corruption through electioneering campaigns, public procurement and justice delivery.⁸⁴ It calls for the criminalization of corruption and its penalization under domestic law.⁸⁵ It suggests, but does not compel, the establishment of the criminal offence of illicit enrichment.⁸⁶

The recovery of stolen assets is a fundamental aspect of the Convention.⁸⁷ This provision is of importance for many developing countries like Nigeria where former leaders and other public officials are regularly accused of corruption. In recent years, the revelation of grand corruption and embezzlement of public funds by Nigerian political office holders can be mind-boggling especially during the military junta of late General Sanni Abacha (1993-1998). Upon Abacha's death in June 1998, his successor in office commissioned a probe into allegations of corruption levelled against Abacha. These investigations revealed that Abacha and his '*kitchen cabinet*' stashed away in foreign bank accounts upward of billions of US dollars.⁸⁸ When Chief Olusegun Obasanjo left office in May 2007, the sum of 2 billion USD had been repatriated to Nigeria, including the 825 million USD previously retrieved by his predecessor in office,

82 *Ibid.* Articles 5 to 14 of the UNCAC.

83 *Ibid.* Article 6.

84 *Ibid.* Articles 7(3), 9 and 11.

85 *Ibid.* Articles 15 to 44.

86 *Ibid.* Article 20. The obligation for States Parties to consider creating such an offence is subject to their constitution and the fundamental principles of their legal system. This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges upon presuming that the accumulated wealth is corruptly acquired, unless the contrary is proved and which is the hallmark of Nigerian criminal jurisprudence as provided for in section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

87 See Article 51 of the UNCAC which provides that "The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard".

88 David U. Enweremadu, "Nigeria's Quest to Recover Looted Assets: The Abacha Affair" (2019) 48:2 Africa Spectr 51.

General Abdulsalami Abubakar.⁸⁹ In April 2018, the sum of 322 million USD forming part of the Abacha loot was repatriated from Switzerland.⁹⁰

2.1.5 THE UNITED NATIONS SECURITY COUNCIL RESOLUTIONS ON TERRORIST FINANCE

The Security Council is a principal organ of the United Nations that is dedicated to maintaining global peace and security.⁹¹ In the wake of the 9/11 attacks, its mandate extends to curtailing the spate of terrorism through its various resolutions.⁹² The first of such resolutions is Resolution 1373. As earlier noted, the Resolution mandates States to criminalize various acts associated with terrorism, as well as its financing. For proper implementation of the provisions, a 15-member Counter-Terrorism Committee (CTC) was established.⁹³ While the CTC is not a direct capacity provider, it does act as a broker between those states that have requisite capacities and those in the need of assistance.⁹⁴

On 28 March 2019, the Security Council adopted Resolution 2462.⁹⁵ The Resolution represents the continuous efforts of the United Nations in the prevention and suppression of terrorism financing. It takes into account the international standards as represented by the Council's previous resolutions, the United Nations Convention on Terrorism, and the FATF's

89 *Ibid.*

90 Punch Newspapers, 7th July 2018; available online <<https://punchng.com/more-questions-than-answers-over-322m-abacha-loot-sharing/>>. Also, lately the sum of £210m forming part of Abacha loot was recovered from Jersey account.

91 The Security Council is composed of 15 members, and each member has a vote. It takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle amicably. However, in some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security.

92 These resolutions include: S/RES/1368/2001, S/RES/1373/2001, S/RES/1377/2001, S/RES/1438/2002, S/RES/1440/2002, S/RES/1450/2002, S/RES/1452/2002, S/RES/1455/2003, S/RES/1465/2003, S/RES/1516/2003, S/RES/1526/2004, S/RES/1530/2004, S/RES/1535/2004, S/RES/1566/2004, S/RES/1611/2005, S/RES/1617/2005, S/RES/1618/2005, S/RES/1735/2006, S/RES/1787/2007, S/RES/1805/2008, S/RES/1822/2008, S/RES/1904/2009, S/RES/1963/2010, S/RES/1988/2011, S/RES/1989/2011, S/RES/2082/2012, S/RES/2083/2012, S/RES/2129/2013, S/RES/2133/2014, S/RES/2160/2014, S/RES/2161/2014, S/RES/2170/2014, S/RES/2178/2014, S/RES/2199/2015, S/RES/2249/2015, S/RES/2253/2015, S/RES/2255/2015, S/RES/2322/2016, S/RES/2341/2017, S/RES/2368/2017, S/RES/2395/2017, S/RES/2396/2017, S/RES/2462/2019.

93 See Article 6 of the Resolution.

94 David Malone, "The Security Council: From the Cold War to the 21st Century" (2004), Rienne Publishers, p. 6.

95 S/RES/2462, available online <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2462.pdf>.

Recommendations. The Resolution brings a new focus on terrorism financing risks by urging all States to assess their respective risks, identify those sectors and financial instruments that are most vulnerable to terrorism financing.⁹⁶ Notably, the Resolution underscores the importance of financial intelligence and information sharing in counter-terrorism, including in detecting networks of terrorists and their financiers.⁹⁷ It also requires States to establish serious criminal offences to prosecute the willful provision or collection of funds for the benefits of terrorist organizations or individual for any purpose.⁹⁸

One of the new trends captured by the Resolution is the funding of terrorism through ransom payments to terrorist groups by the victims of kidnappers.⁹⁹ The Resolution urges States to do more to prevent ransom payments to terrorists' groups. It is believed that ransom payments incentivize terrorists to continue using kidnapping as a revenue source. This is more apt for the Nigerian situation where kidnapping for ransom has become a lucrative criminal enterprise.¹⁰⁰ States are required under the Resolution to foster public/private partnership with financial institutions, the technology industry and social medium platforms.¹⁰¹ The essence of this partnership is aimed at monitoring and addressing the evolution of terrorism-financing trends, sources and methods. Also, the Resolution mandates the Counter-Terrorism Committee Executive Directorate (CTED) to strengthen its counter-financing of terrorism (CFT) assessment through targeted and focused follow-up assessment. The assessment is required to be done through the issuance of annual thematic summary gaps aimed at capacity building in consultation with other stakeholders.¹⁰² Lastly, the Resolution strongly urges all States to implement the AML/CFT international standards embodied in the revised Forty FATF

96 See Articles 14 and 23 of the Resolution.

97 See Articles 16 and 22 of the Resolution.

98 See Article 2 of the Resolution.

99 See Article 26 of the Resolution.

100 See "For Nigeria's Criminals, Kidnapping Remains Lucrative Trade" available online <<https://www.voanews.com/africa/nigerias-criminals-kidnapping-remains-lucrative-trade>>.

101 See Article 22 of the Resolution.

102 See Article 35 of the Resolution.

Recommendations.¹⁰³

2.2 THE FINANCIAL ACTION TASK FORCE

2.2.1 FATF: THE SYMBOL OF UNIFIED GLOBAL AML/CFT STANDARDS

Collectively, the contents of the various international treaties constitute the global anti-money laundering and anti-terrorist finance apparatus. They are the foundation of global attempts to purge the menace. Along with the formation of a global approach to money laundering and terrorist finance control, an international body emerged to oversee, and ensure effective implementation of global rules. Within the regulatory realm, the Financial Action Task Force (FATF) gradually became the most influential actor in the campaign.¹⁰⁴ To a pronounced degree, the standards that individual states must meet in deterring the financial aspects of crime are the standards proffered by this influential actor.

2.2.2 FORMATION, ORIGIN AND MANDATE OF THE FATF

The international framework on money laundering and terrorist financing has largely been influenced by the Financial Action Task Force (FATF) which was created by the G-7 Summit in Paris in 1989.¹⁰⁵ The formation of the FATF was in response to the growing concern about the effects of money laundering as well as utilization of the financial system to launder money.¹⁰⁶ Specifically, the objectives of the FATF are to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and financing of proliferation, and other related threats to the integrity of the international financial system.¹⁰⁷

103 *Ibid.* Article 4. See also Article 7 of UN Security Council Resolution 1617 which endorses the FATF's Forty Recommendations.

104 Navin Beekarry, 'The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law' (2011) 31 *Northwestern Journal of International Law & Business* 137, 170.

105 The G-7 countries consist of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States.

106 E. P. Ellinger, Eva Lomnicka and C V M Hare, *Ellinger's Modern Banking Law* (5th edition, OUP 2011) 93.

107 See the FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF/OECD, 2012 as updated in June 2019). For further discussion, see Nance, M.T.,

In 1990-1991, the G-7 created, and ascribed to, the FATF four main tasks: self-reporting and mutual assessment on the adoption and implementation of the FATF Recommendations by all its members; coordination and oversight of efforts to encourage non-members to adopt and implement the Recommendations; making further recommendations and evaluations of countermeasures while serving as a forum for considering developments in money laundering techniques domestically and worldwide; and for the exchange of information on enforcement techniques to combat money laundering; and standing ready to facilitate cooperation between organizations concerned with combating money laundering and between individual countries or territories.¹⁰⁸

Originally conceived to attend to money laundering and threats to financial system, in 2001 the mandate of the FATF expanded to include the fight against terrorist financing.¹⁰⁹ In its early mandate to resist money laundering, the FATF, drawing on extant international treaties, released an initial set of Forty Recommendations.¹¹⁰ In 2012, and inclusive of its mandate to attend to terrorist finance, the FATF released a list of international standards attentive to money laundering and terrorist financing.¹¹¹

2.2.3 THE FATF RECOMMENDATIONS

The FATF Recommendations constitute the most important and most comprehensive international instrument on money laundering and financing of terrorism and proliferation of

“Re-thinking FATF: an experimentalist interpretation of the Financial Action Task Force” (2018) 69 *Crime, Law and Social Change* 131.

108 FATF, Report 1990-1991 (13 May 1991), p. 3.

109 The mandates are (a) Establish international standards for combating money laundering and terrorist financing; (b) Ensure global action to combat money laundering and terrorist financing, (c) Ensure that FATF members have implemented the revised Forty and the Nine Recommendations in their entirety and in an effective manner through a peer or mutual evaluation process; (d) Ensure the enlargement of the international network against money laundering and financing of terrorism and promoting worldwide application of the FATF standards; (e) Enhance the relationship between FATF and International organizations, regional bodies and non-member countries; (f) Further develop the typologies exercises (examining money laundering and terrorist financing techniques and trends; and (9) Reach out to all parties affected by the FATF’s standards.

110 See the FATF Recommendations, Updated June 2019. Available online <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>>.

111 The said mandate is available at online at <<http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf>>.

weapons of mass destruction.¹¹² The Recommendations represent the global standards in combating the threat posed to the integrity of the financial systems. In 1990, the FATF issued its first set of Forty Recommendations which were aimed to combat money laundering. Subsequently, this initial set underwent a series of iterations.¹¹³

In 1990, the FATF issued a report containing a set of Forty Recommendations designed to combat the misuse of financial systems by laundering drug money. Drawn principally from the Vienna Convention, the Forty Recommendations provided a set of anti-money laundering procedures which covered three main areas: criminalization, or criminal offences;¹¹⁴ prevention, or measures designed to strengthen financial institution resistant to money laundering and enable the detection of criminal money;¹¹⁵ and measures aimed at facilitating international co-operation.¹¹⁶

In 1996, the FATF Recommendations were revised to capture evolving money laundering trends and techniques beyond drug trafficking context. The realization that money laundering could occur outside the scope of drug related offences necessitated the revision of the FATF Recommendation. In 2003, the Recommendations were once again revised to take account of developments beyond the narrow auspices of international treaties.¹¹⁷ The revision drew heavily upon developments such as the Basel Customer Due Diligence (CDD) Principles.¹¹⁸ In

112 *Supra* Note 27, p. 218.

113 In its Report of 6 February 1990, FATF envisaged that its Recommendations will need periodic evaluation. See W. Gilmore, *Supra*, Note 6, p. 98.

114 See Recommendations 1-8, 24, 25-33, 35.

115 *Ibid.* Recommendations 9-23, 26, 34.

116 *Ibid.* Recommendations 36-40.

117 The main changes introduced in the 2003 revision are (a) the extension of the CDD principles to financial institutions and enhances customer identification measures for higher-risk customers and transactions; (b) the extension of AML/CFT measures to designated non-financial businesses and professions (DNFBPs); (c) the inclusion of institutional measures in AML systems; and the strengthening of transparency of legal persons and arrangements.

118 See Basel Committee on Banking Supervision: Customer Due Diligence for Banks (October 2001) available online <<https://www.bis.org/publ/bcbs85.pdf>>. According to Abubakar, when the Basel Committee of Banking Supervision (BCBS) wrote the Basel Statement of Principles and introduced the concept of Know Your Customer (KYC) in 1988 as a fundamental principle in banking supervision, the aim was far broader than catching criminals. The principle sought to facilitate credible risk management by financial institutions and secondly to reduce the risk of uncontrolled flows worldwide. The KYC was later upgraded to the CDD for banks. The CDD principles are well encapsulated in FATF Recommendation 10. See generally, Abubakar, I. A., "An Examination of the Concept of Customer Due

species, the iterations responded not specifically, or always, to the conclusion of new international accords. The Recommendations drew more widely, attempting to ensure that money laundering law, prevention in particular reflected increasing knowledge of the practice.

2.2.4 REVISIONS ATTENTIVE TO TERRORIST FINANCE

Following the US 9/11 attacks, the FATF extended its mandate to address the financing of terrorism. On October 31, 2001 the FATF issued Eight Special Recommendations.¹¹⁹ The Recommendations were specifically designed to confront terrorist financing and complement the Forty Recommendations on money laundering.¹²⁰ In order to ensure that terrorist and other criminals were prevented from financing their activities or laundering the proceeds of their crimes through cross-border movement of currency and bearer negotiable instruments, a ninth special recommendation was added in 2005.¹²¹

The relevance of the provisions of the ninth special recommendation is more apt for a developing country like Nigeria where cross-border movement of money and weaponry can be more pronounced or common than in developed countries. The porosity of the Nigerian borders has been adjudged as one of the main factors encouraging proliferation of illegal arms and related domestic insurgencies.¹²² It has been recognized that the greatest challenge facing

Diligence under the Nigerian Money Laundering (Prohibition) Act, 2011 (As amended)” Journal of Asian and African Social Science and Humanities, Vol. 1, No., 1 (2015).

119 The Eight Special Recommendations specify the following actions to be carried out by members of the FATF (a) to ratify and implement fully the United Nations instruments, particularly the 1999 United Nations Convention for the Suppression of the Financing of Terrorism; (b) to make the financing of terrorism, terrorist acts and terrorist organizations a criminal offence and to designate such offences as predicate offences for money laundering; (c) to freeze and confiscate terrorist assets; (d) to report suspicious transactions related to terrorism; (e) to co-operate with other countries’ enforcements efforts relating to terrorist financing investigations; (f) to impose anti-money laundering requirements on alternative remittance systems; (g) to strength customer identification measures in international and domestic wire transfers; and (h) to amend laws and regulations to ensure that non-profit organizations are not abused for the purpose of terrorist financing.

120 FATF Cracks Down of Terrorism Financing, Washington, FATF, October 31, 2001, p. 1.

121 Specifically, the ninth recommendation aims to ensure that countries have measures (a) to detect the physical cross-border transportation of currency and bearer negotiable instruments; (b) to stop or restrain currency and bearer negotiable instruments that are suspected to be related to terrorism financing or money laundering; (c) to stop or restrain currency or bearer negotiable instruments that are falsely declared or disclosed; (d) to apply appropriate sanctions for making a false declaration or disclosure; and (e) to enable confiscation of currency or bearer negotiable instruments that are related to terrorism financing or money laundering.

122 *Supra* Note 30.

Nigeria today is international terrorism that is aided by religious extremism, porosity of borderline and cross-border security challenges and crime.¹²³

2.2.5 THE FATF RECOMMENDATIONS: 2012 REVISIONS

In 2009, the FATF initiated a review of its recommendations against money laundering and terrorist financing. This culminated into the formal adoption of a single set of revised recommendations in February 2012. In the light of the extended scope of the standard, the title was amended to include reference to the finance of proliferation.¹²⁴ Primarily, the revised standard incorporates knowledge borne of global surveillance of evolving terrorist threats. Notably, the major changes introduced by the revised recommendations included the adoption of a risk-based approach (RBA) to regulation.¹²⁵ In species, the RBA approach counsels that individual countries identify and assess their unique money laundering and terrorist financing risks and apply a risk-based approach to mitigation.¹²⁶ Notably, too, the 2012 revisions add tax crimes in the list of designated categories of predicate money laundering offences.¹²⁷ While the

123 Babatola J.T., “Challenges of Nigeria's Borders and Frontier Security- 1960-2014” ResearchGate Publications, p. 2.

124 The FATF on February 16, 2016 adopted a revised standard, now entitled the “International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations. However, it should be noted that the FATF Recommendations was recently updated in June 2019. Specifically, Recommendation 15 was amended to clarify how the FATF standards apply to activities or operations involving virtual assets.

125 International Monetary Fund: Revisions to the Financial Action Task Force (FATF) Standard Information Note to the Executive Board, July 17 2012. The additional changes introduced are change of title, extension of the interpretive notes to facilitate the implementation of the recommendations and customer due diligence measures, extension of investigative powers techniques that countries should use were expanded, and expansion of international cooperation with a requirement on countries to respond to requests made pursuant to non-conviction based confiscation proceedings and related provisional measures (unless this is inconsistent with fundamental principles of their domestic law) was added.

126 In implementing a RBA, financial institutions and DNFBPs are required to put in place processes to identify, assess, monitor, manage and mitigate money laundering and terrorist financing risks. The general principle of a RBA is that, where there are higher risks, countries should require financial institutions and DNFBPs to take enhanced measures to manage and mitigate those risks; and that, correspondingly, where the risks are lower, simplified measures may be permitted. Simplified measures should not be permitted whenever there is a suspicion of money laundering or terrorist financing. Specific Recommendations set out more precisely how this general principle applies to particular requirements. Countries may also, in strictly limited circumstances and where there is a proven low risk of money laundering and terrorist financing, decide not to apply certain Recommendations to a particular type of financial institution or activity, or DNFBP. Equally, if countries determine through their risk assessments that there are types of institutions, activities, businesses or professions that are at risk of abuse from money laundering and terrorist financing, and which do not fall under the definition of financial institution or DNFBP, they should consider applying AML/CFT requirements to such sectors.

127 The revised FATF standard designates the following categories of offenses as predicate offenses to money laundering: participation in an organized criminal group and racketeering; terrorism, including

revised FATF standard does not contain a definition of ‘tax crimes’, it requires that countries apply the crimes of money laundering to all serious offences and the list of predicate offences include tax crimes.¹²⁸

Prior to 2012, the FATF mandatory requirements on politically exposed persons (PEPs) only cover foreign PEPs, their family members and close associates.¹²⁹ However, the 2012 Revised Recommendations expanded the scope of PEPs to include domestic PEPs and PEPs of international organizations in line with Article 52 of the United Nations Convention against Corruption (UNCAC) with the primary objective of fighting corruption.¹³⁰ Consistent with this objective, Recommendations 12 and 22 require countries to implement measures requiring financial institutions and designated non-financial business and professions (DNFBPs) to have appropriate risk management systems in place to determine whether customers or beneficial owners are foreign PEPs, or related or connected to a foreign PEP. If this is so, to take additional measures beyond performing normal customer due diligence (CDD) as provided for in Recommendation 10 to determine if and when they are doing business with them.¹³¹

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; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; (including in relation to customs and excise duties and taxes); tax crimes (related to direct taxes and indirect taxes); extortion; forgery; piracy; and insider trading and market manipulation.

128 The General Glossary to the FATF Recommendations notes that, when deciding on the range of offenses to be covered as predicate offenses under each category, countries may decide, in accordance with their domestic law, how they will define these offenses and the nature of any particular elements of those offenses that make them serious offenses.

129 See the 2003 FATF 40 Recommendations: Recommendation 6 (for Financial Institutions) and Recommendation 12 (for DNFBPs).

130 FATF Guidance on Politically Exposed Persons, Recommendations 12 and 22 (June 2013) available online at < <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>>.

131 *Ibid.* The FATF Recommendation 10 which encapsulates the principles of CDD requires that if, during the establishment or course of the customer relationship or when conducting occasional transaction, a financial institution suspects that transactions relate to money laundering or terrorist financing, then the institution should:

Seek to identify and verify the identity of the customer and the beneficial owner, whether permanent or occasional, and irrespective of any exemption or any designated threshold that might otherwise apply, and make a suspicious transaction report (STR) to the financial intelligence unit (FIU) in accordance with Recommendation 20. When performing CDD functions under Recommendation 10, financial institutions are also required to verify that any person purporting to act on behalf of the customer is so authorized, and should identify and verify the identity of the person. Also, when performing CDD measures in relation to customers that are legal persons or legal arrangements, financial institutions

The 2012 Revised Recommendations also seek to promote and strengthen the regulations pertaining to corporate vehicles such as companies, trusts, foundations, partnership and other types of legal persons and arrangements. Despite the crucial role the corporate vehicles play in the international economy, under certain conditions, they have been used for illicit purposes such as money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing and other illegal activities.¹³² In recognition of this fact, the revised recommendations require countries to ensure that adequate, accurate and timely information on the beneficial ownership of corporate vehicle is available and can be accessed by the competent authorities in a timely fashion.¹³³

Another major feature of the 2012 Revised Recommendations is the incorporation of the Nine Special Recommendations into the mainstream of the FATF Forty Recommendations and thus obviating the need for Special Recommendations.¹³⁴

2.2.6 THE FATF REVIEW POLICY

Strictly speaking, the FATF is not an international law-maker. It has no particular or legitimate authority to prescribe anti-money laundering and anti-terrorist finance laws. It is not an official organ of the United Nations nor it is an international actor – such as an international court – that has some power authorized by the conventions of international law. However, the FAFT has become, in fact, a *de facto* authority in the arena of anti-money laundering, anti-terrorist

should be required to identify and verify the customer and understand the nature of its business, and its ownership and control structure. Recommendation 10 also requires financial institutions to identify beneficial owners of a customer's account, which in the case of legal persons includes taking reasonable measures to identify the physical persons who own or controls the legal person.

132 FATF Guidance: Transparency and Beneficial Ownership (October 2014), available online at <<http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>>.

133 *Ibid.*

134 The 9 Special Recommendations on terrorist financing were merged with the 40 Recommendations on money laundering; a separate section on terrorist financing and on financing of proliferation was created; the number of recommendations was brought from 49 down to 40; and the remaining recommendations were rearranged in a more logical order. The recommendations have been structured as follows: (a) AML/CFT policies and coordination; (b) Money laundering and confiscation; (c) Terrorist financing and financing of proliferation; (d) Preventive measures; (e) Transparency and beneficial ownership of legal persons and arrangements; (f) Powers and responsibilities of competent authorities and other institutional measures; and (g) International cooperation.

finance law. It is through its presence, through its works, that it has achieved an international presence. The pivotal role of the FATF as a player in the global financial regulatory regime is captured by Nance:

“Over the past three decades, the international community has built a far-reaching global governance regime that takes aim at illicit finance. At the center of this effort is the Financial Action Task Force (FATF). While FATF is relatively unknown to people who do not work directly with it or study it, FATF and the anti-money laundering (AML) rules it promulgates have become primary tools of economic and security policy, both foreign and domestic. Indicating its significance, G20 leaders in the wake of the 2008 global financial crisis included FATF as a vital player in efforts to build ‘a new international financial regulatory architecture’ alongside other financial celebrities like the IMF and the OECD”¹³⁵

To ensure effective compliance with its standards, the FATF has developed assessment mechanisms. This assessment is conducted by the FATF and the FATF-Style Regional Bodies (FSRBs) through mutual evaluations for its members and associate members.¹³⁶ A mutual evaluation report provides an in-depth description and analysis of a country’s system for preventing criminal abuse of the financial system.¹³⁷ A country is only deemed compliant if it can prove this to the other members. In effect, the onus is on the assessed country to demonstrate that it has an effective framework to protect the financial system from abuse.¹³⁸

Mutual evaluations have two basic components: technical and effective compliance.¹³⁹ Technical compliance involves the assessment of legal and regulatory frameworks of the assessed country. The extent to which a country implements the technical requirements of each of the FATF Recommendations remains important to the evaluation exercise. However,

135 Nance, M.T., “The regime that FATF built: An introduction to the Financial Action Task Force”, *Crime, Law and Social Change* (2018), Vol. 69, Issue 2, p. 110.

136 The FSRBs are associate members of the FATF, which are primarily non-European Third World countries. In order to achieve global implementation of the FATF Recommendations, the FATF relies on a strong global network of FSRBs in addition to its own 38 members. The FSRBs have an essential role in promoting the effective implementation of the FATF Recommendations by their membership within their respective regions.

137 The mutual evaluations are conducted through peer review, where members from different countries assess another country level of compliance with the global AML/CFT standards.

138 See FATF Mutual Evaluations, available online <[https://www.fatf-gafi.org/publications/mutualevaluations/more/more-about-mutual-evaluations.html?hf=10&b=0&s=desc\(fatf_releasedate\)>](https://www.fatf-gafi.org/publications/mutualevaluations/more/more-about-mutual-evaluations.html?hf=10&b=0&s=desc(fatf_releasedate)>)>.

139 *Ibid.*

compliant laws and regulations are not enough. Each country must ensure that the operational, law enforcement and regulatory measures designed to combat money laundering and terrorism financing work effectively to deliver intended results.

A key objective of the FATF's review policy is to continually identify jurisdictions with significant weaknesses in their AML/CFT regimes that present a risk to the international financial system.¹⁴⁰ The review process under the supervision of the FATF's International Co-operation Review Group (ICRG) focuses on three main areas: threats, vulnerabilities or risks emanating from relevant jurisdictions.¹⁴¹ A jurisdiction that enters the ICRG's review process as a result of its mutual evaluation results has a one year observation period to work with the FATF or its FSRB to address identified deficiencies before public identification and formal review by the FATF.¹⁴²

During the review process, the FATF considers the strategic AML/CFT deficiencies, measures and progress made by the jurisdiction to address them. If the FATF is of the view that the progress made is insufficient to address the identified deficiencies, the FATF develops an action plan with the jurisdiction to address the outstanding strategic deficiencies. In addition, the FATF requires a high-level political commitment that the jurisdiction will give effect to the action plan in accordance to the agreed milestones and timelines through its legal and regulatory reforms.¹⁴³ If a jurisdiction fails to make sufficient or timely progress, the FATF may decide to put pressure on the jurisdiction to make meaningful progress through the issuance of its public statement.¹⁴⁴

140 See FATF Review process, available online < [https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc\(fatf_releasedate\)>](https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate)>).

141 Specifically, a jurisdiction qualifies for review when (a) it does not participate in FSRB or does not allow mutual evaluation results to be published in a timely manner; or (b) it is nominated by a FATF member or an FSRB; or (c) it has achieved poor results in its mutual evaluation.

142 Usually, the FATF publishes two statements at the end of each plenary meeting in February, June and October. These statements provide a summary of the recent action taken in accordance with each jurisdiction's action plan, as well as a list of the strategic deficiencies remaining to be addressed.

143 *Supra* Note 140.

144 The FATF Public Statement identifies two groups of jurisdictions. First, jurisdictions for which the FATF calls on its members and non-members alike to apply enhanced due diligence measures proportionate to the identifiable risks. Second, jurisdictions with such serious, perennial strategic deficiencies that have

In order to be excluded from the FATF's monitoring and review process, a jurisdiction must demonstrate that it has substantially addressed all the key components of its action plan. Upon being satisfied that a jurisdiction has achieved a substantial compliance with the implementation of its action plan, the FATF will conduct an on-site visit. The on-site visit is aimed at confirming the extent of legal and regulatory reforms, political commitment and institutional capacity to sustain the implementation of the action plan. Once the outcome of the on-site visit is adjudged to be positive, the FATF will decide on removing the jurisdiction from public identification at the next FATF plenary. After its removal from public identification, the concerned jurisdiction will continue to work with the FATF or the relevant FSRB to improve on its AML/CFT framework.¹⁴⁵

Again, the FAFT has no authority, such as the United Nations Security Council, to assert any power over states. It is an international actor, and has come to constitute the standard setter of norms attentive to money laundering and terrorist finance. To the extent that the FATF has become an authoritative influence in ensuring the adequacy of state-based norms, its authority derives from its presence, from its adoption of mutual evaluation exercise, rather than from some tenet of international law.

2.2.7 THE FATF BLACKLIST

The most controversial aspect of the FATF's review policy is the imposition of sanctions on non-member countries through a process known as blacklisting.¹⁴⁶ While the FATF does not have the formal authority to issue legally binding rules, its mandate to combat money

failed to make progress after the calls for enhanced due diligence, FATF calls on its members and non-members alike to apply, in addition to enhanced due diligence, counter-measures in order to protect the international financial system from risks emanating from those jurisdictions.

145 *Supra* Note 140.

146 The FATF blacklist was the common shorthand description for the FATF list of "Non-Cooperative Countries or Territories" (NCCTs). According to Nance [*supra* note 135, p.110], the FATF on behalf of the interest of a few select states imposes regulations that are illegitimate and costly. Also, it has been contended that the reviews are not conducted by organizations with near-universal membership, rather than by a self-selected group of countries that may be reluctant to render frank criticisms of fellow members.

laundering and terrorist financing is tied to several powerful international financial institutions such as the International Monetary Fund (IMF) and the UN Security Council. In essence, what may be called soft law of the FATF is hardened by its direct incorporation in UN Security Council Resolutions or IMF conditionality.¹⁴⁷

In order to secure the global financial system from criminal abuse, the FATF requires both its members and non-members' jurisdictions to implement the global AML/CFT standards. Since the jurisdictions that are candidates for blacklisting tend to have some incentives to create bank secrecy regimes and otherwise avoid cooperating, the FATF members have threatened restrictions on financial transactions with blacklisted jurisdictions that do not make amends. Starting from 2000, Countries that do not meet the FATF standards are designated as non-cooperative countries or territories in the global fight against money laundering and terrorist financing.¹⁴⁸

The FATF and its review of the AML/CFT regime of non-member countries have evoked criticism. For instance, the FATF is not particularly inclusive. It has a largely overlapping membership with the Organization for Economic Co-operation and Development (OECD) which has been expanded to include some 'strategically important' developing states.¹⁴⁹ Despite its global regulatory ambition to combat money laundering and terrorist financing, the FATF specifically excludes most developing states from its membership, generating a problematic fit with the notion of sovereignty and legal equality of sovereign nations.¹⁵⁰ As the deputy Chair of the Caribbean Financial Action Task Force stated, the FATF is "the creation of a handful of rich nations, and declared it unacceptable that a handful of states, however

147 For instance, see Article 7 of the UN Security Council Resolution 1617, which endorses the FATF's 40 Recommendations. See also James T. Gathii "The Financial Action Task Force and Global Administrative Law" available online <<https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1410&context=facpubs>>.

148 See FATF Blacklist, available online <https://en.wikipedia.org/wiki/FATF_blacklist>.

149 Sharman, J.C., "The Global Anti-Money Laundering Regime and Developing Countries: Damned If they Do, Damned if they Don't?" *Journal of International Studies Association Annual Conference* (2006) Vol. 22, p. 5.

150 *Ibid.*

powerful should usurp the right to dictate standards to the rest of the world under the threat or imposition of sanctions.”¹⁵¹

Further, the non-inclusive ordering of the FATF stands accused of, through its declarations of ‘non-cooperative’ countries of breaching sovereignty norms.¹⁵² A more inclusive ordering, one which admitted the perspectives of ‘other’ nations, would arguably increase its international legitimacy. Moreover, the FATF’s blacklist stands accused of double standards. In this regard, arguably, only non-FATF members risk being ‘blacklisted’ despite the fact that a number of the FATF members have long fallen short of full implementation of the global AML/CFT standards.¹⁵³ For instance, FATF members like the United States, Canada and Australia have often received very poor evaluations in terms of their compliance with the Forty Recommendations, yet, with the exceptions of Turkey in 1996, and Austria 1999-2000, none has been included on a blacklist.¹⁵⁴

Further the IMF berated the FATF’s blacklisting policy because of its negative impact on economies of countries. The IMF persuaded the FATF to jettison the blacklisting method of coercion which is viewed as being against the ideals of the IMF and which according to Robert

151 See Hülse, R. (2008), “Even Clubs can't do without Legitimacy: Why the Anti-money Laundering Blacklist was suspended” *Regulation and Governance*, vol. 2, no. 4, pp. 459-479. Scholars have argued that FATF is a tool that powerful countries- the EU Member States and/or the United States, in particular- use to force their preferences on other jurisdictions. From a more strategic constructivist standpoint, Sharman argues that “the US and EU use FATF to paint non-compliant jurisdictions as a rogue, unreliable players, thereby scaring off would-be investors. On his part, Simmons contends that FATF reflects the preferences, soft and ill-formed, of the United States alone. Further, Drezner argues FATF’s core agenda reflects consensus among the US and EU member states, while the flexibility inherent in the recommendations reflects enduring disagreements on the details. See generally: Sharman, J.C. (2009), “The Bark in the Bite: International Organizations and Blacklisting” *Review of International Political Economy*, 16(4), 573-596. Sharman, J.C. (2011), “The Money Laundering: Regulatory Criminal Finance in the Global Economy” Cornell University Press. Simmons, B.A. (2000), “International Efforts against Money Laundering.” In D. Shelton (Ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (pp. 244-263). Oxford University Press. Simmons, B.A. (2001), “The international Politics of Harmonization: The Case of Capital Market Regulation” *International Organization*, 55, 589-620. Drezner, D. (2007), “All Politics is Global: Explaining International Regulatory Regimes” Princeton University Press.

152 *Ibid.*

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

154 *Supra* Note 149, p. 20.

Kudrle “does not lead to any demonstrable financial impact.”¹⁵⁵ The blacklist was finally abandoned in the year 2006.¹⁵⁶

2.3 CONCLUSION

As demonstrated in this chapter, laudable efforts have been made at the international level to curtail the menace of money laundering and terrorist financing through the development of global laws. The works of the FATF, along with the contents of the international treaties, have become the standards to which individual states must adhere. As discussed in the next chapter, Nigeria has made considerable efforts to bring itself into compliance with the international standards, to curb or resist money laundering and terrorist finance.

155 See Sharman, J.C. (2006), “Havens in a Storm: The Struggle for Global Tax Regulation” Cornell University Press, pp. 101-126. See Kudrle, R.T (2009). Did blacklisting hurt the tax havens? *Journal of Money Laundering Control*, 12(1) 33-49. Also, according to Nance, M.T. (*supra* note 135 at p. 119) “Social learning that extends from peer review and implementation is more important tool of change than threats of blacklisting or financial punishment”.

156 *Supra* Note 148 FATF Blacklist, available online <https://en.wikipedia.org/wiki/FATF_blacklist> The term “non-cooperative” was criticized by some analyst as misleading, as a member of countries in the list simply lacked the infrastructure or resources to cope with relatively sophisticated financial crimes. As a result, starting from 2008 the FATF has devised a more analytical process of identifying jurisdictions deficient in their anti-money laundering and anti-terrorist financing regimes. See generally, Rainer Hulse “Even club can’t do without legitimacy: Why the anti-money laundering blacklist was suspended” *Regulation and Governance* (2008)2, 459-479.

CHAPTER THREE- THE ANTI-MONEY LAUNDERING AND COMBATING FINANCING OF TERRORISM LEGAL FRAMEWORKS IN NIGERIA

INTRODUCTION

The preceding chapter chronicled the international efforts to combat the menace of money laundering and terrorist financing. However, the effective implementation of the global AML/CFT standards depends largely on the individual states that are required to domesticate the international norms. This chapter aims to interrogate the evolution of Nigeria's AML/CFT legal framework as influenced by the international norms and its assessment by the international standard setters such as the FATF. This chapter underscores the fact that Nigeria has a putative AML/CFT legal framework, albeit, on paper. As will be demonstrated in this chapter, Nigeria has a very detailed AML/CFT legal framework and equally enjoys international recognition. However, the drawback lies in implementation challenges.

Like many other countries, the Nigerian government has put in place a number of legislative and regulatory measures to prevent and combat money laundering and terrorist financing. Nigeria has signed and ratified the relevant international instruments.¹⁵⁷ Nigeria's commitment to combating money laundering and terrorist financing is demonstrated by the enactment of six key principal pieces of legislation, complemented by a range of regulations, circulars and guidelines.¹⁵⁸ The key legislative measures are (a) National Drug Law Enforcement Agency (NDLEA) Act, 1989 (b) Money Laundering (Prohibition) Act 2011 (as amended) (MLPA); (c) Economic and Financial Crimes Commission Act, 2004 (EFCC Act); (d) Independent Corrupt

157 Nigeria ratified the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) (3 October 1989), the UN Convention against Transnational Organized Crime (Palermo Convention) (29 March, 2001), and the UN Convention against Corruption in 2003 (14 December 2004).

158 See the Central Bank of Nigeria (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations, 2013 (CBN Regulations 2013); Securities and Exchange Commission Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) Compliance Manual for Capital Market Operators, 2010; The Special Control Unit Against Money Laundering of the Federal Ministry of Industry, Trade and Investment issued- Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Regulations for Designated Non-Financial Business and Professions in Nigeria, 2013.

Practices and Other Related Offences Commission Act, 2000 (ICPC Act); (e) Terrorism (Prevention) (Amendment) Act, 2013 (TPAA); and (f) Nigerian Financial Intelligence Unit Act, 2018 (NFIU Act). The high points of these statutory enactments form the thematic preoccupation of this chapter.

3.1 NIGERIA'S AML/CFT LEGAL FRAMEWORKS

3.1.1 THE NDLEA ACT, 1989

Nigeria's efforts at formulating an anti-money laundering regime dates back to 1989 when it enacted the National Drug Law Enforcement Agency Decree No. 48 on 29 December 1989 (Now NDLEA Act) barely three months after ratifying the Vienna Convention. On the basis of the Vienna Convention, the NDLEA Act restricted money laundering offences to the laundering of the proceeds of drug trafficking.¹⁵⁹ The promulgation of the NDLEA Act represents a timely response to the growing drug trafficking activities in Nigeria. During this period, Nigeria was reputed to be a strategic warehouse and safe haven for the formation of commercial illicit drugs trafficking and regarded as the locus for illicit drug trafficking for major drugs such as cocaine, heroin, marijuana and psychotropic substances to other parts of the world.¹⁶⁰ Nigeria was identified as second only to China in the exportation of heroin into the United States.¹⁶¹

To stem this tide of drug trafficking in Nigeria, the NDLEA Act criminalizes every kind of activity connected with the production, processing, distribution, sale, use and concealment of illicit drugs.¹⁶² The Act also makes provisions for seizure, forfeiture and criminalization of drug trafficking related offences as captured by the Vienna Convention.¹⁶³ The sanctions for drug

159 The NDLEA Act in substance mirrored the provisions of the Vienna Convention almost word-by word.
160 Rawlings, A.U (2013) "The National Drug Law Enforcement Agency" *Journal of International Social Research*, Vol. 6, Issue 24, p. 356.

161 Chibuike, U.U, (1998) "The Adoption of a Money-Laundering Law in Nigeria" *Journal of Money Laundering Control (JMLC)* Vol. 1, Issue 3, pp 220-228.

162 S. 11 of the National Drug Law Enforcement Agency Act.

163 *Ibid.* Ss. 26, 27 and 33.

related offences range from 15 years to life imprisonment and the Act vests the Federal High Court of Nigeria with exclusive jurisdiction to adjudicate over the offences created under the Act.¹⁶⁴

However, the major weakness of the NDLEA Act lies in its restriction of money laundering offences to the laundering of the proceeds of drug trafficking notwithstanding that money laundering could manifest outside the scope of drug related offences. It soon became clear that other economic and financial crimes, for example human trafficking, were escalating and contributing to the growth in the incidence of money laundering. These apparent gaps in the NDLEA Act led to the enactment of a primary legislation on money laundering- Money Laundering Decree No 3 of 1995 which has gone through chains of amendment culminating into the enactment of the Money Laundering Prohibition Act, 2011 (as amended).¹⁶⁵

3.1.2 MONEY LAUNDERING PROHIBITION ACT, 2011 (MLPA)

The primary anti-money laundering law (AML) in Nigeria is the MLPA (as amended) which repealed the Money Laundering (Prohibition) Act, 2004.¹⁶⁶ The MLPA provides appropriate penalties and expands the scope of supervisory and regulatory authorities.¹⁶⁷ The Act also requires financial institutions to observe Customer Due Diligence (CDD) when there is a transaction involving just \$1,000 or its equivalent.¹⁶⁸ However, this relatively low threshold for

164 *Ibid.* Ss. 11-20, 22-23, and 26.

165 The 1995 Decree aimed to ensure that a documentary trail is left in all money laundering transactions through banks as well as create a closer link between banks and the NDLEA with the objective of preventing and haunting down money launderers. However, the ineffectiveness of the 1995 Decree in combating money laundering coupled with the inability or unwillingness of the political class to curtail money laundering practices led to Nigeria being placed on the Non-Cooperative Countries and Territories in June 2001. In a swift reaction, the 1995 Decree was amended in December 2002 and labelled the Money Laundering Act (Amendment) Act, 2002, repealed in 2003 and replaced with the Money Laundering (Prohibition) Act, 2003 (2003 Act). The 2003 Act was subsequently repealed and replaced with the Money Laundering (Prohibition) Act, 2004 (2004 Act).

166 MLPA, s. 24. See generally Ikpang, A.J (2011) "A Critical Analysis of the Legal Mechanisms for Combating Money Laundering in Nigeria" African Journal of Law & Criminology Vol. 1, No. 1, pp. 116-130.

167 For instance, see section 2(5), MLPA which clearly spells out the penalty for failure to declare or making false declaration to the Nigerian Customs with regards to international transfers as required by the provisions of Section 12 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995. On conviction, the violators will either forfeit the undeclared funds or be imprisoned for at least 2 years or both.

168 MLPA, Ss. 3(1) (b), (5).

financial transactions has not been very effective because of the cash based economy of Nigeria.¹⁶⁹

Section 6(10) of the MLPA provides immunity for directors, officers and employees of financial institutions and designated non-financial institutions from any civil or criminal liability by customers resulting from the performance of duties under the Act.¹⁷⁰ Prior to the enactment of the MLPA, the duty of confidentiality hindered actions against money laundering. In addition to performing normal CDD functions, section 3(7) of the MLPA requires the financial institution or designated non-financial institution put in place an appropriate risk management system regarding Politically Exposed Persons (PEPs) in line with the FATF Recommendation.¹⁷¹

Despite the provisions of the MLPA, misappropriation of public funds by political office holders has not significantly declined. This brings to question the effectiveness of the MLPA.¹⁷² How could transactions involving huge sums of money be made without detection from the regulatory authorities and especially by financial institutions?

The MLPA divides the regulatory regime between Financial Institutions (FIs) and Designated Non-Financial Institutions (DNFIs). Section 1 (a) and (b) of the Act provides that ‘No person or body corporate shall, except in a transaction through a financial institution, make or accept cash payment of a sum exceeding ₦5,000,000.00 or its equivalent, in the case of an individual; or ₦10,000,000.00 or its equivalent, in the case of a body corporate.’ A transfer to or from a foreign country of funds or securities by a person or body corporate including a Money Service Business of a sum exceeding \$10,000 or its equivalent shall be reported to the Central Bank of

169 Mohammed O. Amali, “Curbing Money Laundering: Global Reception and Implementation of International Anti-Money Laundering Standards- a Case Study on Nigeria”. Unpublished doctoral thesis, University of Huddersfield (2016). available online at: http://eprints.hud.ac.uk/id/eprint/31396/1/__nas01_librhome_librsh3_Desktop_FINAL_THESIS.pdf.

170 This follows Rec.21 of the FATF: The Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (Financial Action Task Force, February 2012 (last updated June 2019)

171 See FATF, Rec.12.

172 See ‘Nigeria Ex-Oil Minister Arrested in London, available online <<https://www.bbc.com/news/world-africa-34430597>>.

Nigeria (CBN), Securities and Exchange Commission (SEC) or EFCC in writing within 7 days from the date of the transactions.¹⁷³

The regime for risk-based assessment countenanced by the FATF is provided for in the MLPA. Under section 3(4) of the Act, FIs and DNFI are required to take enhanced measures to manage and mitigate risks. Where higher risks are identified, they are required to take enhanced measures to manage and mitigate the risks. Where lower risks are identified, they may adopt simplified measures to manage and mitigate the risk, provided that simplified customer due diligent measures are not permitted whenever there is suspicion of money laundering or terrorist financing.¹⁷⁴

The regulation of non-financial business sectors also falls within the legislative scope of the MLPA. Sections 5 and 25 of the MLPA regulate DNFI, which include dealers in jewellery, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, supermarkets, and such other businesses as the Federal Ministry of Industry, Trade and Investment (the Ministry) or other authorities may designate.¹⁷⁵ Thus, section 5(1) of the MLPA provides that a DNFI whose business involves a cash transaction exceeding \$1,000 or its equivalent shall identify the customer by filling out a standard data form and presenting an approved identity document.¹⁷⁶ A DNFI that fails to comply is liable to a fine of ₦250,000 for each day during which the offence continues; and suspension, revocation or withdrawal of the licence to operate.¹⁷⁷

The inclusion of lawyers as gatekeepers in money laundering control has generated considerable controversy.¹⁷⁸ This controversy stems from the contention that AML regulatory

173 MLPA, s. 2(1).

174 See Regulations 17, 30 and 58 of the CBN Regulations 2013.

175 MLPA, s. 25.

176 MLPA, s. 5(1) (c) directs all DNFI to record all transactions.

177 MLPA, s. 5(6).

178 According to FATF, Gatekeepers are, essentially, individuals that 'protect the gates to the financial system' through which potential users of the system, including launderers, must pass in order to be successful. See FATF Report on Laundering the Proceeds of Corruption (July 2011), para. 55, available

regime impinges on attorney-client privilege.¹⁷⁹ In Nigeria, sections 5 and 25 of the MLPA and the CBN’s Circular made thereunder came under judicial scrutiny in *Nigerian Bar Association v Attorney General of the Federation* (the NBA Case).¹⁸⁰ It was contended that classifying legal practitioners as a DNFI contravened section 37 of the Nigerian Constitution, section 192 of the Evidence Act 2011 and the Legal Practitioner’s Act 2004.¹⁸¹ The Nigerian Bar Association sought an order deleting legal practitioners from the definition of DNFI, similar to the Canadian case of *Attorney General of Canada v Federation of Law Societies of Canada*.¹⁸² The Court struck down the provisions of sections 5 and 25 of the MLPA on the ground that the practice of law did not fit into the category of trades captured by the DNFI under the MLPA. The Court further held that the legal profession was already well regulated by the provisions of Legal Practitioners Act, the Rules of Professional Conduct for Legal Practitioners 2007, and the Evidence Act.¹⁸³

online at < <https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf>>

Also, FATF briefly describes gatekeepers as “designate non-financial business and professionals; including lawyers, notaries, real estate agents, trust, casino, accountants, and other independent legal professionals who perform the role of a trusted party. See Kevin L. Shepherd, “Guardian at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers,” *Real Property, Trust, and Estate Journal* (2009), p. 611. See also FATF, *Risk-Based Approach Guidance for Legal Professionals* (France: OECD, 2008), para. 11.

179 *Supra* Note 135, p. 121.

180 Unreported decision of the Federal High Court of Nigeria in Suit No FHC/ABJ/CS/173/2013, delivered on 17 December 2014. See also the CBN Circular-Reference FPR/CIR/GEN/VOL.1/028 dated 2nd August, 2012.

181 Legal Practitioners Act, Cap L11, Laws of the Federation of Nigeria (LFN), 2004.

182 [2015] 1 S.C.R. 401 delivered on 13 February 2015. In that case the Federation of Law Societies of Canada raised a constitutional challenge to certain provisions of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17 and the Regulations made thereunder which imposes duties on financial intermediaries, including advocates and notaries in Quebec and barristers and solicitors in all other provinces to collect, record, and retain material, including information verifying the identity of those on whose behalf they pay or receive money. The legislation puts in place an agency to oversee compliance, the Financial Transactions and Reports Analysis of Canada, and empowers the agency to search for and seize materials and imposes penal consequences for non-compliance. The Supreme Court upheld part of the decision striking down the relevant provisions of the law and regulations made thereunder on the ground that those provisions breached the constitutional right to attorney-client privilege and further held that the lawyer’s duty of commitment to the client’s cause is essential to maintain confidence in the integrity of the administration of justice.

183 See Rule 19(1) of the Rules of Professional Conduct for Legal Practitioners. See also Section 192 of the Evidence Act which grants privilege to lawyer/client communication excludes communication made in furtherance of illegal purpose or information obtained by a legal practitioner evidencing that a crime or fraud has been committed during his engagement by the client.

Clearly, the decision of the Court in the NBA Case is inconsistent with the international AML/CFT standards developed by the FATF.¹⁸⁴ This constitutes a significant loophole in Nigeria's AML/CFT legal framework.¹⁸⁵ The argument of the NBA that the legal profession is sufficiently regulated is unconvincing because the extant laws and rules do not provide clear guidance for dealing with issues of money laundering and terrorist financing.

Overall, the MLPA is a good piece of legislation which reflects global standards on AML. Fundamentally, the MLPA contains comprehensive provisions to prohibit the laundering of the proceeds of a crime or illegal act, provide appropriate penalties and expands the interpretation of financial institutions and scope of supervision of regulatory authorities on money laundering activities among other things. The evident shortcomings are in enforcement rather than formal order of the law.

3.1.3 THE EFCC ACT, 2004

The enactment of the Economic and Financial Crimes Commission (Establishment) Act, 2004 (EFCC Act) was in direct response to pressure from the FATF.¹⁸⁶ From 2001 to 2006, the FATF named Nigeria as a non-cooperative country in the global fight against money laundering.¹⁸⁷ The EFCC Act established the Economic and Financial Crimes Commission (EFCC), which is charged with the responsibility of enforcing all economic and financial crimes laws.¹⁸⁸ The EFCC was also designated as the Nigerian Financial Intelligence Unit.¹⁸⁹ As NFIU designate, it has the responsibility of coordinating the various institutions involved in the fight against

184 See Recommendations 22 & 23 of the FATF.

185 See generally Ahiauzu, N., Inko-Tariah, T. "Applicability of Anti-money Laundering Laws to Legal Practitioners in Nigeria: NBA v. FGN & CBN." *Journal of Money Laundering Control*, London, Vol. 19, Iss. 4 (2016): 329-336.

186 The EFCC Act was initially enacted in 2002 but subsequently repealed and re-enacted by the EFCC Act 2004.

187 See About the Non-Cooperative Countries and Territories (NCCT) Initiative available online <<https://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html>>.

188 See the Explanatory Memorandum of the EFCC Act.

189 See section 1(2) (c) of the EFCC Act. The NFIU also functions as a national centre for the receiving, analyzing and dissemination of Suspicious Transaction Reports (STR) and other information regarding potential money laundering or terrorist financing.

money laundering and terrorist financing.¹⁹⁰ The designation of EFCC as the NFIU triggered the eventual suspension of Nigeria from the Egmont Group.¹⁹¹ The factors that led to Nigeria's suspension are discussed later in this work.¹⁹²

The EFCC Act contains elaborate provisions aimed at ensuring that economic and financial crimes are eliminated or reduced. The EFCC has the power to adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crime related offences or the properties, the value of which corresponds to such proceeds, to eradicate the commission of economic and financial crimes.¹⁹³ The EFCC is also statutorily empowered to adopt measures, which include coordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes.¹⁹⁴ The Act also imbues the EFCC with powers of investigation and prosecution.¹⁹⁵ The Commission may launch investigation into the financial affairs of any one who is suspected of living above his legitimate income.¹⁹⁶

190 Section 7 (2) of the EFCC Act provides that in addition to the powers conferred on the Commission by this Act, the Commission shall be the coordinating agency for the enforcement of the provisions of- (a) the Money Laundering Act, 2004(now MLPA, 2011); (b) the Advance Fee Fraud and Other Related Offences Act, 2006; (c) the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, as amended; (d) the Banks and Other Financial Institutions Act 1991, as amended; (e) Miscellaneous Offences Act; and (f) any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code.

191 The Egmont Group is a united body of 164 Financial Intelligence Units (FIUs) that was established in 1995. The Egmont Group provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing. This is especially relevant as FIUs are uniquely positioned to cooperate and support national and international efforts to counter terrorist financing and are the trusted gateway for sharing financial information domestically and internationally in accordance with global Anti Money Laundering and Counter Financing of Terrorism (AML/CFT) standards. The Egmont Group recognizes sharing of financial intelligence is of paramount importance and has become the cornerstone of the international efforts to counter money laundering and terrorist financing. FIUs are not law enforcement agencies, with their mission being to process and analyze the information received. Once evidence of unlawful financial activity is found, the matter is then passed to the relevant law enforcement agencies. For more details on the Egmont Group, see <<https://www.egmontgroup.org/en/content/about>>.

192 See Co-Chair's Statement -24th Plenary of the Egmont Group of Financial Intelligence Units from 2-7 July 2017 available online <<https://egmontgroup.org/en/content/co-chairs%E2%80%99-statement-24th-plenary-egmont-group-financial-intelligence-units>>.

193 See sections 6(d) and 6 (e) of the EFCC Act.

194 *Ibid.* section 6(f).

195 *Ibid.* section 7(1) (a).

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

The EFCC is under an obligation to establish and maintain a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved.¹⁹⁷ In furtherance of this mandate, Nigeria plays an active role in the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA), which is a FATF-style body established by the member states of Economic Community of West African States (ECOWAS).¹⁹⁸

3.1.4 TERRORISM (PREVENTION) (AMENDMENT) ACT, 2013

Following the September 2001 terrorist attacks, the United Nations Security Council (UNSC) passed Resolution 1373.¹⁹⁹ As discussed previously, this Resolution required all member-states enforce sanctions against terrorism financing. Nigeria's initial responses were shown to be slow and inadequate until the case of a young Nigerian, Umar Abdulmutallab, who on December 25, 2009 attempted to set off an explosive aboard Delta/North West Airlines Flight 253 to Detroit which originated from Nigeria.²⁰⁰ As a result of this event, the US Transportation Security Administration (TSA) classified Nigeria as a "*Country of Interest*" on the US's Terror Watch List and subjected passengers to enhanced security screening. One of the conditions to have Nigeria delisted from the US's Terror Watch List was to enact further anti-terrorism legislation.²⁰¹ Beyond the international requirements, Nigeria has been further motivated to pass laws because of the violent activities of Boko Haram after 2009.²⁰²

197 *Ibid.* section 6(j) (iv). The subsection provides that EFCC should collaborate with government bodies within and outside Nigeria in order to observe the movement of proceeds or properties derived from the commission of economic and financial and other related crimes.

198 The primary aims of GIABA are to develop strategies to protect the economies of Member States from abuse and the laundering of the proceeds of crime, improve measures and intensify efforts to combat the laundering of proceeds from crime in West Africa.

199 UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001).

200 *Supra* Note 54, p.6.

201 See Isaac, T.S C. Onuoha, F.C. (2011) "Forcing the Horse to Drink or Making it Realize its Thirst? Understanding the Enactment of Anti-Terrorism Legislation in Nigeria" Perspectives on Terrorism, Vol. 5, Issues 3-4, 33.

202 Boko Haram is an ISIS-aligned jihadist group based in northeastern Nigeria, also active in Cameroon, Chad, and Niger. The group promotes a Salafist-jihadist brand of Islam and seeks to establish a caliphate, or Islamic state, in Nigeria. To achieve this goal, the group has carried out large-scale attacks inside Nigeria, including an attack on the U.N. headquarters in Abuja in 2011 the abduction of nearly 300 school girls in April 2014, and the multi-day massacre of the northern town of Baga and surrounding villages in

However, owing to political bickering and parochial ethno-religious sentiments, Nigeria did not give much effect to Resolution 1373 until 2011 with the passage of the Terrorism (Prevention) Act No. 10 of 2011. The Act was subsequently amended in 2013.²⁰³

The Terrorism (Prevention) (Amendment) Act, 2013 (TPAA) provides for a wide range of terrorism related offences.²⁰⁴ The TPAA also criminalizes the financing of terrorism. Section 13(1) of the TPAA prohibits making available funds, property or other services by any means, whether legitimate or otherwise to terrorist organizations or individual terrorists with the knowledge or having reasonable grounds to believe that such funds or property will be used to facilitate a terrorist act. The Act prescribes up to life imprisonment upon conviction.²⁰⁵ Where an entity is convicted of an offence under the Act, such entity is liable to the forfeiture of any assets, funds, or property used or intended to be used in the commission of the offence. In addition, the Court may issue an order to wind up the entity or withdraw the license of the entity and its principal officer or both.²⁰⁶ Where the Court orders the entity to be wound up, its

January 2015 that killed approximately 2,000 civilians. In November 2018, Boko Haram attacked a military base in Borno State—looting weapons, equipment, and vehicles, and leaving more than 100 soldiers dead. Since 2009, Boko Haram has claimed the lives of some 30,000 people, and displaced over two million, according to a January 2019 Defense Post report. See Counter Extremism Project on Boko Haram, [available online <https://www.counterextremism.com/sites/default/files/threat_pdf/Boko%20Haram-08222019.pdf>](https://www.counterextremism.com/sites/default/files/threat_pdf/Boko%20Haram-08222019.pdf).

203 The Act fell short in a number of ways: it did not provide for the effective coordination of counter-terrorism efforts and intelligence, for extra-territorial application, or adequate punishment. It also failed to ensure due process and other safeguards for human right. Consequently, that Act was amended in 2013. See also the EFCC Act 2004 ss.15, 46. For reviews, see Andrew I. Chukwuemerie, (2006) "International legal war on the financing of terrorism: A comparison of Nigerian, UK, US and Canadian laws" (2006) 9 *Journal of Money Laundering Control* 71-88; Isaac T.S., (2008) "Legal Framework for the Punishment of Terrorism in Nigeria: A critique of the EFCC Establishment Act" *The Nigerian Army Quarterly Journal* Vol. 4, No. 3. E.U. Ejeh, A.I. Bappah, and Y. Dankofa, 'Nature of Terrorism and Anti-terrorism Laws in Nigeria' (2019) 10 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 186.

204 Section 2(a)-(h) of the Act provides that: "A person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly: (a) does attempts or threatens any act of terrorism, (b) commit an act preparatory to or in furtherance an act of terrorism, (c) omit to do anything that is reasonably necessary to prevent an act of terrorism, (d) assists or facilitate the activities of persons engaged in an act of terrorism or is an accessory to any offence under the Act, (e) participate as an accomplice in or contribute to the commission of any act of terrorism or offences under the Act, (f) assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism, (g) is an accessory to any act of terrorism, or (h) incites, promises or induces any other person by any means whatsoever to commit any act of terrorism or any of the offence under the Act and is liable on conviction to maximum death sentence." See also generally sections 3-24 of the TPAA.

205 See Section 13(2)(b) of the TPAA.

206 Section 25 (2) of the TPAA.

assets and property shall be transferred to the Federation Account.²⁰⁷

It is important to note that the provisions of the Act have extra-territorial effect.²⁰⁸ In furtherance of this, section 32 of the Act vests the jurisdiction to try terrorism related offences created under the Act or any other related enactment on the Federal High Court located in any part of Nigeria, whether or not the offence was committed in Nigeria and completed outside Nigeria.²⁰⁹ In order to forestall delay in hearing terrorism cases, the Act empowers the Federal High Court to adopt all legal measures necessary to avoid unnecessary delays and abuse.²¹⁰ The Court can even refuse to entertain applications for stay of proceedings until judgment is delivered.²¹¹

However, a noticeable gap in the TPAA is that it fails to address the question of State-terrorism or State-sponsored terrorism.²¹² Certain provisions of the TPAA are also seen as constituting threats to some fundamental rights guaranteed in Chapter 4 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). For instance, section 27(1) of the TPAA, provides that:

“the Court may, pursuant to an *ex-parte* application, grant an order for the detention of a suspect under this Act for a period not exceeding 90 days subject to renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention is dispensed with”

This provision is in direct contravention of section 35(4) of the Constitution.²¹³

207 *Ibid.* s. 25(3).

208 *Ibid.* s. 2(2).

209 A case that bears semblance with this provision is the case of *State v. Okah SS94/2011*. The accused, who was resident in South Africa, was tried and convicted for his involvement in the planning of two car bomb in Nigeria wherein many people were killed and injured. The South African Court predicated its jurisdiction to hear and determine the case upon the ground that “South Africa is a member of the United Nations and therefore committed to executing its obligation in terms of international instruments dealing with combating terrorism. See general Akujobi A.T., (2018) “An Assessment of the Nigerian Terrorism Prevention Act and Its Impact on National Security” *Global Journal of Human-Social Science: H. Interdisciplinary*, Vol. 18, Issue 1.

210 See section 32(5) of the TPAA.

211 See Section 32(6) of the TPAA.

212 S. I. Nwatu & C. A. Ogbuabor, “Paper presented at the 45 th Annual Conference of the Nigerian Association of Law Teachers held at the University of Lagos”, (2012), p. 21.

213 Section 35(4) of the Constitution provides that ‘Any person who is arrested or detained in accordance with subsection (1)(c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of- (a) two months from the date of his arrest or detention in the case of

Similarly, section 28(4) provides that where a person arrested under the Act is granted bail by a court within the 90 days detention period stipulated by the Act, “the person may, on the approval of the Head of the relevant law enforcement agency be placed under a house arrest and shall (a) be monitored by its officers; (b) have no access to phones or communication gadgets; and (c) speak only to his counsel until the conclusion of the investigation.” Arguably, placing a person under house arrest without a valid court order (as required by the Constitution, (sections 6 and 36) is illegal and susceptible to abuse.

Subject to these criticisms, Nigeria’s legal regime for dealing with terrorism is very detailed. However, until the perennial struggles against corruption, a reality reinforced by worsening socio-economic conditions such as poverty, social injustice and unemployment, are addressed Nigeria will have to contend with terrorism for a long time to come.²¹⁴

3.1.5 CORRUPT PRACTICES AND OTHER RELATED OFFENCES ACT, 2000

Corruption has been the bane of Nigeria’s growth and development.²¹⁵ This had been the case since its colonial era.²¹⁶ Corruption has become so entrenched that it has stunted growth in all sectors and has been the primary cause for Nigeria’s socio-economic backwardness.²¹⁷ It is against this backdrop that the Corrupt Practices and Other Related Offences Act, 2000 was enacted. The Corrupt Practices and Other Related Offences Act, 2000 established the Independent Corrupt Practices Commission (ICPC), whose main goals are to investigate reports of corrupt practices, to eradicate corruption in public bodies and to educate the public

a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date’.

214 Njoku E.T. (2017) “Laws for Sale:” The Domestication of Counterterrorism Policies and Its Impact in Nigeria. In: Romaniuk S., Grice F., Irrera D., Webb S. (eds) The Palgrave Handbook of Global Counterterrorism Policy. Palgrave Macmillan, London, pp. 1003-1020.

215 Kamaldeen Ibraheem & Falilat Ajoke, “Corruption and Economic Development: Evidence from Nigeria” (2013) 3:2, 46.

216 Rose Nkechi Nwankwo, “Official Corruption and Poverty Reduction in Nigeria : A Critical Assessment (2003-2010)” (2013) 6:2, 305.

217 Sheriff F. Folarin, “The Anti-Corruption War in Nigeria : A Critical Appraisal of the Role of the ICPC and EFCC” (2017) September., p.16.

against corruption.²¹⁸ The ICPC also lists amongst its duties the prevention of corruption through studies of systems, practices and procedure as well as the mandate to tackle corruption in all forms both by investigation and education.²¹⁹

Section 6 of the Act provides for the primary responsibilities of the ICPC as follows: (i) to receive and investigate reports of the conspiracy to commit, attempt or actual commission of offences created by the Act and in appropriate cases prosecute the offenders; (ii) to examine, review and enforce the correction of corruption-prone systems and procedures of public bodies, with a view to eliminating or minimizing corruption in public life; and (iii) to educate and enlighten the public on and against corruption and related offences with a view to enlisting and fostering public support for the fight against corruption.

Despite these laudable provisions, Nigeria remains ranked as one of the world's most corrupt countries.²²⁰ As recent as 2018, Nigeria ranked 144 out of 180 countries, having scored just 27 point in the Transparency International Corruption Perception Index (CPI).²²¹ The prevalence of financial crimes in Nigeria tend to validate CPI's ranking and raise concern about whether the elaborate legislative and regulatory frameworks put in place are deliberately superficial, so that the country may be seen as acting in compliance with global standards.²²²

3.1.6 THE NFIU ACT, 2018

The Nigerian Financial Intelligence Unit (NFIU), formally established in 2004 and domiciled within the EFCC, became fully operational in 2005. The establishment of the NFIU is based on the requirements of Recommendation 29 of the FATF Standards and Article 58 of the United

218 ICPC website, <http://www.icpcnigeria.com/>.

219 *Ibid.*

220 GIABA, "Mutual Evaluation Reports on Anti-Money Laundering and Combating the Financing of Terrorism, 2007".

221 Transparency International Corruption Perception Index, available online at: <https://www.transparency.org/cpi2018>. However, it should be noted that the CPI has its limitation and distortions. See Shrabani Saha, et al. "Is There a 'Consensus' Towards Transparency International's Corruption Perceptions Index?" *International Journal of Business Studies* (2012) 20:11.

222 See also Basel AML Index 2018 where Nigeria ranked 16 out of 129 countries surveyed with a risk score of 6.86.

Nations Convention against Corruption (UNCAC).²²³ The NFIU was admitted into the Egmont Group of FIUs in 2007.²²⁴ The NFIU has since sought to develop standards and procedures for the receipt, analysis and dissemination of financial intelligence to law enforcement agencies, to perform onsite and off-site examination of financial institutions, to enhance compliance with the legal and regulatory regime on AML/CFT in Nigeria as well as respond to global trends by collaborating with other FIUs globally.²²⁵ At least initially, the NFIU performed creditably. The Egmont Group approved the NFIU to mentor the FIUs of The Gambia, Liberia and Sierra Leone and equally appointed the Director of the NFIU as its regional representative for the West/Central African sub-region.²²⁶

Subsequently, however, the Egmont Group expressed concerns.²²⁷ One was the leakage of confidential information obtained from the Egmont Group's secure web in flagrant violation of clause 7 of the interpretive note to FATF Recommendation 29.²²⁸ Clause 7 of Recommendation 29 requires that information received, processed, held or disseminated by FIUs must be securely protected, exchanged and used only in accordance with agreed regulations. The second concern points to Nigeria's non-compliance with clauses 8 and 10 of the interpretive note to Recommendation 29 which mandates that FIUs enjoy operational and financial autonomy. In essence, the NFIU is required to be an autonomous entity and not tied to the EFCC. The failure of the Nigerian government to promptly address these concerns led to the suspension of Nigeria from the Group on July 5, 2017.²²⁹

223 UN General Assembly, United Nations Convention against Corruption: Resolution adopted by the General Assembly, 21 November 2003, A/RES/58/4.

224 NFIU until recently draws its powers from the MLPA 2011 as amended and the EFCC Act 2004.

225 A comprehensive list of FIs and DNFI that are required to submit reports to NFIU is contained in Section 25 of the MLPA 2011 as amended.

226 NFIU Mentors FIU of Gambia, Liberia and Sierra Leone in the GIABA-EU Joint Project: Regional Peer-to-Peer Exchanges and Mentorship Programme; available online <<http://www.nfiu.gov.ng/index.php/2012-05-18-07-05-55/154-giabamentor>>.

227 Co-Chairs' Statement - 24th plenary of the Egmont Group of Financial Intelligence Units available online at: <https://egmontgroup.org/en/content/co-chairs%E2%80%99-statement-24th-plenary-egmont-group-financial-intelligence-units>.

228 The leaked information allegedly relates to suspicious transaction reports.

229 Rotimi T. Suberu, "Strategies for Advancing Anti-corruption Reforms in Nigeria" Vol. 147, No 3, *Journal of the American Academy of Arts and Sciences*, 2018 at pp. 189-201.

As a condition for re-admittance into the Egmont Group, Nigeria was required to devise a legal and regulatory framework that would ensure operational and financial autonomy of the NFIU by March 2018, failing which Nigeria risked being expelled from the Group. It is needless to say that the consequences of expulsion are grave. The suspension activated the denial to Nigeria of the Egmont secure web information exchange platform and stalled the process of Nigeria's application to join the FATF. Also, there was imminent threat that Nigerians would be unable to fund international transactions as expulsion would affect the usage of visa, master card, credit and debit cards issued by Nigerian banks. Implications of the expulsion for financial sector are also serious for the international ratings of Nigeria's financial institutions, resulting in their inability to engage in major transactions.

To address the suspension from the Egmont Group, the Nigerian National Assembly, on 7 March 2018, passed the Nigerian Financial Intelligence Unit Establishment Bill, which received presidential assent on June 29, 2018. The Act establishes an independent NFIU.²³⁰ The NFIU is designated as the central body in Nigeria responsible for requesting, receiving and disseminating financial intelligence reports and other information to all law enforcement, security agencies and other relevant authorities.²³¹ The Act also establishes the office of the Director of the NFIU who shall be responsible for the administration and management of the NFIU, thus making it an autonomous body from the EFCC.²³² The Act also establishes a fund to which budgetary allocation approved by the National Assembly shall be paid to run the Unit.²³³

Another feature of the Act is the establishment of the NFIU in the CBN for the purposes of institutional location and logistic support. Given that the core functions of the NFIU are different from that of the CBN, this location fully complies with Clause 9 of the interpretive

230 Section 2(2) of the NFIU Act.

231 See the Explanatory Note to the NFIU Act.

232 Section 5(1) of the NFIU Act.

233 Section 11 of the NFIU Act.

note to Recommendation 29 of the FATF.²³⁴

Having addressed the prime concerns that led to the suspension of Nigeria's membership of the Egmont Group, the suspension was lifted in September 2018.²³⁵ Undoubtedly, the lifting of the suspension will enhance and re-position Nigeria's drive to combat money laundering and terrorist financing through exchange of sensitive information and intelligence with other FIUs around the world.

Ironically, with the enactment of the foregoing legislations, one would expect the prevalence of money laundering and other financial crimes in Nigeria to be on the decline. This has not been the case. Despite a strong and detailed legal framework, enforcement of anti-money laundering legislation in Nigeria remains weak owing to factors discussed in chapter four of this work.

3.2 FATF AND OTHER REVIEWS OF NIGERIA'S AML/CFT LEGAL FRAMEWORKS

Nigeria's AML/CFT regime has largely been influenced by the pressure from the international community. Undoubtedly, the leading international organization at the forefront of setting and implementing the global AML/CFT standards is the FATF.²³⁶ Although the FATF does not have the formal authority to sanction governments of non-member countries, it may nevertheless invoke Recommendation 21 to financial institutions in non-member jurisdictions that have not complied with the FATF Recommendations.²³⁷ As part of its mandate, the FATF conducts onsite evaluation of its members' compliance with the Forty Recommendations. A team of evaluators comprising of legal, regulatory and law enforcement experts from member

234 Clause 9 provides that an FIU may be established as part of an existing authority. When a FIU is located within the existing structure of another authority, the FIU's core functions should be distinct from those of the other authority.

235 Co-Chair's Statement 25th Plenary of the Egmont Group of Financial Intelligence Unit; (24-27 September, 2018); available online https://egmontgroup.org/en/filedepot_download/1659/58.

236 *Supra* Note, 149.

237 *Supra* Note 33, p. 86.

states visit the relevant countries and conduct a review of the AML/CFT architecture.²³⁸ Also, the FATF noted that the ability of its members to protect themselves against money laundering could be undermined if non-member jurisdictions fail to adopt the Forty Recommendations.²³⁹ In this regard, the FATF provides guidelines for identification of those jurisdictions that do not cooperate in taking measures to combat money laundering and encourage them to implement international AML/CFT standards as recommended by the FATF.²⁴⁰ In furtherance of its mandate, the FATF on 14 February 2000 published a report on Non-co-operative Territories and Countries (NCCTs) and set out twenty-five criteria which are consistent with the Forty Recommendations.²⁴¹ The 2000 report aimed to identify detrimental rules and practices which impede international co-operation in the fight against money laundering. The report also described a process designed to identify jurisdictions which have rules and practices that can impede the fight against money laundering and to encourage these jurisdictions to implement international standards in this area. Finally, the report contained a set of possible counter-measures the FATF members could use to protect their economies against financial crimes.²⁴² In furtherance of the foregoing objectives, the FATF established four regional groups to begin the process of considering the position in a number of jurisdictions, both within and outside the FATF's membership.²⁴³ In June 2000, the FATF released a list of fifteen jurisdictions which failed to measure up in the global efforts to combat money laundering.²⁴⁴ However, in June

238 *Ibid.* p. 87.

239 Pieth, M. (2004). International standards against money laundering. In M. Pieth & G. Aiolfi (Eds.), *A Comparative guide to anti-money laundering: A critical analysis of systems in Singapore, Switzerland, the UK and the USA*" Edward Elgar Publishing Limited, pp. 21-22.

240 *Ibid.*

241 FATF Criteria for Defining Non-Cooperative Countries and Territories (14 February 2000) available online. <https://www.fatf-gafi.org/media/fatf/documents/reports/Initial%20Report%20on%20NCCTs%202002_2000.pdf>

242 FATF on Money Laundering, Review to Identify Non-Cooperative Countries or Territories: Increasing the World-Wide Effectiveness of Anti-Money Laundering Measures; available online at <<https://www.fatf-gafi.org/media/fatf/documents/reports/2001%202002%20NCCT%20ENG.pdf>>.

243 These groups include one in Africa, the Caribbean, the Middle East and Asia. These bodies are mandated to coordinate efforts on money laundering within the context of their respective jurisdiction. See also *Supra* Note 33, p. 87.

244 These countries include Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russian Federation, Saint Kitts and Nevis, Saint Vincent and the Grenadines.

2001; Nigeria joined the league of NCCT's list following the review of its AML legal framework, with de-listing being conditional on the introduction and implementation of the global AML/CFT standards to the satisfaction of the FATF. Specifically, in reviewing Nigeria's AML/CFT it was noted that Nigeria demonstrated an obvious unwillingness or inability to cooperate with the FATF in the review of its system. Also, it was discovered that Nigeria's 1995 Money Laundering Decree had a significant number of deficiencies which include a discretionary licensing procedure to operate a financial institution, the absence of customer identification under very high threshold for certain transactions, the lack of the obligations to report suspicious transactions if the financial institution decides to carry out the transactions. The scope of the application of the Decree on money laundering is unclear because it generally refers to financial institution, and it does not seem to be applied to insurance companies and stock brokerage firms.²⁴⁵

In response to Nigeria being placed on NCCT's list and in compliance with the Palermo Convention and pressure from the FATF, the 1995 Decree was amended in December 2002 and labelled the Money Laundering Act (Amendment) Act, 2002. The new Act extended the scope of the 1995 Decree by expanding predicate offences for money laundering to include "proceeds of crime or an illegal act."²⁴⁶ The Act also expanded AML obligation to non-financial institutions, and extended customer identification requirements to include frequent transactions of US\$5,000 or more.²⁴⁷ Also, as earlier noted in this work, the EFCC Act was enacted because Nigeria was listed as one of the non-cooperative countries in the global

245 FATF's NCCT List (22 June 2001) available online < <https://www.fatf-gafi.org/media/fatf/documents/reports/2000%202001%20NCCT%20ENG.pdf>. See also "Money Laundering and Financial Crime" (INCSR 2002), pp.171-172 available online <https://2009-2017.state.gov/documents/organization/8703.pdf>.

246 The Act also expanded AML obligations to non-bank financial institutions, and extended customer identification requirements to include frequent transactions of \$5,000 or more.

247 In May 2003, the 1995 Decree was repealed and replaced with the Money Laundering (Prohibition) Act, 2003 (2003 Act). In less than a year after the 1995 Decree was repealed and replaced with the 2003 Act, the Money Laundering (Prohibition) Act 2004 was enacted (2004 Act). The 2004 Act repealed the 2003 Act and makes comprehensive provisions to prohibit laundering of proceeds of crime and extended regulatory Regime to DNFI's. The Money Laundering Prohibition Act, 2011 (as amended) repealed the 2004 Act.

AML/CFT efforts.

In recognition of the progress Nigeria had made to implement its AML regime, including establishment of an operational FIU and significant commitment in money laundering investigations, prosecutions and convictions, Nigeria was removed from the list of NCCT in June 2006.²⁴⁸ However, after being de-listed from the NCCT's black list, Nigeria remained under the close monitoring of FATF/GIABA for at least a year.²⁴⁹ In October 2009, the FATF conducted a preliminary review of the Nigerian AML/CFT regime and identified some strategic deficiencies upon which the FATF engaged with Nigeria to develop an Action Plan to address those deficiencies. The Action Plan that was subsequently developed included specific action that Nigeria is required to address in five key areas: criminalize terrorist financing in accordance with the FATF standards and relevant Conventions; implement the UNSCRs 1267 and 1373 through law, regulations or other necessary measures, and ensure that there are appropriate procedures to freeze, seize and confiscate terrorist funds; establish whether the current money laundering legislation captures all the required predicate offences, and make necessary amendments to the AML legislation or the underlying criminal code (bearing in mind that Nigeria has adopted an all crimes approach to the ML offence); ensure that the requirements of the FATF Recommendation 5 have been set out appropriately in law or regulation and other enforceable means, and that they apply to all financial institutions covered by the FATF definition; and clarify the respective AML/CFT responsibilities of the NFIU and the three financial services supervisory bodies (the CBN, the SEC and NAICOM), and demonstrate that they are undertaking effective AML/CFT supervision across the financial sector.²⁵⁰

In February 2010, Nigeria demonstrated political commitment to implement the Action Plan.

248 FATF's NCCT List (23 June 2006) available online <<https://www.fatf-gafi.org/media/fatf/documents/reports/2005%202006%20ENG.pdf>>.

249 *Ibid.*

250 GIABA Press Release- Nigeria Exits FATF Global Compliance List; Sao Tome and Principe Handed Over to GIABA; available online <https://www.giaba.org/media/f/624_Press>.

However, as a result of certain setbacks in the implementation of the Plan, particularly the delay in the passage of the revised Money Laundering (Prohibition) and Terrorism Prevention Acts, Nigeria was considered not to be making significant progress and was consequently placed on a Public Statement by the FATF in October 2011. The Public Statement identified the outstanding strategic deficiencies in Nigeria’s AML/CFT legal framework.²⁵¹ In response to this development, the MLPA 2011 (as amended) was enacted with the commencement date of 3rd June 2011. Similarly, in 2011, the Terrorism Prevention Act was enacted largely as a result of the pressure from FATF and the US placing Nigeria on its Terror Watch List.

As part of the review process of Nigeria’s AML/CFT regime, in September 2013, the FATF’s Cooperation Review Group (ICRG) conducted an on-site visit to Nigeria. In the course of the visit, it was noted that Nigeria had substantially completed the technical items on her Action Plan and that there was political and institutional capacity to continue to implement AML/CFT reforms. Further to this development, the FATF in its Public Statement issued on October 18, 2013 declared that Nigeria ceased to be subject to the FATF’S monitoring process under its on-going global AML/CFT compliance process. The Public Statement reads:

“...The FATF welcomes Nigeria’s significant progress in improving its AML/CFT regime and notes that Nigeria has established the legal and regulatory frameworks to meet its commitment in its Action Plan regarding the strategic deficiencies that the FATF had identified in February, 2010. Nigeria is therefore no longer subject to FATF’s monitoring process under its on-going global AML/CFT compliance process...”²⁵²

251 It was recognized that Nigeria has taken steps towards improving its AML/CFT regime, including by enacting AML/CFT legislation. However, despite Nigeria’s high-level political commitment to work with the FATF and GIABA to address its strategic AML/CFT deficiencies, Nigeria has not made sufficient progress in implementing its action plan, and certain strategic deficiencies remain. Nigeria was required to work on addressing these deficiencies, including by: (1) adequately criminalizing money laundering and terrorist financing (Recommendation 1 and Special Recommendation II); (2) implementing adequate procedures to identify and freeze terrorist assets (Special Recommendation III); (3) ensuring that relevant laws or regulations address deficiencies in customer due diligence requirements and that they apply to all financial institutions (Recommendation 5); and (4) continuing to improve the overall supervisory framework for AML/CFT (Recommendation 23). The FATF encourages Nigeria to address its remaining deficiencies and continue the process of implementing its action plan. See the FATF Public Statement- 28 October 2011. Available online: <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatfpublicstatement-28october2011.html>.

252 *Supra* Note 250.

As previously stated, Nigeria recently enacted the NFIU Act as a result of its suspension from the Egmont Group and the threat of expulsion. The forgoing episode illustrates once again that Nigeria tends to be reactive and reluctant in the fight against money laundering and terrorist financing, with reform usually implemented on the pain of sanction or threat from the global community. As well as giving the wrong signal externally, this policy cycle results in legislation being passed on the basis of the pressure from the global standard setters without proper appreciation of the fitness of these standards to local circumstances and prevailing realities. As rightly pointed out by Amali, “legal and regulatory reforms to International Anti-Money Laundering initiatives can only be achieved with a proper appreciation of the culture and unique peculiarities of the receptive jurisdiction where emphasis is placed on the local environment rather than a mere response to international requirement for the sake of it.”²⁵³ Hence, Nigeria’s AML/CFT legal frameworks might be said to represent a form of ‘cosmetic compliance’ for the approval of the global standard setters. Ironically and hypocritically, the same developed countries setting the standards have been providing safe havens for illicit funds from developing countries like Nigeria.²⁵⁴

3.3 CONCLUSION

Nigeria has made giant strides to ensure that its AML/CFT legal frameworks comply with the global standards. Impressively, Nigeria was able to get its name off the FATF’s blacklist and its AML/CFT legal frameworks received international endorsement. However, regardless of its international endorsement, the local peculiarity of the Nigerian nation has made the legal frameworks less effective. It appears that Nigeria’s compliance with the global standards is at best cosmetic. Regardless of the plethora of AML/CFT laws, the incidence of financial crimes continues to undermine Nigeria’s growth and development. The next chapter of this work is

253 *Supra* Note 169, p.21.

254 Illicit Financial Flows from Developing Countries: Measuring OECD Responses; available online <https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf>.

devoted to examining why Nigeria's internationally certified AML/CFT legal frameworks have not been effective.

**CHAPTER FOUR- THE SOCIO-POLITICAL CONTEXT AND SYSTEMIC CHALLENGES TO THE
IMPLEMENTATION OF ANTI-MONEY LAUNDERING AND TERRORISM FINANCING
STANDARDS IN NIGERIA**

INTRODUCTION

The preceding chapter discussed the efforts Nigerian government has made in domesticating the global AML/CFT standards. As previously noted, Nigeria's AML/CFT regime is not only broad in its scope but enjoys international approval. As such, one would expect that the trend of money laundering and terrorist financing to be on the decline. The reality is far from this on account of poor economic and political environment. Money laundering and terrorist financing continue to spread more rapidly. This shows a glaring sharp disconnect between the formal laws and the interaction of those laws with the underlying reality. While it is important for states to adopt and implement the global AML/CFT regimes, this should be done bearing in mind the peculiarities of each individual country. This is more apt for a developing country like Nigeria which is characterized by developmental challenges, poor leadership, political bickering, dysfunctional institutions, infrastructural deficit and lack of capacity to drive the global AML/CFT regimes. This view finds expression in the words of Mugarura.²⁵⁵

“...subscribing to global initiatives has proved problematic where societies are characterized by different local and developmental challenges which dictate the adaptability of the evolved global anti-money laundering regimes differently...”

This chapter interrogates the socio-political context to the implementation of Nigeria's AML/CFT legal frameworks. It also examines the systemic challenges to the implementation of AML/CFT standards in Nigeria.

Moreover, any narrative on Nigeria's AML/CFT regime would be incomplete without reference to the socio-political environment within which the crimes occur. Obviously, the

255 *Supra* Note 33, p. 147.

prevalence of money laundering and terrorist financing in Nigeria is a reflection of Nigerian society dating back to the colonial era. The structure of public administration by colonialism is based on uneven landscapes and a lopsided vision of governance which created the opportunity to nurture corruption from the very onset.²⁵⁶ Likewise, the colonial administrative, educational, economic and socio-political policies contained elements designed to curb intellectual depth and vibrancy of ideas among the Nigerian people.²⁵⁷

Beyond the negative influence of colonialism, the post-colonial Nigeria is also characterized by inefficiencies in all key sectors, such as governance, economy, social, legal and education. These inefficiencies continue to undermine Nigeria's growth and development. Having said this, the primary pre-occupation of this chapter is to identify the socio-political challenges inhibiting the effective implementation of the global AML/CFT standards in Nigeria. These challenges include corruption, lack of political will and weak institutions, porous borders and cash-based economy, shoddy investigation and poor prosecution and other legal loop holes such as immunity clause for some political office holders and plea bargaining. Until Nigeria overcomes these perennial challenges, winning the war against money laundering and terrorist financing may be a tall order.

4.1 CORRUPTION

The primary purpose of this section is not to delve into the etymological meaning of corruption but to examine the symbiotic relationship between corruption and money laundering in Nigeria and how this relationship has undermined Nigeria's AML/CFT efforts. However, corruption has been defined to mean the abuse of a position of trust to gain an unfair advantage.²⁵⁸

Corruption denies people the benefits of the exploitation of the abundance of the natural

256 Uzochukwu J. Njoku, "Colonial Political Re-Engineering and the Genesis of Modern Corruption in African Public Service : The Issue of the Warrant Chiefs of South Eastern Nigeria 1 as a Case in Point" (2005) 14:1 99, p. 109.

257 Joe Duke II "The Impact of Colonialism on the Development of Management in Nigeria" *International Journal of Business and Management*, Vol. 5, No. 8 (August, 2010) p. 72.

258 Ejike Anaeto Ekwueme "The Commercial Corruption and Money Laundering: How Adequate are the Regulatory Mechanisms?" (2012), p. 11.

resources that should have been deployed for developmental purposes.²⁵⁹ It undermines the economy, constitutes a menace to democratic governance, distorts economic, social and political programmes, all of which undermines the prospects of a durable social order.²⁶⁰ In Nigeria, corruption is said to be caused by poor institutional structures, structural inequalities, inequality in the distribution of wealth, glorification and approbation of ill-gotten wealth by general public, and ethnic and tribal loyalty.²⁶¹ The manifestation of corruption in Nigeria is captured by Babangida:

“It [corruption] pervades all strata of the society. From the highest level of the political and business elites to the ordinary person in the village. Its multifarious manifestations include the inflation of government contracts in return for kickbacks; fraud and falsification of accounts in the public service, examination malpractices in our educational institutions including universities; the taking of bribes and perversion of justice among the police, the judiciary and other organs for administering justice; and various heinous crimes against the state in business and industrial sectors of our economy, in collusion with multinational companies such as over-invoicing of goods, foreign exchange swindling, hoarding and smuggling. At the village level, corruption manifests itself in such forms as adulteration of market goods or denting of measures to reduce their contents with a view to giving advantages to the seller.”²⁶²

Corruption is said to be as old as civilization and in reference to Nigeria, it is as old as the history of the country.²⁶³ Corruption in Nigeria is traceable to the colonial era. In fact, colonialism in Nigeria was said to be built on corruption and the colonial legacy of corruption was carried into the independence and post-independence era.²⁶⁴ Every succeeding government has made fight against corruption one of their cardinal political agenda with little progress. This is so despite the setting up of the anti-graft bodies such as Independent Corrupt Practices Commission (ICPC) and Economic and Financial Crimes Commission (EFCC). Since 1996

259 Kelly B.O.E et al. “Globalization and Corruption in Nigeria” *Journal of Law Policy and Globalization*, Vol. 42 (2015)p. 32.

260 *Ibid.* p. 32.

261 Kayode, O.R., (2013) “Corruption in Nigeria: An Appraisal” *Journal of Law, Policy and Globalization*, Vol. 19, p. 44.

262 Directorate for Social Mobilization, Report of the Political Bureau at 212-219 (1987).

263 Victor Egwemi “Corruption and Corrupt Practices in Nigeria: An Agenda for Taming the Monster” *Journal of Sustainable Development in Africa* (Volume 14, No.3, 2012) (2012) 14:3 7, p. 78.

264 Omotola, J.S. (2006) “Through a Dark Glass Darkly: Assessing the New War Against Corruption in Nigeria” *Africa Insight* 36 (3 and 4) 214-228.

when Nigeria first featured in the Corruption Perception Index, it has consistently been ranked among the most corrupt nations of the world.²⁶⁵ Huge sums of money had corruptly been exported from Nigeria since its independence in 1960.²⁶⁶ In Nigeria, it is not only that officials are corrupt, but that corruption is official.²⁶⁷ In the words of Aluko, “corruption appears to have become a permanent feature of Nigerian polity. It has become completely institutionalized, entered into the realm of culture and the value system; it is now a norm and no longer an aberration.”²⁶⁸ Corruption is deeply entrenched in Nigeria and has become the bane of its development. The pioneer Executive Chairman of EFCC was quoted to have stated:²⁶⁹

“The amount involved in various forms of transnational economic and financial crimes especially corruption are often so large that it affects both the integrity of domestic economies and the global financial systems. For instance, an estimated amount of \$100 billion was corruptly exported from Nigeria between mid-1980s and 1999 while more than \$1 trillion illicit funds flowed into the United States annually through the international financial systems...”

Corruption is a major challenge to combating money laundering in Nigeria.²⁷⁰ It indirectly affects implementation of the AML/CFT standards in terms of lack of capacity of AML agencies. It is widely recognized that corruption and money laundering are inextricably linked: where one exists; the other lurks in the background.²⁷¹ In a developing country like Nigeria, corruption is both a cause and predicate offence of money laundering: corruption is the enabling

265 Nageri K.I., Gunu U., et al “Corruption and Economic Development: Evidence from Nigeria” Kuwait Chapter of Arabian Journal of Business and Management Review, Vol. 3, No. 2, 2013, p. 47.

266 The pioneer Executive Chairman of EFCC was credited to have stated that over US\$380 billion dollars had been stolen or wasted by Nigerian governments since independence in 1960. This information is available online at < https://en.wikipedia.org/wiki/Nuhu_Ribadu>.

267 *Supra* Note 263 (Egwemi), p. 79.

268 Aluko, M.H (2002) “The Institutionalization of Corruption and its impact on Political Culture and Behaviour in Nigeria” Nordic Journal of African Medicine, p. 396.

269 Ayodegi Aluko in his unpublished LLM thesis titled “The Impact of Money Laundering on Economic, and Financial Stability and on Political Development of Developing Countries” University of London (2011-2012), p. 27.

270 Oluwadayisi, A.O. et al. “Effects of Money Laundering on the Economy of Nigeria” (2016) 7:02 Beijing Law Rev 158, p. 8.

271 Mugarura, N. “Uncoupling the Relationship between Corruption and Money Laundering Crimes” Journal of Financial Regulation and Compliance, 2016. See also, David, C., Sharman, J. (2009) “Corruption and Money Laundering: A Symbiotic Relationship” Published by Springer. Michael Levi “Corruption and Money Laundering” Journal of Law and Society (2009) Vol. 36, Iss. 4, pp. 589-591.

environment.²⁷² Either the laundered assets are the proceeds of corruption or the process of laundering is facilitated by corrupted law enforcement agencies or officials in the financial institutions.²⁷³ The nexus between corruption and money laundering is well captured in the following words:

“Corruption and money laundering are related and self-reinforcing phenomenon. Corruption proceeds are disguised and laundered by corrupt officials to spend or invest such proceeds. At the same time, corruption in a country’s AML institutions (including financial institutions regulators, financial intelligence units, police, prosecutors and courts) can render AML regime of a country ineffective.”²⁷⁴

Corruption and money laundering precipitate poverty because they undermine economic growth and development. It is generally agreed that corruption in its various manifestations can undermine the capacity of states to apply Customer Due Diligence (CDD) measures. A consequence of corruption is weakness of the AML/CFT regime.²⁷⁵ In Nigeria, the substratum of AML/CFT structure is undermined by bribery and corruption. Bank officials and regulatory authorities that are supposed to be the driving force of AML/CFT regime are susceptible to bribery and corruption. Consequently, the bank officials and regulators pay only lip service to the tenets of customer due diligence (CDD) measures and as such so many suspicious transactions go on unreported.²⁷⁶ CDD is a core AML standard which requires banks to know their customers at the inception of the relationship and to continue to monitor their customers as the relationship progresses. Banks are required to make necessary enquiries to ensure that the money they are accepting as deposits is not proceeds of crime. However, the capacity of the banks and other regulatory authorities to control money laundering is threatened by corruption. Therefore, in an inherently corrupt system as is the case in Nigeria, the prescribed

272 *Supra* Note 33 (Mugarura), p. 124.

273 *Ibid.*

274 World Bank 2007 Strengthening Engagement, p. 68.

275 *Supra* note 258 (Ejike).

276 Bankers Aid Money Laundering in Nigeria by Nuhu Ribadu, the first Chairman of EFCC (Premium Times of December 12, 2017) available online at <https://www.premiumtimesng.com/news/more-news/252281-bankers-aid-money-laundering-nigeria-nuhu-ribadu.html>. See also footnote 118, Abubakar (*supra*).

AML/CFT regime is susceptible to being undermined. Certainly, the corrosive effects of corruption and money laundering are more noticeable in the critical institutions of governance as discussed in the next point.

4.2 LACK OF POLITICAL WILL AND WEAK INSTITUTIONS

Political will is defined as the demonstrated credible intent of political actors (elected or appointed leaders, civil society watchdogs, stakeholder groups, etc) to attack the perceived causes of effects of corruption at a systemic level.²⁷⁷ Therefore, it becomes the critical, credible, sustainable and effective anti-corruption action, for “without it, governments’ statements to reform civil service, strengthen transparency and accountability and reinvest the relationship between governments and private industry remain mere rhetoric.”²⁷⁸

Despite AML/TF laws in Nigeria, financial crimes thrive, in part, due to lack of political will to enforce the laws. As rightly pointed out by Brinkerhoff, a successful anti-corruption effort depends upon a strong political will.²⁷⁹ In Nigeria, successive governments have made the fight against financial crimes the thrust of their administration. Yet, the condemnation of corruption and other financial crimes have remained largely in the realm of political speeches, rhetoric and policy statements. For instance, the inaugural speech of President Olusegun Obasanjo on 29 May, 1999 recognized the extent of corruption in Nigeria:

“...government and all its agencies became thoroughly corrupt and reckless. Members of the public had to bribe their way through in ministries and parastatals to get attention and one government agency had to bribe another government agency to obtain the release of their statutory allocations of funds...Corruption, the greatest single bane of our society today, will be tackled head-on at all levels...No society can achieve anything near its full potential if it allows corruption to become the full-blown cancer it has become in Nigeria...Beneficiaries of corruption in all forms will fight back with all at their disposal. We shall be firm with them. There will be no sacred cows. Nobody, no matter who and where will be allowed to get away with the breach of the law or the perpetration of

277 S. J. Kpundeh, “Political will in fighting corruption” in S. K. Kpundeh and I. Hors (eds), *Corruption and Integrity Improvement Initiatives in Developing Countries* (UNDP/OECD, 1998), pp. 91-110, at p. 92.

278 *Ibid.*

279 Brinkerhoff, D.W. & Kulibaba N., “Perspectives in Participation in Economic Policy Reform in Africa” *Studies in Comparative International Development*, Vol. 31, Issue 3, 1996 pp. 123-151.

corruption and evil...”²⁸⁰

Clearly, Obasanjo’s administration made some inroads in the area of anti-corruption and AML legal frameworks.²⁸¹ However, his government was accused of employing anti-graft agencies to settle political scores.²⁸² This became more noticeable as the second term of President Obasanjo drew to a close. The crusade against corruption at one time even became an instrument for disqualifying unwanted political aspirants and paving the way for the smooth election of Obasanjo's chosen candidates into the various offices.²⁸³

The absence of political will to drive the AML/CFT regime cut across all aspects of governance in Nigeria. It is a known fact that being connected to the ruling political class provides a haven to escape criminal prosecution.²⁸⁴ The Chairman of the ruling party in Nigeria was credited with welcoming new party members with the statement “politicians’ sins are forgiven when they join the ruling party.”²⁸⁵ The import of this statement underscores the influence of party politics in the implementation of Nigeria’s AML/CFT regime. Adding to the cosmetic nature of Nigeria’s AML/CFT legal frameworks, this statement also indicates non-application or selective application of AML/CFT laws when it involves party loyalists. For instance, on the eve of the 2019 presidential elections, two bullion vans were sighted in the premises of the national leader of the ruling party containing an undisclosed amount of money, in clear contravention of anti-money laundering laws. The anti-graft agencies have not deemed it fit to launch an investigation into this allegation despite pictorial evidence and various calls to this

280 Nigerian President Obasanjo’s Inaugural Speech available online at <<http://news.bbc.co.uk/2/hi/world/monitoring/356065.stm>> .

281 It was during the regime of Obasanjo that anti-graft agencies like ICPC and EFCC were established. It was also during this period that NFIU gained the membership of the Egmont Group.

282 Osipitan T., & Odusote A., “Nigeria: Challenges of Defence Counsel in Corruption Prosecution” *Acta Universitatis Danubius Juridica*, Vol. 10, no 3 (2014)p. 79.

283 *Ibid.*

284 EFCC Probes Buhari’s Ministers for Corruption, the Punch Newspapers of October 16, 2016; available online <<https://punchng.com/efcc-probes-buharis-ministers-corruption/>>.

285 ‘Once you Join APC, your Sins are Forgiven; Oshiomole Says as PDP Lambasts Him; Vanguard Newspapers of January 18, 2019, available online <<https://www.vanguardngr.com/2019/01/once-you-join-apc-your-sins-are-forgiven-oshiomole-says-as-pdp-lambasts-him/>>.

effect.²⁸⁶ The petition submitted to the EFCC on this issue is currently gathering dust and unattended to.²⁸⁷ Certainly, this seeming silence and inaction from the anti-graft agencies only points to the fact that some individuals are above the law on the ground of their political affiliation or connection.

The executive control of the AML institutions leaves room for political interference in the statutory duties of the anti-graft agencies. A typical example is the controversial removal of Mr. Nuhu Ribadu as the EFCC Chairman despite his performance in office.²⁸⁸ His removal was alleged to be aimed at frustrating investigations into alleged corrupt practices by former governors during their terms in office.²⁸⁹ The removal of Mr. Ribadu illustrates the limits of strong individuals in weak institutions.²⁹⁰ With President Obasanjo leaving office and Mr. Ribadu's appointment terminated, the EFCC seemed incapable of fighting corruption.²⁹¹

Similarly, the Nigerian Senate recently used their confirmation power to frustrate the appointment of Mr. Ibrahim Magu, the current Acting-Chairman of the EFCC, from becoming the substantive Chairman of the Commission in accordance with the provisions of the EFCC Act. The refusal to confirm Mr. Magu by the Senate has been described as a political reprisal over commencement of investigations against some Senators on allegations of corruption.²⁹²

286 Bullion Vans: Take Tinubu Petition Seriously, TI tells EFCC; Punch Newspapers of November 5, 2019, available online < <https://punchng.com/bullion-vans-take-tinubu-petition-seriously-ti-tells-efcc/>.

287 See, 'Exclusive: Petition Against Tinubu "Lying Fallow" In Our Office- EFCC Source' available online < <http://saharareporters.com/2019/10/31/exclusive-petition-against-tinubu-%E2%80%9Clying-fallow%E2%80%9D-our-office-%E2%80%93efcc-source>>.

288 The achievements of Nuhu Ribadu were recounted by Dr. Ngozi Okonjo-Iweala in her book titled "Reforming the Unreformable: Lessons from Nigeria" (2012) MIT Press. According to her, EFCC under Nuhu Ribadu was courageous and totally committed to tracking down corrupt officials. It initiated investigations of 28 governors and other associates. Once the governors left office, five were successfully arraigned before the Court on July 16, 2007, and two were tried and convicted. For the first time in Nigeria's history, the highest law officer of the land, the Inspector General Police, was investigated for corruption, tried and convicted and sentenced to six months' imprisonment.

289 Hatchard (2014), "Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa" (Edward Elgar Publishing Limited) 31

290 See Institutions, Not Heroes: Lesson from Nigeria, available online < <https://globalanticorruptionblog.com/2015/04/27/institutions-not-heroes-lessons-from-nigerias-efcc/#more-3298>>.

291 *Ibid.*

292 News24: Nigeria's Senate blocks appointment of anti-graft chief (News24 15 March 2017) <<http://m.news24.com/news24/Africa/News/nigeria-senate-blocks-appointment-of-anti-graft-chief-20170315>>.

While it is conceded that political will is germane to the effective AML/CFT operations in developing countries, momentary political will, without more, is not enough to combat money laundering and terrorist financing. Strong political institutions must of necessity be sustained and developed along with the AML/CFT regulation.²⁹³ It is believed that the combination of strong political will and strong political institutions will go a long way to stem the tide of corruption and financial crimes in Nigeria. The anti-graft agencies must be willing to stamp out these crimes regardless of who is involved. This point was underscored by the former Chief Justice of Nigeria, Aloma Mukhtar. According to her “the Court cannot on its own prosecute criminal cases; there must be the willingness of all prosecuting agencies to prosecute cases brought before our courts, especially high-profile cases of corruption and all other”²⁹⁴

4.3 A CASH-BASED ECONOMY AND POROUS BORDERS

Nigeria is a heavily cash-oriented economy. Retail and commercial payments are primarily made in cash.²⁹⁵ In recognition of the inherent problems associated with a cash-based economy, the Central Bank of Nigeria (CBN) in 2011 released a circular on the introduction of ‘cashless’ policy which sets the daily cash deposits and withdrawal limits at ₦500,000 for individuals and ₦3,000,000 for corporate bodies. The circular also stated that the policy would commence in 2012. In 2012, the policy kicked off in some states.²⁹⁶ The policy was introduced to promote the development and modernization of the Nigerian payment system; to reduce the cost of banking services (including cost of credit) and promote financial inclusion through the provision of efficiency and greater reach; and to improve the effectiveness of monetary policy in managing inflation and drive economic growth.²⁹⁷ The policy also aimed to curb some of

293 Rahmon Olalekan Yusuf “Anti-Money Laundering Framework in Nigeria: An Umbrella with Wide Leakage” *Journal of Law, Policy and Globalization*, Vol. 66 (2017) 172.

294 *Supra* Note 261 [Kayode] p. 47.

295 Okey O. Ovat "The Central Bank of Nigeria's Cashless Policy in Nigeria: Benefits and Challenges" *Journal of Economics and Sustainable Development*, Vol. 3, No. 14, 2012, p. 128.

296 These states are: Lagos, Rivers, Abia, Anambra, Ogun, Kano and the FCT, Abuja.

297 See Cash-less Nigeria, available online at <<https://www.cbn.gov.ng/cashless/>>.

the negative consequences associated with high usage of physical cash, notably corruption and money laundering.²⁹⁸

While a respectable effort in the control of money laundering, the cashless policy arguably proves defective: it does not prohibit withdrawals above the stipulated amounts and grants exemptions to government departments, agencies and embassies. This exemption implies that it is individuals and corporate entities that are more likely to engage in money laundering activities. Experience has shown that it is the heads of government agencies and other public office holders that are more likely to launder money.²⁹⁹

Moreover, the policy seems unrealistic for an economy that is cash intensive. It is reported that more than 50 percent of economic transactions in all sectors are conducted in cash.³⁰⁰ It is also stated elsewhere that almost 65%-70% of the citizens of Nigeria lack functional education, knowledge and access to computers which is a precondition to effective participation in the cashless policy.³⁰¹ These challenges, among others, led to the partial suspension of the pilot phase of the cashless policy.³⁰² The re-introduction of the cashless policy scheduled to take effect on 18 September 2019 encountered resistance.³⁰³ Equally, the Nigerian House of Representatives passed a resolution suspending an aspect of the policy, charges on cash deposits, a suspension it explained as due to lack of consultation with relevant stakeholders.³⁰⁴

298 *Ibid.*

299 Sam Aba “Can Nigeria’s Current Cashless Policy Curtail Money Laundering Practices” Seminal Paper on Contemporary Issues in Finance (2014) p. 19.

300 Moshi, H (2012), “Implications of cash dominated transactions for money laundering” available online <http://www.issafrika.org>.

301 Alawiye A., Adewale A., et al “The Cashless Payment System as a Panacea to the National Security Challenges in Nigeria” (October 7, 2013). Available at SSRN: <https://ssrn.com/abstract=2337239> or <http://dx.doi.org/10.2139/ssrn.2337239>.

302 See Michael Ife (2013), “The Challenges of the Cashless Policy in Nigeria and Recommendations-To be or Not to be” available online < <https://www.globalsure.net/the-challenges-of-the-cashless-policy-in-nigeria-and-recommendations-to-be-or-not-to-be/>>.

303 The CBN via its Circular (Referenced: PSM/DIR/CON/CWO/02/2014) dated 17 September, 2019 approved processing fees of 2% for cash deposits on any sum above ₦500,000 for individual and 3% fees for corporate entities on any sum above ₦3,000,000. This is in addition to already existing charges on withdrawals of 3% and 5% respectively.

304 See Punch Newspaper of September 19, 2019 “Cashless Policy: Reps ask CBN to suspend charges on deposits”, available online <<https://punchng.com/cashless-policy-reps-ask-cbn-to-suspend-charges-on-deposits/>>. However, the CBN is credited to have said that there’s no going back on the cashless policy on the ground that the policy is estimated to affect only 10% of bank customers. See Punch Newspaper

Another factor militating against Nigeria’s AML/CFT efforts is porous and illegal borders. Essentially, money laundering has frequently involved cross-border transactions in order to disguise trail of dirty money. There are over 1,400 illegal routes into Nigeria.³⁰⁵ The porosity of the borders has been identified as the main factor encouraging proliferation of illegal arms and insurgencies.³⁰⁶ In recognition of this, the Nigerian government on 25 April 2019 approved the sum of ₦52 billion to ensure electronic monitoring of borders.³⁰⁷ This action resulted from the realization of the physical impossibility of monitoring all entry points into the country without the aid of electronic monitoring. As it appears that electronic monitoring of Nigerian borders is less effective, the Nigerian government recently closed all Nigeria’s land borders indefinitely to checkmate the activities of smugglers.³⁰⁸

4.4 LACK OF SYNERGY BETWEEN INVESTIGATORY AUTHORITIES, POLITICAL INTERFERENCE AND POOR PROSECUTION

The 2012 Revised FATF Recommendations require countries to ensure that competent authorities conducting investigations are able to use a wide range of techniques in the investigation of money laundering and terrorist financing.³⁰⁹ Consistent with this global prescription, Nigeria’s AML/CFT legal frameworks provide for anti-graft agencies such as EFCC, ICPC, and NFIU. Arguably, these agencies lack the capacity to wage an effective war against money laundering and terrorist financing. The offences of money laundering and terrorist financing are information driven which requires an in-depth investigation. Therefore, the inability of the regulatory agencies to collaborate and harness meaningful information is

of September 21, 2019, “No going back on cashless policy, says CBN”, available online <<https://punchng.com/no-going-back-on-cashless-policy-says-cbn/>>.

305 *Supra* Note 123.

306 *Ibid.*

307 See ‘Nigerian Porous Borders: FG Approves ₦52 Billion to Ensure Electronic Monitoring’, available online at <<https://silverbirdtv.com/politics/57996/nigerian-porous-borders-fg-approves-n52bn-ensure-electronic-monitoring/>>.

308 Nigeria: Indefinite Closure of Land Borders; available online <<https://allafrica.com/stories/201911220848.html>>.

309 FATF, Recommendation 30.

detrimental to the effective implementation of controls.³¹⁰ The United States Department of State in its recent report has this to say about Nigeria's investigative authority:

“The Economic and Financial Crimes Commission (EFCC) is the leading money laundering investigative authority in Nigeria. EFCC usually conduct investigations with little prosecutor involvement and over-rely on investigation by confession. In 2016, the EFCC aggressively investigated high-profile money laundering cases. However, the EFCC's conviction rate continue to be low due to in part to gaps in the judicial system that cause cases to languish in the system for long periods of time without resolution. There are concerns about the Department of States Services' capacity to investigate money laundering and that it does not share case information with other agencies that also conduct financial investigations.”³¹¹

Closely associated to lack of synergy is shoddy investigation and poor prosecution leading to low conviction rates. Money laundering and terrorist financing cases require an in-depth investigation by competent skilled investigators. The Nigerian conviction rate is low. As the Nigerian Vice President recently noted with dismay:

“the EFCC, a body that is charged with the responsibility of investigating and prosecuting money laundering and other financial crimes that was established since 2002, has achieved a very low conviction rate in high profile cases since its establishment. This is despite the high rate of corruption in the society. He further observed that the agency only managed to prosecute 8 high profile cases in 13 years. He lamented that the Supreme Court had even overturned one case out of the 8 decided cases which is a great testimony that a lot is wrong with the current system from the prosecutorial team to the implementation of anti-money laundering legislation.”³¹²

The low conviction rate is an indication that the investigative and prosecutorial authorities lack the skills to effectively investigate and prosecute money laundering and terrorist finance offences.

Another area in which the anti-graft agencies are incapacitated in Nigeria relates to poor infrastructure. This incapacitation is evident in the area of data gathering, particularly given the

310 *Supra* Note 33.

311 See International Narcotics Control Strategy Report Volume II, Money & Financial Crimes, March 2017, released by the United States Department of State which can be accessed at: <https://www.state.gov/documents/organization/268024.pdf>.

312 'Osinbajo Decries Low Conviction in Corruption Cases' available online at < <http://thenationonline.net/osinbajo-decries-low-conviction-in-corruption-cases/>>.

lack of a centralized database.³¹³ The lack of centralized database inhibits investigative capacity. Availability of data is a prerequisite for any customer due diligence by financial institutions. Entities lack the capacity to effectively track and detect money laundering. Capacity building requires training as well as the provision of modern equipment to develop monitoring databases.³¹⁴

It is important to note that anti-graft agencies in Nigeria are not free from influence by the political class. For instance, the power of the Attorney General of the Federation (AGF) over criminal matters is overwhelmingly broad. Section 174 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) empowers the AGF to institute, take over and continue or discontinue any criminal case before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under Any Act of the National Assembly before judgment is delivered.³¹⁵ In exercising this power, the AGF is required to have regard to the public interest, the interest of justice and the prevention of the abuse of the legal process.³¹⁶ This provision is susceptible to abuse. Moreover, courts have held that the prosecutorial powers of the AGF as entrenched in the Constitution are at the absolute discretion of the AGF and not subject to review by a court of law. In *Ezomo v AG, Bendel State*, the Supreme Court of Nigeria held that :³¹⁷

“The pre-eminent and incontestable position of the Attorney General, under the common law, as the Chief Law Officer of the State, either generally as a legal adviser or specifically in all court proceedings to which the State is a party, has long been recognized by the courts. In regard to these powers, and subject only to ultimate control of public opinion and that of Parliament or the Legislature, the Attorney General has, at common law, been a master unto himself, law unto himself, and under no control whatsoever, judicial or otherwise, vis-à-vis his powers of instituting or discontinuing criminal proceedings. These powers of the Attorney General are not confined to cases where the State is a party. In the exercise of his powers to discontinue a criminal case or to enter a *nolle prosequi*,

313 See Mutual Evaluation Report (2008), p. 189-190.

314 *Supra* Note 166, p. 129.

315 See also Section 211 of the Constitution which imbued the Attorney-General of a State with the same powers.

316 See Section 174(3) CFRN 1999 as amended.

317 [1986] 4 NWLR (Pt. 36) 448, at p 459, paras. C-F.

he can extend this to cases instituted by any other person or authority. This is a power vested in the Attorney-General by the common law and it is not subject to review by any court of law. It is, no doubt, a great ministerial prerogative coupled with grave responsibilities”.

Given Nigeria’s political climate, this wide prosecutorial discretion is prone to being abused. As a political appointee and also the Minister of Justice, there are concerns that this power may be used to hinder the effective administration of justice.³¹⁸ These concerns became evident when late President Umaru Musa Yar’dua granted a written request of the then Attorney-General and Minister of Justice, Mr. Aondoaka, SAN to the effect that: (a) all agencies involved in the prosecution of criminal offences such as EFCC and ICPC should report and initiate criminal proceedings with the consent of the Attorney-General of the Federation; and (b) that the Attorney-General of the Federation should exercise powers conferred on him pursuant to section 43 of the EFCC Act 2004 to make rules and regulations with respect to the exercise of any of the duties, functions or powers of the EFCC.³¹⁹ Although subsequently reversed by the late president, this hindered criminal prosecutions. For example, the said Attorney General went as far as blocking a Mutual Legal Assistance request from the United Kingdom and this remained the situation until the death of President Yar’dua in 2010. It was upon the inauguration of President Goodluck Jonathan that Nigeria resumed effective cooperation with the United Kingdom.³²⁰

Abuse of the constitutional framework came to fore recently with the discontinuation of the trial of the former Gombe State Governor, Senator Danjuma Goje on the orders of the Office of the Attorney General of the Federation on June 7, 2019. The former governor was standing trial on corruption charges to the tune of ₦25billion. It is believed that the discontinuation of the trial was politically motivated. The political permutation started when Goje joined the race to contest for Senate Presidency, which the ruling party, All Progressive Congress (APC) had

318 Mutual Evaluation Report (2008) p. 187.

319 *Supra* Note 166 (Ikpong).

320 *Supra* Note 287 (Hatchard) p.45.

given to Senator Ahmed Lawan by consensus. When it became clear that Goje might constitute a threat to the party's choice of Ahmed Lawan for the top Senate job, Goje was persuaded to step down from the race. However, Goje struck a deal with the Federal Government for withdrawal of corruption charges against him.³²¹

In exercising the powers under sections 174 and 211 of the Constitution, the Attorney-General is required to have due regard to the public interest, the interest of justice and the need to prevent abuse of legal process. From the foregoing, it appears that the Court has some inherent discretion to question the legality or otherwise of the *nolle* power of the Attorney-General.³²²

Surprisingly, the constitutional legality of the withdrawal of the corruption charges against Goje, arguably a patent gross abuse of legal process, did not engage the attention of the Court.

It is my view that unless and until the institutions and agencies established to combat money laundering and other financial crimes are truly independent in the discharge of their statutory mandate, the fight against money laundering in Nigeria will continue to be subjected to political interference.

4.5 ABUSE OF THE IMMUNITY CLAUSE

Immunity as a political concept in Nigeria is a product of colonial heritage.³²³ Despite being politically independent, Nigeria laws still retain some vestiges of colonial blue print such as the concept of sovereign immunity.³²⁴ Section 308 (1), (2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) makes provision for immunity from civil and

321 Goje and the Abuse of Nolle Prosequi, available online at <<https://www.pressreader.com/nigeria/thisday/20190707/282024738821545>>.

322 G.O. Etose, J.U. Aziembemhin et al (2018) "An Appraisal of the Application of the Doctrine of Nolle Prosequi in Nigeria" *Cranbrook Law Review*, Vol. 8(1) pp. 9-25.

323 The Black Law Dictionary 8th Edition at p. 765 defines Immunity as any exemption from duty, liability or services of process such as an exemption granted to public officials.

324 The principle of sovereign immunity stemmed from the English Common Law System expressed in Latin maxim: *Rex Non Po test Peccare* (the king can do no wrong). However, it is interesting to note that the Crown Proceedings Act 1947 has embraced a cause of action against the Crown in English Common Law. Section 2(1) of the Act provides that "subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity..." The recognition of the crown's liability in torts is said to promote public interest though the enforcement of the legal liability is limited. Unfortunately, the Nigerian Constitution which imported immunity clause from the Common Law has failed to place a balance between the clause and public interest.

criminal actions. By virtue of this provision, the President, Vice President, Governors and Deputy Governors in Nigeria are exempted from criminal and civil actions while in office.³²⁵

It is further provided that no criminal proceedings shall be instituted or continued against a person who the section applies to during his period of office. These persons shall not be arrested or imprisoned and no process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or even issued. Subsection 2 provides that civil proceedings can be brought against these persons only in their official capacity.

The rationale for the provision of immunity clause under section 308 of the Constitution was stated succinctly by the Supreme Court of Nigeria in *Bola Tinubu v IMB Securities Ltd*:³²⁶

“the immunity clause is meant to provide a shield for the person of the President, Vice President, Governor or Deputy Governor from frivolous or vexatious litigation in respect of personal or criminal proceedings that would distract him from the serious business of governance.”

In effect, the clause is not meant to protect the individual office holders but the sanctity of the office they hold. It is contended that to drag an incumbent president to court and expose him to the process of examination and cross-examination cannot but denigrate and ridicule the office.³²⁷ Similarly, in *Alamiyeseigha v FRN*, the Court of Appeal held that:³²⁸

“It is certainly not the purport of that provision for the beneficiaries

325 Section 308 provides thus: (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section-

- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

- (2) The provisions of subsection (I) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

326 [2000]7 NWLR (Pt.767)581.

327 Anna Simonova, “The Risk-Based Approach to Anti-money Laundering: Problems and Solutions” (2011) 14 Journal of Money Laundering Control 346.

328 [2006] 16 NWLR (Pt 1004) 41.

of the said immunity to hide behind the Constitution and offend the law. To the contrary, it is intended to protect the beneficiaries from the hindrances of frivolous court actions and from litigations aimed to victimize them for actions taken in the public interest against any individual interest. It is to allow the executives function without fear or favour in the discharge of their duties.”

Dissenting voices stand opposed to immunity under the Nigerian Constitution. First, it is contended that the provision has been manipulated to promote injustice, impunity and corruption.³²⁹ According to Asabor, the use of protective shield of constitutional immunity as a legislative instrument and defence of corruption and money laundering by crooked public officials has gained an alarming scale and frequency.³³⁰ Furthermore, it is contended that when the corrupt officials leave public office and lose immunity, it is often too late to prosecute as evidence is lost; witnesses die or are otherwise unavailable. Effectively, the immunity clause negates the tenets of rule of law:

“Immunity of this sort negates the principle of equality before the law, a cardinal aspect of the rule of law. Every civilized society must practice at least the fundamentals of the rule of law. The concept of the rule of law is based on the principle that the law is supreme and is the source and foundation of all civilized societies. Its main thrust is to establish the freedom of the citizen and protect him from arbitrary use of power by public authorities. The rule of law adds meaning to the concept of rights. All persons must be equal before the law. There should be no undue privileges and discrimination in society.”³³¹

The political elites’ habit of abusing the Constitutional immunity clause has negatively impacted on the fight against money laundering and needs to be reformed.³³²

It is important to note that the United States which is arguably one of the oldest democracies in the world provides for immunity under its Constitution. However, the immunity clause under the US Constitution is circumscribed. The immunity only relates to allegation of civil wrongs

329 See Bizak Azeez “Immunity Clause under the Nigerian Constitution: Matters Arising” available online <<https://www.pmnewsnigeria.com/2018/12/01/immunity-clause-under-the-nigerian-constitution-matters-arising/>>.

330 Asabor, I. “Immunity in International Law” The Vanguard Newspaper, 2 October 2002.

331 Ibraheem Ojo Tajudeen, “Executive Immunity in Nigeria : Putting Off Old Garments” (2013) 1.

332 *Supra* Note 220 (GIABA Report) at p. 14.

and available to the President alone. The essence of the immunity clause under the US Constitution was well captured by the US Supreme Court in *Nixon v. Fitzgerald*:³³³

“The President holds a unique position under the Constitution and he cannot make important and discretionary decisions if he is in constant fear of civil liability and diverting the President's time and attention with a private civil suit affects the functioning of the entire federal government thereby abrogating the separation of powers mandated by the Constitution. By separation of powers, the judicial, executive and legislature branches are equal and will not intrude upon each other.”

Unlike immunity under the Nigerian Constitution, immunity under the US Constitution is qualified and only covers the civil actions of the president for his official decisions. In *Clinton v. Jones*, the US Supreme Court ruled that the executive branch has qualified executive immunity to enable it discharge its duties without concern that a particular action may result in civil liabilities from its actions.³³⁴ Moreover, the Court also stated that the president does not have absolute immunity on unofficial acts.³³⁵

4.6 ABUSE OF PLEA BARGAINING

Another element perceived to mock the administration of criminal justice system in Nigeria is the concept of plea bargaining. Plea bargaining is provided for under section 270 of the Administration of Criminal Justice Act, 2015.³³⁶ Plea bargaining is a legal practice in common law systems whereby an accused pleads guilty in return for reduced charges or a lighter sentence.³³⁷ By this practice, both the accused and prosecutor make compromises for a

333 [1982] 457, US 731 (1982).

334 520 US 681.

335 *Ibid.* at p. 1358. Writing for the majority, Judge Bowman explained that “the President, like all other government officials, is subject to the same laws that apply to all other members of our society. That he could find no case in which any public official ever has been granted any immunity from suit for his unofficial acts.” In this case, the Court also rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch would violate separation of powers. See also <<https://supreme.justia.com/cases/federal/us/520/681/case.pdf>>.

336 The section provides that ‘Notwithstanding anything in this Act or in any other law, the prosecutor may receive and consider a plea bargain from a defendant charged with an offence either directly from the defendant or on his behalf; or offer a plea bargain to a defendant charged with an offence where the prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process.’

337 Sule Peter Echewija, “Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique” IAFOR Journal of Ethics, Religion and Philosophy (2017) Vol. 3, Issue 2, According to Sikiru Adewale, there are four types of plea bargaining: Charge bargaining, Sentence bargaining, Count

mutually agreeable bargain. The proponents of the concept of plea bargaining contend that it saves time and the resources of the state and also helps in decongesting the courts' criminal docket. Howe identifies the benefit of the concept of plea bargaining as follows:

“We prefer to trade some punishment to avoid the high cost associated with a bargainless system, and we do not believe that trial outcomes provide the only or even the best measure of social value or of fairness in criminal adjudication. For these same reasons, we can conclude that a system with bargaining, rather than one without bargaining, serves the public interest and the interest of the defendants. Bargaining has value even if it often ends outside the shadow of trial.”³³⁸

However, the concept of plea bargaining has been criticized for being morally reprehensible and amounting to distortion of the concept of justice and which in effect provides a soft-landing for elitist law-breakers³³⁹ The justification of plea bargaining on the basis of cost-benefit analysis and enormity of caseloads as opposed to the gravity of offence committed negates the ideals of justice.³⁴⁰ While plea bargaining may save time, there is something less gratifying about it.³⁴¹ A question rightly posed by an author is- “What sort of justice derives from a negotiated judgment”?³⁴² The resentment for the practice of plea bargaining is captured by George Fisher:

“There is no glory in plea bargaining. In a place of noble clash of truth, plea bargaining gives skulking truce. Opposing lawyers shrink from battle,

bargaining and Fact bargaining. See Sikiru Adewale “Plea Bargaining in Criminal Prosecution.” Available online <<https://www.academia.edu/35563178/>>.

338 Howe, Scott W. (2005). The value of plea bargaining. *Oklahoma Law Review*, Vol. 58(4), p. 636. In effect, the import of the quotation suggests that courts merely rubber stamp plea bargaining cases. This point was underscored by the Supreme Court of Canada in *R v. Nixon* 2011 SCC 34, [2011] 2 SCR 566. The Court noted at paragraph 53 that “the judge is presented with the end product of the plea negotiations, not with the set of circumstances or considerations that went into the mix.” See also Zina Lu Burke Scott “An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada.” *Saskatchewan Law Review* 2018, Vol. 81.

339 *Supra* Note 334 (Echewija).

340 See Arthur Rosett & Donald R. Cressey “Justice by Consent: Plea Bargains in the American Courthouse.” Philadelphia PA: J.B. Lippincott Company, 1976. According to Rosett and Cressey at p. 167 “When the opportunity to avoid conviction and punishment for a serious offence by pleading guilty to a less serious one depends on the degree of overcrowding of the trial calendar, justice is not done. When this opportunity depends on the friendship between defence counsel and the prosecutor, the tenacity of the former or the political ambitions of the latter, justice is not done.

341 See Uviller, R. H. (1977). “Pleading guilty: A Critique of Four Models.” *Law and Contemporary Problems*, 41 (1), 102. Uviller at p. 102 stated that “Negotiated settlement of a cause of litigation is no stranger to prevailing American notions of justice. Yet there is something less than fully gratifying about compromise, and when the high principles and great social purposes of criminal justice are set in the balance, the process sometimes seems downright unsavory”.

342 *Supra* Note 334, p. 36.

and the jury's empty box signals the system's disappointment. But though its victory merits no fanfare, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance."³⁴³

In fact, Nigeria is reputed to be a country of paradoxes, one in which the VIP steals an elephant and runs away with it but the poor man steals a goat goes to jail.³⁴⁴ An illustration is the case of John Yusuf, a former Assistant to Director of the Police Pension Board.³⁴⁵ Yusuf was charged for embezzling ₦32.8 billion of public funds. He entered into a plea-bargaining agreement, consequent upon which he was sentenced to two years' imprisonment or an option of paying ₦750,000 as fine. As expected, he instantly paid the fine.³⁴⁶ Another case is that of Lucky Igbinedion, the former governor of Edo State. Having been accused of looting about ₦4.4 billion, he entered into a plea-bargaining agreement and was fined the sum of ₦3.5 million while he forfeited three landed properties to the Federal Government of Nigeria.³⁴⁷ In this way:³⁴⁸

“...a common goat or yam thief goes to jail while the white- or blue-collar criminal is given a mere symbolic sentence, most of which is easier served in pleasurable surrounding or offered the opportunity of fines in lieu of incarceration. ”

343 Plea Bargaining's Triumph: A History of Plea Bargaining in America (Stanford, CA: Stanford University Press, 2003) 1.

344 Garba, S. (2016, May 26). Nine key milestones in president Buhari's first year. Sahara Reporters. Retrieved from <http://saharareporters.com/2016/05/26/nine-key-milestonespresident-buharis-first-year-garba-shehu>.

345 'Beyond the Thief and the Judge; Vanguard Newspapers of February 4, 2013; available online <<https://www.vanguardngr.com/2013/02/beyond-the-thief-and-the-judge/>>.

346 However, the Court of Appeal subsequently set aside the sentence. The Appellate Court ruled that Yusuf will now serve a six-year prison sentence and pay a fine of ₦22.9 billion.

347 Federal Republic of Nigeria v Lucky Igbinedion (2014) LPELR 22760. Another disturbing example is the case of the former Inspector General of Nigeria's Police, Tafa Balogun, who converted billions of Naira belonging to the Police Force for his personal use and was handed a six-month jail term for each of the eight counts brought against him as well as a fine of ₦500,000 for each of the count. The terms were however to run concurrently while the judge ordered that the 67 days he spent in detention during trial should be deducted. Similar scenario played out with regards to the former CEO of Oceanic Bank, Cecilia Ibru, who was accused of mismanaging depositors' funds.

348 Prof. Akin Oyeboode, a renowned Prof. of International Law, speaking in one of his lectures titled "Plea Bargaining, Public Service Rules and Criminal Justice in Nigeria; available online <<http://www.nigeriavillagesquare.com/articles/plea-bargaining-public-service-rules-and-criminal-justice-in-nigeria.html>>.

Can it be said that justice is served when the wealthy bargain and pay, often likely with the proceeds of crime? Justice is served when punishment is proportionate to the seriousness of offence committed- which brings about sentence satisfaction.³⁴⁹ According to Echewija:

“where such satisfaction is lacking, there is, in its place, a moral vacuum or a displacement gap-a void between what victims of crime expect as sanction and what the state’s judicial institution actually provides. All the plea-bargained rulings of corruption cases in Nigeria open up such moral vacuum and to that extent remain unjust.”³⁵⁰

The point is that in a corrupt country like Nigeria, a genuine fight against money laundering and terrorist financing requires the creation of a wide range of disincentives and, certainly, plea bargaining as currently practice in Nigeria is not one of them. If anything, it diminishes Nigeria’s efforts to combat financial crimes. It is no gainsaying that the practice of plea bargaining weakens both the moral and legal obligations to obey the law because it connotes the syndrome of- “*steal big and declare little to enjoy the remaining loot.*” To deter financial crimes in Nigeria, looters of the common wealth must be made to face the music regardless of their status in the society. This has the effect of sending a strong message that no one would be permitted to profit from his own fraud or take advantage of his own wrong.

4.7 CONCLUSION

The various factors discussed in this chapter point to the fact that Nigeria’s compliance with global AML/CFT initiatives appeared to be theoretical. Nigeria’s AML/CFT legal frameworks from inception have largely been influenced by the need to comply with the global standards rather than voluntary action and without due regard to its local peculiarities. Arguably, it appears that the global norms are developed on the false premise that they could enjoy universal application regardless of peculiarity of individual countries. It has been contended that the domestication of global AML/CFT initiatives should be preceded by tailored reforms at a local

349 See Andrew Ashworth (2005) “Sentencing and Criminal Justice” Fourth Edition, Cambridge University Press, p. 102.

350 *Supra* Note 337, p. 44.

level to harmonize differences between the systems and hence enhance the co-existence of the global community.³⁵¹ In essence, for effective implementation of the global standards, it is important to take into consideration the local peculiarity of individual countries. In this connection, this chapter identifies some of the systemic and developmental challenges militating against the effective implementation of AML/CFT standards in Nigeria. Unless and until these challenges are tackled, the implementation of the global AML/CFT standard in Nigeria may be a futile exercise.

351 *Supra* Note 33, p. 222.

GENERAL CONCLUSION

In seeking to combat money laundering and terrorist finance, the global community has established money laundering and terrorist finance standards. These standards, derived from a series of international agreements and the work of the FATF serve as models for national governments. Modelled on these standards, Nigeria has enacted an elaborate AML/TF framework. However, enforcement appears more formal than real. The continued prevalence of money laundering and terrorist financing in Nigeria speaks of that profound disconnect. A robust regulatory framework is not sufficient. Efforts must be made to ensure that the laws are effectively enforced.

Although, Nigeria has demonstrated a strong commitment to domesticate the global AML/CFT standards, it tends to be reactive and reluctant in the fight against money laundering and terrorist financing. Pressure from the international community, negative reviews by the FATF and exclusion from the Egmont Group prompted responses. To an extent, Nigeria's AML/CFT legal frameworks might be said to represent a form of '*cosmetic or reactive compliance*' for the approval of the global standard setters. There is reason to believe that Nigerian leaders are not fighting corruption because they believe in it, but because such a fight 'looks good' to the outside world.³⁵²

Moreover, corruption is endemic in Nigeria. It provides the enabling environment for money laundering and the financing of terrorism. The key challenges militating against the effective implementation of the AML/CFT legal framework are endemic corruption, a lack of political will, domestic immunity, plea bargaining (and its favouring of the wealthy criminals), and a host of capacity related problems including shoddy investigations, weak institutions, lack of synergy among the investigatory and enforcement agencies. In this, the domestic situation within Nigeria presents the greatest challenge to effective implementation and enforcement of

352 *Supra* Note 217.

international AML/TF standards.

Corruption must be fought decisively, and the institutions involved in the fight against money laundering strengthened. In the words of President Buhari “If we don’t kill corruption, corruption will kill Nigeria.³⁵³” The widening gap between the rich and poor, and poor standards of living that have provided fertile grounds for corruption must be addressed. The rate of unemployment and poor remuneration needs to be curtailed. A poorly paid worker and hungry people are vulnerable to money laundering-related crimes.³⁵⁴ They may not be able to resist the temptation that comes with the financial gains. Trading their birthright for a mess of pottage like the Biblical Esau could mean nothing to them.

In addition to confronting the broad corruption problem, discrete changes to domestic law might offer some prospects of achieving greater resistant to money laundering and terrorist finance. The immunity clause might be expunged from the Nigerian Constitution, or modified along the lines of the United States model. It is not in doubt that the rationale behind the concept of immunity is well intended but given the manner with which most Nigerian public office holders embezzle public funds, this provision has become a clog on the machinery of justice. In some ways, immunity serves the private personal interests of public officer holders rather than the public interest. In the same vein, the powers of the Attorney-Generals under sections 174 and 211 of the Constitution could be made subject to judicial scrutiny in order to ensure that the overriding consideration in the exercise of the power is public interest. This might at least purge some of the political dimensions from enforcement.

Equally, plea bargaining might be re-thought. A genuine fight against money laundering and terrorist financing requires a wide range of disincentives and plea bargaining as it is currently practiced in Nigeria does not act as a disincentive. The concept erodes the moral authority of

353 “If We Don’t Kill Corruption It Will Kill Us” <<https://www.vanguardngr.com/2015/03/if-we-dont-kill-corruption-it-will-kill-us-says-buhari/>>.

354 *Supra* Note 33, p. 249.

law. It is morally reprehensible for someone to launder the sum of ₦10,000,000 and be asked to forfeit a meagre ₦2,000,000. Short of rejecting the concept outrightly, perhaps in the context of serious financial crimes, plea bargaining policy might be reformed to permit some mitigation of the criminal sentence but little, or no mitigation, in terms of financial accounting. Resisting the temptation to ‘bargain’ for lower financial penalties might send a strong message about intolerance for financial crime.

Capacity building, enhancing the skills of investigators and ensuring that institutions have the technological ability to analyze and pursue money laundering investigations would enable some deterrence. The offences of money laundering and terrorism financing are complex. Resistant authorities must be able to match that complexity through proper intelligence gathering and information sharing. They must be properly trained. The anti-graft agencies must equally be strengthened and allow to operate free of state control or interference. AML/CFT laws must be made applicable to all regardless of party, ethnic or religious affiliations.

Money laundering and terrorist financing offences center on money. The cashless policy introduced by the CBN must be pursued rigorously and regularly updated to keep pace with present reality. Huge sums of money continue to exchange hands without going through the financial institutions. Expectedly, this makes it difficult if not impossible for suspicious transaction reports to be tracked for filing.

Finally, developing countries like Nigeria arguably need to participate more fully in the formation of international standards. Their voice needs to be heard at the negotiation table.³⁵⁵ Were the international standards produced by developing countries, they might look quite different. Capacity-building, and assistance in that capacity-building, might be the centerpiece

355 *Supra* Note 135, p. 124. According to Nance, M. T. “The tension with a participatory understanding of effectiveness lies in the numbers. On the one hand, increased participation brings greater experience, wisdom, and insight from the ‘front line’ that would help identify and respond to challenges. At the same time, too many voices create a din from which it hard to create order. The balance that FATF members must strike is between front-line experience and an efficient, independent decision-making process.

of global norms. According to Nance, “capacity-building assistance- beyond sharing ideas and stretching into funding- might be an area that FATF members should give greater priority.”³⁵⁶

As stated at the outset, Nigeria is greatly endowed with natural and human resources. These endowments unfortunately do not translate into an ability to regulate money laundering and terrorist finance. Despite attesting to its willingness to combat ML/TF, implement and enforce global anti-money laundering and terrorist finance norms, Nigeria remains bedeviled by internal disorder. That disorder needs to be addressed, both to deter global financial evils as well as to enable Nigeria’s realization of the promises that such endowments bestow.

356 *Ibid.* p. 122.

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