

TACKLING
MONEY LAUNDERING
—
IN EAST AND SOUTHERN
AFRICA

AN OVERVIEW OF CAPACITY

VOLUME ONE

Edited by
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ABBREVIATIONS AND ACRONYMS

CHAPTER 1: OVERVIEW

CEO	Chief Executive Officer
DRC	Democratic Republic of the Congo
FATF	Financial Action Task Force on Money Laundering
ISS	Institute for Security Studies
LHDA	Lesotho Highlands Development Authority
SADC	Southern African Development Community
SSC	Social Security Commission
TNC	Transnational corporation
UN	United Nations

CHAPTER 2: BOTSWANA

BoB	Bank of Botswana
DCEC	Directorate on Corruption and Economic Crime
DCEA	Directorate on Corruption and Economic Crime Act
FIA	Financial Intelligence Agency
MACMA	Mutual Assistance in Criminal Matters Act
PSCA	Proceeds of Serious Crime Act

CHAPTER 3: KENYA

CBK	Central Bank of Kenya
IDCM	Interministerial Drug Co-ordinating Committee
KACA	Kenya Anti-Corruption Authority
UN	United Nations
US	United States
UNDCP	United Nations Drug Control Programme

CHAPTER 4: LESOTHO

FIU	Financial Intelligence Unit
LHDA	Lesotho Highlands Development Authority
LHWP	Lesotho Highlands Water Project
LRA	Lesotho Revenue Authority
UN	United Nations

CHAPTER 5: MALAWI

FICA	Financial Intelligence Centre Act
SADC	Southern African Development Community
SARPPCO	Southern African Regional Police Chiefs Co-ordinating Organisation
SGS	Société Générale Desurveillance
UN	United Nations

CURRENCIES

ZAR	South African Rand
Ksh	Kenya Shilling
Tsh	Tanzania Shilling
Ush	Uganda Shilling
BP	Botswana Pula
MWK	Malawi Kwacha
EUR	Euro
LSL	Lesotho Loti
MZM	Mozambique Metical
US\$	United States Dollar
Z\$	Zimbabwe Dollar
C\$	Canadian Dollar
N\$	Namibian Dollar

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As an applied policy research institute that strives to conceptualise, inform and enhance the security debate in Africa, the Institute for Security Studies (ISS) is committed to undertake independent research and analysis, facilitate and support the formulation of policy, raise the awareness of the public and of decision makers, and monitor trends and policy implementation.

The ISS has been fortunate to secure the generous assistance of the Royal Danish government in this endeavour. The ISS enlisted the professional research services of the eminent researchers who contributed to the two volumes that comprise this monograph, namely Ray Goba, Peter Edopu, Jai Banda, Kamogediso Mokongwa, Nomzi Gwintsa, George Kegoro, Bothwell Fundira and Eugene Mniwasa. In conducting the studies used in compiling this monograph, each researcher interacted with persons, agencies and institutions too numerous to list. The ISS expresses its gratitude to the Royal Danish government, to all the researchers who contributed material to the monograph and to all persons, agencies and institutions that provided information to them. The ISS also thanks Fiona Adams for language editing and layout.

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EXECUTIVE SUMMARY

In the first of this two-volume monograph, Charles Goredema, in a broad overview, presents an outline of factors impacting on the capacity of key sectors of the relevant infrastructure to detect the laundering of tainted money and other illicit proceeds. To some extent the overview assesses their strengths and/or weaknesses against the backdrop of real challenges identified from sub-regional case studies.

In Botswana money-laundering control appears to be shared by the police, the Bank of Botswana and the Directorate for Economic Crime and Corruption. Anti-money laundering law is of recent origin in the country. In Chapter 2 of this volume, Kamogediso Mokongwa reviews its enforcement and comments on the perceived capacity of the relevant institutions.

In his contribution on the control of money laundering in Kenya in Chapter 3, George Kegoro observes that this will require concerted and co-ordinated action at two levels. At the first level, measures are required to detect and punish economic crime, from which illicit money is derived. The principal sources of proceeds of crime—which include corruption, drug trafficking and violent crime—were identified in an earlier study. Measures to control offences related to these activities will augment whatever control mechanisms are introduced against money laundering in Kenya. Also examined are the measures required at the second level, to address the problem of money laundering directly, as an independent and logical result of economic crime.

In recent years, Lesotho has come under the international spotlight over a variety of criminal and civil cases arising from the corruption and bribery of a top official by a number of international companies. Some major international banks were used to facilitate the laundering of the proceeds. The revelations brought into question the integrity of these institutions and had a potentially damaging effect on their reputation. Lesotho has now been placed in a position where it has to keep up the momentum to portray a genuine and sustained commitment to fight corruption. This requires a commitment to put in place institutional mechanisms to fight not only corruption, but also money laundering. Nomzi Gwintsa analyses

the prevailing legislative and institutional environment in Lesotho in Chapter 4 of this volume and assesses the country's capacity.

Criminal entrepreneurs are continually looking for new routes for laundering the proceeds of crime. Economies like that of Malawi, with emerging financial centres but inadequate controls, are particularly vulnerable. The need has long been acknowledged for money laundering in Malawi to be fought by establishing a comprehensive anti-money laundering regime, with legal and complementary regulatory tools. Malawi does not yet have dedicated anti-money laundering laws. At the time of writing, a Bill was under consideration. In anticipation of its adoption, Chapter 5, written by Jai Banda, evaluates the potential of existing infrastructure in Malawi to implement laws against money laundering.

In the second volume of this monograph, Ray Goba examines the capacity of the financial and commercial services sectors in Namibia to detect, prevent or assist in the prosecution of money laundering crimes. In Chapter 1 of that volume he gives an extensive coverage of the situation in Namibia, as experienced through recent cases.

Tanzania does not have anti-money laundering laws. In Chapter 2 of the second volume, Eugene Mniwasa examines the measures adopted to address the problem of money laundering and the financing of terrorism in Tanzania.

In the face of formidable challenges, all sectors in Uganda that are charged with detecting activities predicate to money laundering are engaged in efforts to combat money laundering itself, as well. The lack of laws that specifically deal with money laundering continues to be an impediment. At the time of writing, money laundering was not a distinct crime in Uganda. To get around the inadequacy in legislation, most financial and commercial institutions have put internal or sector measures in place to detect it. Most of these institutions, such as the banks, have global linkages and thus benefit from the macro policies of parent institutions. The major multilateral banks all have internal systems developed by their main offices to be used by all their branches globally. These efforts have been complemented by anti-money laundering guidelines adopted by the Bank of Uganda in 2002 for banks and other financial institutions. In Chapter 3 of the second volume, Peter Edopu expresses the hope that when Uganda eventually passes an anti-money laundering law, the policies and procedures taking shape under the umbrella of the guidelines will be carried forward.

In the final chapter of the second volume Bothwell Fundira uses South Africa's Financial Intelligence Centre Act, (38/2000), as a benchmark against which to measure the adequacy of existing and proposed measures against money laundering in Zimbabwe. He examines the capacity of the key institutions in the light of case studies.

CHAPTER 1

OBSERVATIONS ON TYPOLOGIES OF MONEY LAUNDERING IN THE SADC REGION

Charles Goredema

Introduction

Since the beginning of 2001 the Institute for Security Studies (ISS) has been studying the factors that expose the financial and commercial sectors, among others, in Southern African Development Community (SADC) states to the laundering of tainted money and other illicit proceeds. This has been done in various ways. Much information has been revealed, published and discussed in many fora.¹ Some of the findings are relied on in this chapter, without repetition.

This chapter confines itself to the situation in the sub-region since the start of 2003. It traces trends and developments through examples and case studies. It makes no significant attempt to estimate the magnitude of money laundering in SADC states. In the process, the chapter gives a broad analysis of factors impacting on the capacity of key sectors of the relevant infrastructure to detect the laundering of tainted money and other illicit proceeds. To some extent, the chapter assesses their strengths and/or weaknesses against the backdrop of real challenges identified from sub-regional cases studies. It concludes with tentative suggestions for possible short-term options. At the outset some of the chapter's limitations need highlighting. Firstly, it does not purport to present a comprehensive picture of the incidence of money laundering across the SADC sub-region. Due consideration had to be given to space and time constraints. Secondly, money laundering is a relatively new offence in the SADC. It is not yet universally recognised as such in all member states. There is an understandable absence of statistics to reveal its prevalence. This is compounded by a deficiency of consolidated statistics² on the serious predicate economic crime and corruption cases that have occurred in the sub-region during the period reviewed. More than any other factor, this was the biggest barrier in preparing a tapestry of the desired detail. While prominent cases assist in illustrating detected trends, at most they only reveal part of the story. Further, the cases cited in this chapter did not all arise (in the sense that the predicate offences were committed) in the period under review. Indeed, in most cases the laundering preceded this period, but the nature and extent only became known or established in the review period.

Money laundering typologies

Proceeds of drug trafficking

Drug trafficking is identified most readily with money laundering virtually everywhere in the SADC. Dagga (marijuana) and mandrax (methaqualone) sales feature prominently among the sources of illegal funds, but they are by no means the only ones familiar to crime syndicates. Significant sums are also generated from sales of cocaine, heroin and ecstasy. Since the early 1980s the drug industry has been known to influence trends in 'downstream' crimes, notably vehicle theft, smuggling, corruption, housebreaking, armed robbery and murder. As it is an industry that involves a range of participants, it is necessary to identify the important role players for the purposes of money laundering. Studies of the dagga market in South Africa have identified a chain of entrepreneurs that includes small (subsistence) farmers, transporters, wholesalers, retailers, vendors (some operating off the street) and exporters. Research conducted by the ISS has revealed that, in the market chain:

the wholesaler makes the most money. Although his mark up (sic) is less than that of the retailer, the quantities in which he deals are much larger. Most poorly paid are the producer and the street dealer, who work for subsistence-level income. At no point in the domestic market chain is much money made, however, as the market is too diffuse and the unit cost too small. The real market is in export.³

Wholesalers are therefore best positioned to participate in significant money laundering from local dagga sales.

At its profitable levels, drug trafficking is cash intensive. Drug dealers usually rely on cash as a primary medium of exchange. Drug traffickers accumulate huge amounts of cash that must be hidden and converted to avoid detection of drug activity. They share at least three characteristics across the sub-region:

- they need to conceal the origins and often the ownership of the money;
- they need to control the money; and
- they need to change the form of the money.

The drug market in South Africa is the largest in the sub-region. At the end of June 2002, two 'busts'—in Douglasdale, north of Johannesburg, and in Roodepoort on the West Rand—yielded massive seizures of dagga, cocaine, ecstasy, mandrax and chemicals for the manufacture of mandrax. The haul

was valued at ZAR2.7 billion (US\$270 million at that time). More than 100 syndicates are known to be active in the drug-trafficking industry in South Africa. It appears that most launder their assets locally in the acquisition of motor vehicles, legitimate businesses and front companies and residential properties. Asset seizures in the 18-month period from July 2002 to January 2004 give an indication of the scale of laundering of drug money. In June 2002, the Asset Forfeiture Unit of the National Prosecuting Authority reported that of the 150 cases in which assets had been seized,⁴ 31% involved drug trafficking.

Recent shifts observed in South Africa

Drugs

Drug trafficking tends to provide resources on which other forms of illegal activity feed. A report on typologies of money laundering in the sub-region prepared in 2002 underlined the positioning of Southern Africa, primarily South Africa, as a transit point for narcotics from the South-East Asia sub-continent and South America to markets in the northern hemisphere, especially in Europe. Intelligence-driven operations in South Africa involving the police and the Directorate of Special Operations (the Scorpions) have resulted in numerous 'drug busts'. The effect has been to curtail the availability of imported narcotics, thereby raising the need for domestic production. An increase in the number of manufacturing points, in the form of laboratories, is evident. Drugs found being produced include methacathinone (CAT-9 laboratories were discovered in 2003) and mandrax.

The drug seizures of June 2002, referred to above, yielded chemicals for the manufacture of mandrax estimated to be worth ZAR2.7 billion (then equivalent to US\$270 million).

Theft and hijacking of motor vehicles

The predominance of South African vehicles in the statistics of stolen and hijacked vehicles trafficked in Southern Africa continues and is linked to organised criminal groups. Stolen vehicles and trucks are still exchanged for other goods, such as drugs, firearms, cobalt and diamonds. The police report that corruption is a serious problem as those involved in vehicle theft acquire and use forged vehicle registrations as well as customs and immigration documentation. Insurance fraud has also been found in connection with truck and vehicle hijackings.

Money laundering and financial scams

Syndicates from South-East and East Asia, Nigeria and Eastern Europe have been active in criminal activities in South Africa. Nigerian syndicates are primarily involved in narcotics and financial scams, for example the Nigerian '419' scam. Their success rate has not been quantified. Russian Mafia syndicates have been found to be operating in a number of criminal groups in several Southern African states, including Angola, Botswana, Mozambique, Namibia, Swaziland and South Africa. They concentrate mainly on diamond and weapon smuggling, corruption, fraud and money laundering schemes. They are also involved in legitimate business.

Chinese Triad activity appears to take advantage of increased levels of illegal immigration from China and Taiwan. Triads have long been involved in smuggling endangered species, especially *perlemoen* (abalone). Illegal activities also include prostitution and blackmail. In South Africa, Chinese syndicates are believed to control trafficking routes for abalone to and from Hong Kong and Singapore, via Mozambique, Swaziland and Lesotho (and occasionally Zimbabwe).

Robberies

Cash-in-transit robberies, which may either be the 'classical' in-transit heists or pavement-type robberies, continued to provide a source of laundered funds in the period under review. The number of reported cash-in-transit robberies declined between January and August 2002. No statistics could be obtained for the period September 2002 to July 2003. The number of participants per group appeared to have increased, as did the level of violence and aggression used. There was also a notable pre-occupation with robbing security personnel of firearms. Bank robberies declined, a development attributed to greater security measures implemented in that sector, but armed robbery of tourists increased.

Laundering the proceeds of informal enterprise

The informal sector continues to be strong in Mozambique, Tanzania, Malawi and Uganda. Illicit activity is known to occur within this sector but has not been quantified. In Mozambique and Zimbabwe it extends to the marketing of commodities of all descriptions. In Mozambique, there is a black market that even trades in minerals. In Zimbabwe the

'parallel' economy is continuously expanding at the expense of the formal economy. There is anecdotal evidence that the informal sector is vulnerable to money laundering. An arrest was reported at Mavalane Airport of a prospective passenger active in the informal sector carrying a case containing US\$ 1 million.

An ISS researcher, Andre Standing, studied the contemporary socio-economic dimensions of drug-related criminal activity in Cape Town. He came up with rather startling, but important, findings, which may be of general application to illicit economies in transitional societies. Standing's observations are reproduced below.⁵

Observations on the Cape Flats' illicit economy

Operating without formal regulation, the illicit economy displays the most vivid failings of free market enterprise, what we may refer to as 'predatory capitalism'. Most strikingly, the spoils of crime are concentrated among a tiny minority, some of whom have become multi-millionaires. Predatory capitalism allows winners to take all. Subsequently, the fortune of the criminal elite that is derived from business on the Cape Flats is spent on lavish goods manufactured elsewhere or is invested, as recommended by business consultants, in promising property and businesses, almost all of which are based in prosperous regions outside the Cape Flats. Capital accumulated by unrestricted competition, which in the classic model of capitalism was supposed to trickle down and enrich society, is in fact pumped out of the area.

The gross polarisation of wealth on the Cape Flats is largely dependent on the activities of the majority of the powerless in the crime boss's community, especially the abundant members of territorial gangs. Unlike the boss who has properties in various areas and invests the proceeds of crime in prosperous industries, the average street gangster is confined to a small geographic area and is faced with extremely restricted social and geographic mobility. These "loyal brothers", as famously referred to by Don Pinnock, support the gang boss by being employees, foot soldiers as well as his major consumers. Therefore a sizeable proportion of the profits generated by working for the criminal

elite are re-spent on the same commodities and services supplied by him. The majority of those who operate in the criminal economy are simultaneously socially excluded and criminally exploited.

While the criminal elite can protect and sustain their position in the criminal economy through violence and corrupt relations, those at the less profitable end are far less secure. Here illicit economic activity is characterised by uncertainty and vulnerability. The criminal boss provides no income insurance or employment benefits, considered basic rights in the formal economy. What is more, few who engage in petty drug dealing or other forms of criminal trade escape arrest and prosecution. In prison the average employee of the criminal economy will receive no income from the outside and on his release he is not guaranteed re-employment, either in the illicit economy, which has an abundant supply of expendable workforce, or in the formal economy, which is typically closed to those with a criminal record. This experience can be contrasted with that of the criminal elite who, when occasionally forced to spend time in prison, continue to collect dividends from their business empires, which remain intact waiting for their release.

(Footnotes have been omitted from the extract.)

Currency speculation proceeds

Reports on the incidence of commercial crime in the SADC regularly highlight the role that currency speculation plays in generating proceeds for money laundering, facilitated by corruption and, in some cases, political cronyism and fraud.

Currency speculation in Zimbabwe: a brief exposition

The incidence of currency speculation is not quantified in Southern Africa, but there is no doubt that it constitutes a major predicate activity for money laundering.

The exploitation of fluctuations in the availability, and consequently, the value of foreign currency has become a major source of income in parts of the sub-region afflicted by shortages. Zimbabwe presents classic examples of the practice at a crude level. It also illustrates how what

commences as a series of sporadic transactions for subsistence purposes can quickly become a species of syndicated economic crime.

Currency speculators range from street traders to senior public officials, including government ministers. Part of the reason for the 'currency rush' is the vast disparity between the stipulated, lawful, rate at which the Zimbabwe dollar should trade and the 'real' market rate. A recent survey has shown the linkages between corruption and currency speculation. Well-connected individuals are known to have procured hard currency, in the form of US dollars, from official repositories, at the government prescribed rate of Z\$55 to the US dollar, and subsequently sold the same currency on the parallel market for Z\$6,000. This represents a profit of astronomical proportions. Recent reports point to the conversion of Zimbabwe currency into the Botswana pula. This is subsequently followed by the further conversion of the pula into US dollars in Botswana or other neighbouring countries. The US dollars are either repatriated back to Zimbabwe or transmitted to other countries.

Profits of currency speculation are known to have been invested on the stock market, in real estate, and used to acquire luxury motor vehicles.⁶

Proceeds of corruption

A series of judicial hearings in Lesotho dominated late 2002 and early 2003. The hearings are referred to in this chapter as the Lesotho Highlands Water Project corruption trials. The amounts of money involved were large in the sub-regional context, though they may appear trivial on the global scale. The technical disputes precipitated by the trials (which threatened to occupy nearly as much time as the adjudication of the merits of the cases), as well as the issues of principle, were certainly far more important.

The Lesotho Highlands Water Project corruption cases

The Lesotho Highlands Water Project resulted from a treaty concluded between Lesotho and South Africa in 1986. Its objective was to create a system of dams and tunnels to provide water to South Africa and electricity for Lesotho. The implementation of the project required

the establishment of at least three new bodies, one of which was called the Lesotho Highlands Development Authority (LHDA), mandated to manage the entire project. Its Chief Executive Officer (CEO) was Masupha Sole. The construction of two dams, an essential part of the project, involved the LHDA in conducting business with a wide range of transnational corporations (TNCs), some of which had hitherto unquestioned credentials. Competition to gain tenders was stiff, and a flurry of intermediaries participated at various stages. During the course of the project, it emerged that a large number of TNCs had paid money into bank accounts in Switzerland in the name of certain intermediaries, and that some of it had subsequently passed into bank accounts held by the LHDA CEO, Sole. In the case of the key intermediary, one ZM Bam, investigations revealed a general pattern of 60% of the money that was paid into Bam's account being transmitted to Sole very shortly thereafter. It was established in court that between January 1991 and April 1991, Sole received C\$493,000 and he received another C\$188,000 between June 1991 and January 1998.

The source of this particular bribe was a Canadian TNC, Acres International, which wanted to secure the contracts for the construction of the Katse Dam.

Sole also received bribes from other companies involved in the project, and, according to a member of the prosecuting team,⁷ more trials are expected. Firms that have been implicated include the Highlands Water Venture Group, which comprises Impreglio Impresit Girola of Italy, Hochtief of Germany, Bouygues of France and Basil Read of South Africa. The consortium is alleged to have paid Sole US\$375,000 between 1991 and 1998.

The Lesotho Highlands Water Project consortium, which includes LTA-Grinaker from South Africa and Alston of the UK, is alleged to have bribed Sole with ZAR6.6 million (just over US\$1 million as at April 2004). Intermediaries charged include Jacobus du Plooy and two Panamanian companies, namely Universal Development Corporation and Electro Power Corporation, as well as Max Cohen, ZM Bam and Margaret Bam. At the time of writing, Cohen, who did not attend the initial hearings, had disappeared without trace. ZM Bam died during the trial.

Sole was sentenced to 18 years in jail for receiving more than ZAR7.5 million (US\$1 million) from international contractors and consultants.

This was reduced on appeal to 15 years.

The forensic investigations revealed a trail of money leading from the TNC contractors to six intermediaries, all of whom managed banking accounts outside Lesotho, and then further on to a second tier of intermediaries and ultimately to Sole's accounts in Geneva. Transfers were traced further to an account in Sole's name at Standard Bank in Ladybrand, just across the border in South Africa. During the period in question ZAR406,985.79 was deposited into the Standard Bank account. In addition, Sole also deposited foreign currency to the value of £298,620 and US\$812,406. Small transfers were recorded between that account and Sole's account with Barclays Bank in the Lesotho capital of Maseru⁸ (Barclays Bank subsequently transferred its interests in Lesotho to Standard Bank).

As far as is known, the amount recovered from Sole in a civil judgment awarded against him in October 1999, and confirmed on appeal in April 2001, was ZAR8.9 million (then worth US\$1,186,666.60). In addition Acres International was fined ZAR22 million (US\$2,933,333.30) on conviction.

The Lesotho corruption trials will probably be remembered more for the multiplicity of procedural issues raised by the defendants than for any other reason. For the purpose of a study of money laundering in general, however, the trials have an added significance, in that they demonstrate:

- one of the modes by which funds for laundering are raised;
- a relatively straightforward transmission system for those funds, involving at least three stages;
- the practical challenges of detecting the infiltration of illicit proceeds; and
- the even more daunting task of investigating the laundering trail even where an 'audit' trail exists.

In fact, in both the case against Sole and that against Acres, the proof of money laundering was an inevitable component of the probative process of the bribery allegations. The crucial information was located in Switzerland. In a detailed case study prepared for Transparency International, Fiona Darroch points out that:⁹

An application to the Swiss courts for such information is a complex matter. The prosecution is not permitted to go on a 'fishing expedition', trawling through a set of bank accounts in order to find sufficient evidence to enable it to construct its case. It must make its application with particularity, giving the reasons which it has for suspecting that activities within an account will reveal grounds for bringing a criminal prosecution. Where the reasons are insufficiently defined, information in the accounts will not be revealed. It is also important to note that where an account contains many entries and withdrawals of different sums of money, tracing a direct connection between payments which is sufficient to give rise to the inference of bribery cannot sometimes be achieved.

It should be noted, however, that Switzerland can extend mutual legal assistance on the basis of its national law coupled with a declaration of reciprocity. This may be helpful and was useful in the Lesotho corruption cases. It should not obscure the enormity of the challenge that can emanate from transnational transfer of funds of illicit origin. One need only refer to the Abacha embezzled funds case to get a sense of the challenge. The estimated prejudice caused by Abacha through embezzlement and corruption was US\$5.5 billion. The funds were traced to banks in no fewer than 21 countries! Switzerland has been applauded as one of the most co-operative in locating the funds and securing repatriation. Abacha also deposited funds in Austria, the Bahamas, Brazil, Canada, France, Germany, Hong Kong, Italy, Jersey, Kenya, Lebanon, Libya, Liechtenstein, Saudi Arabia, Singapore, Sweden, the United Arab Emirates, the United Kingdom and the United States.¹⁰ The success, albeit modest, achieved by the Nigerian authorities in retrieving some of the Abacha funds cannot be completely disconnected to the opprobrium with which Abacha's regime was viewed by the time of his demise and the tremendous goodwill enjoyed by the Obasanjo government at the time that recovery representations were made.

Outgoing (and incoming) money laundering

Significant laundering of money often involves transnational transfers between two or more countries. Two important types of predicate activity contribute to such transfers. One concerns the proceeds of activities universally acknowledged to be criminal, such as drug trafficking or fraud. The other type involves assets derived from activities that may be criminal in the source country, but are not necessarily so regarded in the destination country. The latter category includes

tax evasion, transfer pricing, prostitution, embezzlement of private funds (private sector corruption) and insider dealing. In addition to the two kinds of money laundering, funds transfers may occur lawfully as offshore investments. In transit, as well as when deposited at the destination, funds originating from any of the three sources could be indistinguishable. Contending with money laundering requires that authorities in the sub-region take cognisance of the nature and pattern of all these activities.

Southern Africa has a long experience of outward capital movement. Its history dates back to colonial days, when exploitation of colonies was an important objective. Large-scale capital flight out of Mozambique and Zimbabwe has been recorded. In Mozambique, it probably reached its climax from 1974–8. Commentators such as Joseph Hanlon have written on the abuse of the banking sector in illicit transfers between Mozambique, South Africa and Portugal during that period.¹¹ The amount of money transmitted out of Zimbabwe and South Africa just before liberation, in each case, has yet to be quantified.¹² There are indications that some of the methods used in colonial plunder were adopted by highly-placed functionaries and some entrepreneurs long after the advent of liberation.

It is an established fact that the transfer of funds is easiest if a convertible currency is used. Global trends have shown that the favoured currency in fund transfers is the US dollar. Two related developments have been instrumental in opening up avenues for money laundering in the SADC. One is the relaxation, and in some cases, abandonment of exchange controls and the other is the proliferation of currency exchange outlets. It is evident that some of the outlets in countries without exchange controls have been used in the acquisition of hard currency for onward transmission beyond the sub-region. South African criminal groups are known to have used *casa de cambios* in Mozambique to launder the proceeds of cross-border activities, such as vehicle theft.¹³ Currency exchange outlets have also been abused in Malawi. The authorities in Zimbabwe closed down all such outlets in November 2002 on the basis that they were instrumental in externalising foreign currency.

Social Security Commission irregularities in Namibia¹⁴

A Commission of Enquiry was mandated by Namibia's President Nujoma to investigate and report on the operations of the Social Security Commission (SSC). Public hearings were conducted in the first half of

2003. At the end of the hearings a report was presented to the President but at the time of writing it had not been made public. However, the print media widely reported the hearings. Some of the 'shenanigans' revealed showed that high ranking and well-placed officials within the SSC, middlemen and insurance brokers, received huge returns by way of commissions for business generated through investments made on behalf of the SSC through various insurance companies.

The revelations during the Commission of Enquiry make it a classic case study to identify the factors that expose the financial and commercial sectors in Namibia to the laundering of tainted money. It is also a useful case study for analysing and assessing the strengths and weaknesses of these sectors in detecting the laundering of tainted money and other illicit proceeds in Namibia generally. It needs to be pointed out that in terms of financial and commercial activity, Namibia is a comparatively small but significant market.

The factors that facilitated the misappropriation of public funds at the SSC can be explained against the background of poor organisational and management structures.

These include the appointment of unqualified and inexperienced personnel to make crucial investment decisions and to manage the operations of the SSC, the appointment of an ineffective Board which could be manipulated by the executives, the absence of effective management structures, and the existence of corruption and nepotism within the Authority, which facilitated the growth of a syndicate within the institution that undermined the Commission by colluding with external 'entrepreneurs' in the insurance sector to perpetrate fraudulent deals on the Commission's behalf, for the benefit of its associates.

The Board did not authorise an Investments Committee that was set up within the Authority. Only a select membership of the Board was privy to its existence and operations. Those members in the know probably benefited from the activities that went on. Internal auditing structures were poor. There was lack of clarity about to whom the Auditing Unit reported.

There were patently ineffective checks and balances built into the structures of the Commission, which facilitated the perpetration of the predicate fraudulent activities. Inflated commissions and kickbacks were made and exchanged and then subsequently laundered by the

beneficiaries. One can see from this how crime, and the absence of proper management structures for the hiring and appointment of appropriate personnel, combined with poor corporate governance, can facilitate money laundering. This can arise in any sphere of the financial and commercial sectors.

After the commissions had been generated the beneficiaries were able to launder the money as a result of a variety of favourable factors and circumstances. The first and most important factor was the absence of anti-money laundering criminal legislation. The second was the absence of suitable anti-corruption provisions in the existing law. It is possible that some of the activities of the persons concerned can be prosecuted under the provisions of the current Anti-Corruption Ordinance. However, some of the activities that probably took place, such as the abuse of inside information, cannot be dealt with as such under Namibia's criminal law as it now stands.

An emergent insurance broker, X, who had used his close family connections in the SSC to divert business to himself, invested his funds in accounts opened in the name of shell close corporations. He used these corporations to open trust accounts with a law firm (run by his cousin) and to purchase motor vehicles, real estate and furniture without raising suspicion. In the absence of anti-money laundering criminal and regulatory law, the non-banking financial and commercial services sectors are not bound by any reporting obligations in the face of suspicious transactions. The dealerships, estate agents and retail furniture shops with which the budding broker dealt, as well as the law firm with whom he opened the trust accounts, were under no legal obligation to report the transactions. It is most improbable that the banking institutions would have suspected any of the subsequent deposits of the respective takings. In this manner the proceeds of X's corrupt deals were insinuated into the legitimate banking system through 'innocent' parties.

The exploitation of resources in the Democratic Republic of Congo

The economic activities of various players in the Democratic Republic of Congo (DRC), which first came to light in the late 1990s simultaneously with the ascent to office of the late Laurent Kabila, continue to generate much interest for scholars of money laundering in the sub-region. The emerging picture has been

sketched graphically in various reports of the panel of experts mandated by the United Nations (UN) Security Council.

Extract from the report of the UN Security Council Special Panel on the exploitation of resources in the DRC, October 2002

The report identifies and names the membership of three ‘elite networks’ that have carved out separate spheres of economic control in the DRC over the past four years. “The elite networks’ grip on the DRC’s economy extends far beyond precious natural resources to encompass territory, fiscal revenues and trade in general,” the Panel noted. Panel Chairman Mahmoud Kassem said the activities of the networks involved highly organised and documented systems of embezzlement, tax fraud, extortion, kickbacks, false invoicing, asset-stripping of state companies and secret profit-sharing agreements, and that these activities were orchestrated in a manner that closely resembled criminal operations. “The networks collaborate with organised criminal groups, some of them transnational organisations, in order to maximise profits,” he stated, adding that they use those criminal groups for discreet military operations, money laundering, illegal currency transactions, counterfeiting operations, arms trafficking, smuggling and many other activities aimed at political destabilisation.

The war economy directed by these networks functions under the cover of armed conflict, manipulation of ethnic tensions and generalised violence that generate enormous profits for “small coterie of powerful individuals or the commercial wing on military institutions,” Mr. Kassem said. The activities drain the DRC’s treasury of revenues at the national and local levels and leave the population without basic services.

The advent of peace in the DRC is expected to provide better opportunities to investigate the extent of money laundering involving resources from the country. At this stage, anecdotal evidence exists that minerals such as diamonds and coltan have been smuggled out of the DRC. Estimates by monitors of the international diamond trade are that on average, 85% of the US\$1 billion worth of rough diamonds extracted from the DRC have been smuggled out every year between 1999 and 2002.

The key strategists in the smuggling and money laundering networks are well known personalities, identified in the UN Panel of Experts’

Report. Some of them have invested resources in real estate in South Africa. A commercial bank with close connections to a SADC government has been abused in the acquisition and transmission of foreign currency between the DRC and South Africa.

Organised crime in general

Transnational organised (or syndicated) crime—manifested as theft and hijacking of vehicles, narcotics trafficking, illicit dealing in gold, diamonds and other precious minerals and illicit dealing in firearms and ammunition—continued to affect the sub-region in the period under review. Its incidence is perceived to be part of a global trend demanding the active attention of sub-regional, regional and international entities. The activities of syndicates are most visible in Southern Africa.

Estimates of the numbers of organised crime syndicates active in South Africa vary from 200 to 240. The majority specialise in drug trafficking, vehicle-related crimes and commercial crime. Others are more general and shifty in terms of occupational focus. At least 32 syndicates are believed to be engaged in transnational crime beyond sub-Saharan Africa. The criminal activities of approximately 150 syndicates are committed primarily in sub-Saharan Africa, particularly in Southern Africa. Relationships have been established between some syndicates and criminal gangs. Syndicates employ gangs in street level activities while they remain active in core areas of operation and in co-ordinating the activities of different gangs. The evidence recorded and accepted by the court in the Carlos Cardoso case in Mozambique highlights this.

Revelations from the Carlos Cardoso murder case

This case arose out of the assassination of Carlos Cardoso, prominent investigative journalist and publisher, and the attempted murder of his driver, Carlos Manjate, in a Maputo street on 22 November 2000. The prosecution produced evidence to show that the decision to murder Cardoso was prompted by his efforts in exposing the machinations of the organised crime syndicate responsible for the fraud on the Banco Commercial de Mozambique (BCM), which resulted in the loss of MZM144 billion (US\$13 million). The fraud was committed

in the first half of 1996, just as the bank was about to be privatised. Three of Cardoso's killers were implicated in the fraud. Two of them managed a chain of currency exchange bureaux.

The evidence also revealed that the vehicle in which the assassins travelled to and from the scene of the crime had been robbed (hijacked) from an employee of CESO-CEI Mocambique, Consultoria e Gestao, in Maputo. For the murder of Cardoso, the accused received MZM1 billion (US\$41,670) and ZAR600,000. With part of the money, the assassins bought several motor vehicles in Mozambique and South Africa, a house, a television set and cellular telephones. One of the culprits deposited a small amount of the proceeds in a bank account in Maputo.

Evidence was also presented of an unsuccessful attempt, in November 1999, on the life of the BCM's legal adviser for his part in the fraud expose. A fee of ZAR600,000 had been agreed for the murder of Dr Antonio Albano Silva.

The abuse of the *bureaux de change* in the provision of the bounty in both cases did not form part of the prosecution case, but it seems likely that the bureaux played a critical role.

The six accused—Anibal Antonio dos Santos Junior, Ayob Abdul Satar, Carlitos Rachide Cassamo (who pulled the trigger), Manuel dos Anjos Fernandes, Momad Assif Abdul Satar and Vicente Narotam Ramaya—were all convicted of murder, attempted murder and association with intent to commit a crime and were sentenced to lengthy terms of imprisonment.

The court ordered all the accused to compensate the heirs of Carlos Cardoso in the sum of MZM14 billion (US\$583,333) and to pay MZM500 million (US\$20,833) to Carlos Manjate, who was left paralysed by gunshot injuries to his neck. Compensation was also ordered against two of the accused implicated in the hijacking of the getaway vehicle, worth US\$12,000. All the property proved to have been acquired by the accused as a result of the murder was forfeit to the state.¹⁵

Each of the accused was ordered to pay the costs of the prosecution in the sum of MZM800,000 (US\$33.33).

The temptation to portray Southern Africa as a breeding ground for organised crime should not overshadow the advances made by the law enforcement sector in combating transnational crime in general and money laundering in particular. Proactive initiatives such as new legislation, along with regional co-operation, are proving increasingly successful in countering transnational crime. The period under review was characterised by increased co-operation between law enforcement agencies of South Africa, Tanzania, Zimbabwe, Namibia, Malawi, Swaziland and Mozambique to identify and monitor routes used by international syndicates. Some of the trends noted as a result of recent initiatives deserve to be highlighted.

Terrorist funding: an overview

In paragraph 4 of Resolution 1373 (2001) the UN Security Council highlighted what it characterised as “the close connection between *international* terrorism and *transnational* organised crime, illicit drugs, money laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials...” (emphasis added).

In Southern Africa, incidents of domestic terrorism overshadow those of international terrorism in terms of gravity. Apart from the East African component of the SADC, it is debatable whether significant funding of international terrorism has originated in the sub-region. Notwithstanding the apparently exclusive focus of Resolution 1373 on the funding of international terrorism, to the exclusion of domestic terrorism, the situation regarding the latter deserves examination.

A number of examples of terrorist funding can be identified in Southern Africa. There is controversy regarding the validity of some of them, but this should be viewed against the background of the enduring controversy as to the concept of terrorism itself. Subjectivity permeates the identification of sources of terrorist funding. In the final analysis, terrorism continues to be defined subjectively, in terms of what are often parochial or transient security priorities,¹⁶ which may occasionally shift from time to time.

In the SADC sub-region, there is no country that better illustrates the dilemma (that the absence of a universal definition causes) in identifying sources than the DRC. How one identifies sources of terrorism in the DRC depends on the standpoint adopted. The long-held view of President Joseph Kabila is that the DRC is afflicted by terrorism sponsored by Uganda and Rwanda.¹⁷ In terms of this view, these countries have supported surrogate forces that have committed

(and in some cases continue to commit) terrorist acts. Any other countries that have rendered military and financial support to Uganda and Rwanda could be tainted as supporting terrorism. A British television station, Channel 4, alleged that Uganda and Rwanda continued to receive significant financial assistance from the United Kingdom, and that part of this could be assisting belligerents in the troubled areas of the eastern DRC.¹⁸

Opponents of the Kabila regime in the DRC would contend that government troops and their allies have also been guilty of terrorism, funded out of national resources in the form of minerals and timber. The reports of the UN Panel of Experts on the Exploitation of Natural Resources in the DRC, cited above, support this view. The ‘criminal elites’ are alleged to have privatised the conflict, or parts of it. Their primary motivation is access to precious resources.

Beyond the state and politically compromised actors, terrorist financing in the DRC can also be linked to drug trafficking, arms trafficking, and “mafia-type wheeling and dealing in the context of the vast potential of the DRC”.¹⁹

Other sources of the resources to sustain terrorism can be identified elsewhere in Southern Africa. The role played by diamonds in reviving and sustaining Unita in Angola is well documented. The prospect of gainful extraction of precious resources has lured foreign intervention into theatres of pre-existing conflict and precipitated the opening up of fresh conflicts in both Angola and the DRC. A virtual war economy has been nurtured. Beneficiaries of this economy range from political leaders to multinational corporations, intermediary networks, local military commanders, warlords and organised crime syndicates.

The conflicts around extractive resources have impacted on the fortunes of civilians in both the host countries and the exploiting countries.²⁰ In some cases, the effect has been to yield secondary conflict in the form of terrorism directed at civilians. This has been the case where civilians or civilian structures are perceived to be a hindrance to resource exploitation. In other cases, the local environment, economy and public welfare have been neglected as the focus is placed exclusively on resource exploitation.

At the same time, organisations involved in international terrorism have taken a commercial interest in precious extractive resources since the mid-1970s. Lebanese groups have been active in diamond exploitation, or rather extortion of proceeds from diamond sales, derived from the West African states of Liberia and Sierra Leone and Cote d’Ivoire.²¹ Several studies have linked al-Qaeda with the trade in gold and diamonds from the DRC, Tanzania and South Africa.²²

As the Financial Action Task Force on Money Laundering (FATF) points out:

The advantages that gold provides are also attractive to the money launderer, that is, the high intrinsic value, convertibility, and potential anonymity in transfers. It is used, according to the FATF experts, both as a source of illegal funds to be laundered (through smuggling or illegal trade in gold) and as an actual vehicle for laundering (through the outright purchase of gold with illegal funds).²³

The same can be said of diamonds. The bluish precious stone, tanzanite, has also been linked to illicit dealings for terrorist funding. At one stage, nearly 90% of tanzanite was sold through the parallel markets. In consequence, many different people and groups, including smugglers and terrorists, have attempted to exploit the situation. An organisation which is believed to front for al-Qaeda has made huge profits from sales of tanzanite and may have used them to finance acts of terrorism. (Osama Bin Laden’s one-time personal secretary, Wadih El Hage, is believed to have used the code name ‘Tanzanite’.)²⁴ Fund transfers may have been processed through the ubiquitous *bureaux de change*, retail and wholesale businesses and import/export outlets.

Charitable donations have increasingly come to be regarded as an important avenue for anonymous collection of resources in the form of funds and clothing to support terrorist activity. The significance of this source in the region has not been quantified, although anecdotal indications apparently exist. It has not been conclusively linked to terrorist funding. The most that can be said is that it may have been used in respect of tanzanite. It is arguable that events in Zimbabwe since mid-2000 are symptomatic of government-sponsored domestic terrorism. Terrorist activity is characterised by the widespread use of a government-trained militia, the police and the army.

Recommendations and concluding observations

The observations made in the study on which this chapter is based suggest that SADC states have yet to adopt comprehensive responses to money laundering. At the very least, the incidence of the predicate criminal and other unlawful activities which yield funds for laundering should be measured. The existence of a dual economy in many parts of the sub-region should be considered in formulating strategies against money laundering. There are indications that participation in the formal economy, and its institutions, is not as high as is assumed by emerging anti-money laundering laws.

It is suggested that SADC states should:

- build on the established consensus that money laundering threatens effective government and socio-economic advancement everywhere;
- improve methods of periodically monitoring and measuring the magnitude of money laundering activities. An important element is the official collection, collation and analysis of data. At present this capacity is generally poor and in some countries it has almost been abandoned. Money laundering detection and control is but a part of general law enforcement, so the capacity to achieve it is affected by any factor that impacts on law enforcement capacity as well. If police performance in other spheres is mediocre, it is likely to be even poorer in respect of money laundering. As a mode of criminal conduct, money laundering has the closest relationship to corruption than any other form of misconduct.

It should be pointed out that certain measures can assist in pre-empting the infusion of illicit funds, but these hinge on the level of co-operation linkages that are developed between source and destination countries of money for laundering.

It appears that given the commitment in the sub-region, SADC states can:

- Develop sustainable capacity in the SADC sub-region to address money laundering at nationally, regionally and internationally;
- Give practical effect to the declared commitment to ratify the UN Convention Against Transnational Organized Crime by harmonising supportive legislative instruments at national level. In this respect the ratification of sub-regional protocols would substantially move the process forward. Prominent examples include the SADC Protocols Against Corruption (2001), on Extradition (2002) and on Legal Assistance in Criminal Matters (2002);
- Formulate implementation plans on money laundering and serious economic crime, taking into account law enforcement capacity and shortcomings. Some priorities have already emerged in the course of joint police operations. The UN Office for Drugs and Crime, which has done much work in assisting police agencies to identify deficiencies in mutual co-operation, has pinpointed a set of priority areas including:²⁵
 - improved information technology and information sharing capacity;
 - comprehensive and recurrent training of border and port officials in risk analysis and screening; and

- improved national and regional capacities to collect, analyse and disseminate crime statistics that can help to formulate policies.

It appears that in the process of enacting laws against money laundering, the role of financial institutions in money laundering control needs to be carefully appraised to prevent imposing unmanageable due diligence obligations on them. There is much to be said for the view that the responsibilities of banks should be limited to keeping good records and being good corporate citizens, by:

- reporting suspicious transactions of any sort; and
- reporting crimes to law enforcement agencies.

It is doubtful that banks of the size encountered in the sub-region will be able, in the short to medium term, to go beyond basic 'know your customer' vigilance to the profiling envisaged in developed systems.

Outside the banking sector, the capacity to implement measures beyond the basic level is likely to be more uneven. The size of insurance companies varies considerably, as does that of currency exchange outlets (*bureaux de change*). To be sure, the larger players in these sectors may be able to establish and maintain a forensic analysis function, but they are certain to be a minority. In the short to medium term, profiling and investigative responsibilities should be allocated to government regulatory and law enforcement agencies such as the police and intelligence agencies.

The investigative capacity of the public law enforcement agencies evidently requires upgrading in many parts of the sub-region. A degree of specialisation in detecting suspicious transactions and forensic investigation needs to be built up. As regards the former, the use of information technology is increasing. A number of possibilities have been explored in recent times, for example involving the use of computer software to alert compliance officers and detectives to economic crime and even to trace money laundering. One of the companies that has developed investigative analysis software is United Kingdom-based i2. It claims that its software 'enhances the analytical capabilities of an organisation and enables understanding of complex and volume data'.²⁶ Financial institutions and economic crime investigators could find this kind of software useful.

Notes

- 1 An example is C Goredema, *Money laundering in Eastern and Southern Africa: An overview of the threat*, Institute for Security Studies (ISS), Pretoria, 2003.
- 2 In some cases, repositories of statistics on economic crime and corruption are dispersed between the police, prosecuting authorities, and specialised agencies, such as anti-corruption commissions.
- 3 T Leggett, Perspectives on supply: The drug trade in Johannesburg, Durban and Cape Town, in T Leggett (ed.), *Drugs and crime in South Africa: A study in three cities*, ISS, Pretoria, 2002.
- 4 Over a period of two years.
- 5 From A Standing, *The social contradictions of organised crime on the Cape Flats*, ISS, Pretoria, 2003. The paper can be found at <www.iss.co.za/Pubs/74/Paper74.html>.
- 6 The most recent revelation of the trend was published in an article by prominent journalist Allister Sparks. A Sparks, Zimbabwe slips into Zairisation, *The Star*, 8 October 2003. The article can be found at <www.star.co.za>.
- 7 Durban advocate, Guido Penzhorn SC.
- 8 The amount transferred to the Maseru account was ZAR90,000.
- 9 Fiona Darroch in a draft case study for Transparency International, *The Lesotho corruption trials: A case study*, unpublished, May 2003, at p 28.
- 10 E Joyce, *Recovering stolen assets: An overview*, UNODC Annex III, 2001, pp 14-16.
- 11 In a series of articles that appeared in *Metical* in September 2001.
- 12 At the time of writing in April 2004, the South African government had extended an amnesty to individuals and corporations that might have transferred money out of the country in violation of exchange control regulations before and after democratisation in 1994.
- 13 See P Gastrow & M Mosse, *Mozambique: Threats posed by the penetration of criminal networks*, unpublished paper presented at the ISS seminar on Organised Crime, Corruption and Governance in the SADC region, Pretoria 18-19 April 2002.
- 14 Based on a commissioned report on anti-money laundering capacity in Namibia (July 2003).
- 15 The following goods seized from the accused were forfeited to the state:
 - Light grey Volvo model 960A, registration KWY 870 GP;
 - Metallic grey Volvo model 570, registration MLI-29-46;

- Creme Mercedes Benz model 300D, registration MLS 94-19;
- Grey-blue Toyota Conquest, registration KNB 401 GP;
- Fiat Uno (damaged);
- Portable Casio Radio-TV, model TV-880 U, series no. 9171730A;
- Ericsson cell phone, Series 1130401 - bvca, 08010212 CE0682;
- Nokia 6210 cell phone, no. 449214/20/637345/4;
- Nokia 6210 cell phone, no. 350611/20200589/8;
- Nokia 6210 cell phone, no. 350146/20/706757/7;
- Nokia 6210 cell phone, no. 350769/20903494/7;
- Nokia 8210 cell phone, no. 449306/10/423617/9;
- Nokia 8210 cell phone, no reference number;
- Nokia 3210 cell phone, no reference number;
- Green and white Colman Keep Cold;
- Blue and white small Colman;
- Xirico television set, portable, no. 10370266;
- Xirico television set, model xbw 1299, no. 10369906;
- Black Artech H92World Receiver portable radio;
- Grey and black Ricardo PA982 pocket radio;
- Casio Radio-TV, model TV-770C, series no. 3620098A;
- Casio Radio-TV, model TV-880N, series no. 9171723A.

The court also permitted the state to search for and seize a Mercedes Benz vehicle, registration MLS-94-19.

- 16 The 1999 Anti-Terrorism and Effective Death Penalty Act in the United States describes terrorist activity as *activity which threatens the national security of the United States* (italics added).
- 17 As stated in the initial report submitted by the DRC to the Counter-Terrorism Committee (hereafter DRC Initial report) in compliance with paragraph 6 of the UN Security Council Resolution 1373, 2001, dated 26 December 2001. A supplementary report submitted on 31 March 2003 did not retract this assertion.
- 18 Channel 4 documentary, *Congo's Killing Fields*, shown by the South African Broadcasting Corporation programme *Special Assignment* on 9 September 2003.
- 19 DRC Initial report, p. 6.
- 20 C Goredema, *Diamonds and other precious stones in armed conflicts and law enforcement co-operation in Southern Africa*, ISS, Pretoria, 2002, pp. 2-3.
- 21 A more detailed account is set out in a report by Global Witness, *For a few dollars more: How al-Qaeda moved into the diamond trade*, April 2003.
- 22 See the Global Witness report; also P Bagenda, *Money laundering in Southern Africa: The case of Tanzania* (unpublished report to be included in a forthcoming ISS monograph profiling money laundering in Southern Africa).

- 23 Quoted in the Global Witness report, op cit.
- 24 Wadih el Hage is currently serving a lengthy term of imprisonment in the United States for his part in the embassy atrocities in East Africa in 1998.
- 25 United Nations Office on Drugs and Crime (UNODC), *Strategic programme framework on crime and drugs for Southern Africa 2003*, UNODC, Vienna, 2003, pp. 18-21.
- 26 See <www.i2.co.uk>.

CHAPTER 2 BOTSWANA'S LEGISLATIVE CAPACITY TO CURB MONEY LAUNDERING

Kamogediso Mokongwa

Introduction

The concept of money laundering, though familiar to many legal and financial systems in the First World, is relatively new in the Third World. Botswana is viewed as a shining example of democracy, a country that emerged from rags to riches. This has led people, both locally and internationally, to believe that there is no serious financial crime in Botswana. To most citizens of Botswana, money laundering is not such a common occurrence as to warrant legislative attention. The Criminal Code of Botswana (Cap. 08:01) does not address money laundering or its related offences. It cannot therefore be easy for financial institutions to take measures to deal with money laundering without clear policy or legislation.

Provisions that have a bearing on money laundering are found in seven pieces of legislation, namely:

- the Banking Act (Cap.46:04);
- the Bank of Botswana Act (Cap. 55:01);
- the Proceeds of Serious Crime Act (PSCA) (Cap. 08:03);
- the Corruption and Economic Crime Act (Cap. 08:05) (CECA);
- the Extradition Act (Cap. 09:03);
- the Banking (Anti-Money Laundering) Regulations (S.I. No. 17 of 2003); and
- the Mutual Assistance in Criminal Matters Act (MACMA) (Cap. 08:04).

Existing institutional mechanisms to detect and control money laundering

Definition of money laundering

In order for financial institutions to be able to curb money laundering, the law must provide an unambiguous definition of the concept. Sections 14 and 17 of the Proceeds of Serious Crime Act (PSCA) deal with money laundering. Section 14 stipulates that a person commits money laundering if he:

- engages, directly or indirectly in:
 - a transaction that involves money, or
 - any other property that is the proceeds of a serious offence;
- receives, possesses, conceals or brings into Botswana, any money or property that is the proceeds of a serious crime and the person knows or ought to reasonably know that such money or property is derived or realized from an *unlawful activity*.

The Act does not, however, specify what constitutes an unlawful activity.

Section 15 of the PSCA is concerned with the concealment of money or property. Subsection (2) defines concealment of money or property to include concealment or disguise of the nature, source, location, disposition, movement, ownership or any rights with respect to such money or property.

It may be argued that a person can only conceal or disguise the nature, source, location, disposition movement, ownership or any rights with respect to such money or property if he or she knows that the money or property in question is tainted, dirty or somewhat related to an unlawful activity.

The definition of money laundering may be weak, but it is fortified by the subsection dealing with concealing or disguising the origin of laundered money or property.

Even though banks, building societies, insurance institutions and professional intermediaries in Botswana are vulnerable to money laundering, they are guided on how to identify tainted money or property.

Institutions regulated by Financial Services Centres (FSCs) include banks, insurance companies and building societies. Section 17 of the PSCA lumps them together as 'designated bodies'.

Section 17 does not define 'designated bodies' but it states that the section applies to:

A person or body of persons whose business consists of or includes the provision of services involving the acceptance or holding of money or property for or on behalf of other persons or whose business appears to the Minister to be liable to be used for the purpose of committing a crime.

In short, a designated body is any business that, it appears to the Minister, is liable to being used for the purposes of committing a serious offence. It is not clear how the Minister reaches that conclusion. Designated bodies include, among others, any bank licensed under the Banking Act, savings banks or post offices, registered stockbrokers, long-term insurance business specified under the Insurance Industry Act (Cap. 46:01), foreign exchange businesses licensed under the Bank of Botswana Act or any other person or body as the Minister may prescribe by order.

The Schedule to the PSCA further lists business relationships, transactions and services under section 17(3). Therefore, any person or business that is involved in such business relationships, transactions and services, is a designated body. These include, *inter alia*, lending, financial leasing, money transmission services, participation in share issues and the provision of services related to such issues, safekeeping and administration of securities, all types of direct life assurance, etc. It must be noted that the section does not seem to directly provide for law firms, which may hold money for clients in their trust accounts.

Proof of identity

In terms of section 17(6) of the PSCA, a designated body is obliged to take reasonable measures to obtain the required proof of identity of a person with whom it proposes to enter into a business relationship or to provide services of a kind specified in the Schedule. However, subsection 6 only applies where the services are in respect of a single transaction or a series of transactions which are, or appear to be, linked to an amount in the aggregate prescribed in the regulation.

Further, section 44 of the Banking Act obliges a bank to open accounts and accept security deposits or rent out safe deposit boxes only when the bank has established the identity of the person in whose name the funds or securities

are to be credited or deposited or the identity of the lessee of a safe deposit box. Where a bank is not satisfied with the true identity of a customer in terms of the Act, it is required to close the account or security deposit or terminate the lease of the safe deposit box and report the matter to the Central Bank.

The true identity of the customer will assist the financial institution in detecting whether or not the money is from an unlawful activity.

Regulations 5-9 of the Banking (Anti-Money Laundering) Regulations also deal with customer identification. They oblige a bank, when establishing business relations, to request from a customer certain documents to prove their identity. This requirement is to ensure that banks are not used to launder tainted money. Where a bank fails to establish the identity of a customer, it is required to close the account or deny the facilities in question. One method by which the bank may verify the names and addresses of its customer is by obtaining a reference from a well-known professional, an employer of the customer, a known customer of the bank or a customary authority that knows the applicant.

Reporting of excess amount of cash or property

Section 17(14) of the PSCA requires a designated body that is a party to a transaction involving an amount of money that exceeds an amount prescribed, from time to time, to report the details of the transaction to the Directorate on Corruption and Economic Crime (DCEC) and to the Regulatory Authority. No regulations prescribing such amounts have been made yet.

At a practical level, however, where a customer deposits an amount exceeding BP10,000 (approximately US\$2500) most banks will inquire from the client how the money was acquired. This practice should not be waived, regardless of the type of customer or his identity. There are occasional reported deviations, such as the reported case of a BP50,000 (US\$12,500) deposit by a Government Minister into a personal bank account that appears not to have been brought to the attention of the DCEC. In consequence, it was never investigated.

Barclays Bank of Botswana has indicated that some of its money laundering control practices are based on instructions from its British-based head office. As far as the bank is concerned, its practices would not be affected by the absence of anti-money laundering laws in the country: if the parent bank provided international guidelines to be followed, it would comply.

Regulation 12(2) of the Banking (Anti-Money Laundering) Regulations requires a financial institution to complete such forms as the Bank of Botswana may prescribe to record an outward transfer or a foreign currency payment for any foreign currency receipts or funds from external sources. Where the transaction involves an amount of BP10,000 or more, the customer must produce full details of the transaction including the name, identity number, purpose, address and other details of the transaction. Whatever records are obtained from the client shall be kept as originals, stored on microfilm or a computerised form for a period of five years so that they may be used during an investigation if the need arises.

Anonymous accounts and suspicious activities

The Banking (Anti-Money Laundering) Regulations prohibit financial institutions from opening anonymous accounts or accounts in obviously fictitious names. Further, a financial institution is to report to the Bank of Botswana (BoB) and the Financial Intelligence Agency (FIA) any transactions by their customers involving large amounts of money or suspicious activities. The Third Schedule to the Regulations lists certain activities that are referred to as '*suspicious activities*'. These include the following:

- suspicious customer behaviour, e.g., if a customer has an unusual or excessively nervous demeanour or behaves abnormally;
- if a customer's permanent address is outside Botswana;
- if a customer makes a large cash deposit without counting the cash;
- a wire transfer that moves large sums to secrecy havens such as the Cayman Islands, Hong Kong, Luxembourg, Panama or Switzerland;
- if an employee lives a lavish lifestyle that could not be supported by his or her remuneration; or
- if an employee avoids taking vacations.

A financial institution is further required to designate one employee as a money laundering reporting officer who serves as a contact person on money laundering matters between the financial institution and the BoB, the FIA and the Botswana Police. A further requirement of the Regulations is for the financial institution to train its staff, irrespective of the level of seniority, on the importance of

reporting any suspicious transactions to the money laundering reporting officer. The Regulations further set out programmes for staff training.

Anti-Money laundering measures and practices

The Banking (Anti-Money Laundering) Regulations oblige financial institutions to put in place anti-money laundering measures and adopt such practices as are necessary for the prevention of money laundering.

Factors that create exposure to money laundering

Even though the relevant pieces of legislation seem to be addressing money laundering, a major weakness is that there does not seem to be any connection between the laws and what actually happens on the ground. A survey of stakeholders revealed ignorance of the concept of money laundering and the relevant laws.

Anecdotal evidence suggests that there is a high level of economic crime and corruption in the country. It is evident that there is a significant number of individuals in positions of power that live beyond their means, with multiple ownership of costly residential properties being common. The source of their income cannot be established. Some are known to have established charitable organisations that donate huge amounts of money without identifiable sources. Other lavish acquisitions noted include aeroplanes. All these have raised a major challenge to the police and the DCEC.

Two of the well-publicised cases involving high-ranking officials were both connected to public works in Botswana. The *State v. Kemokgatla*, involved a construction company, Zakem, that bribed Kemokgatla, the then-Director of Roads, to award it a multimillion Pula contract. Kemokgatla accepted the bribe and built himself a massive double storey house in Gaborone with the proceeds. Construction of the house raised the suspicion of bribery. The Managing Director of Zakem turned a state witness during the trial. Kemokgatla lost his appeal to the High Court in 2003 but the house in question is still registered under his name at the Deeds Office.

The other corruption case led to litigation, in *State v. Rabana*. Rabana was an Assistant Managing Director of the Botswana Housing Corporation when he was charged with corruption. What led to his arrest was the lavish lifestyle he led. His family spent holidays in Disneyland and he built a massive structure at his home village, Shoshong. His house was later termed '*Shoshong Sun City*'.

This case is still continuing after more than eight years of investigations; meanwhile, Rabana is employed in South Africa and his family continues to enjoy the benefits of living at Shoshong.

Cases such as these indicate that corruption is rampant and that there are indeed proceeds available for laundering.

The magnitude of capital flight that is linked to corruption is not fully understood in Botswana, especially as no survey has been conducted to reveal whether such an activity takes place in the country.

Capacity of authorities to detect money laundering

The CECA empowers the DCEC to investigate any person where there are reasonable grounds to suspect that the person maintains a standard of living higher than is commensurate with his means. This requirement, though it appears to empower the DCEC, is somewhat limiting in the sense that where a person such as the businessman referred to above, claims that his lavish lifestyle is from a loan-sharking business, the investigation may not yield anything. The DCEC does not seem to have enjoyed much success in investigating those in higher positions of power.

Further, the use of criminal law to punish money laundering has limitations. In other jurisdictions, such as South Africa, civil law is used to take away the proceeds of crime from launderers. It is more difficult to prove beyond reasonable doubt, as the criminal law requires, that the money in question comes from illicit activities, than it is to establish a claim sufficient for a civil forfeiture.

It must, however, be noted that CECA empowers the DCEC to investigate any alleged suspected offence under the Act, or any other offence disclosed during such an investigation. Therefore, even though the CECA mainly provides for public bodies, or the Act confines the powers of the DCEC to the investigation of allegations of corruption in public bodies, an offence of money laundering may be investigated even if it does not involve a public body. A plausible interpretation of the Act is that a money laundering offence may be investigated if, during an investigation of complaints alleging corruption in a public body, there is evidence that the offence of money laundering is being committed.

Further, the Act provides that if during the investigation of an offence under the Act, another offence is disclosed, the officer is empowered to arrest without

a warrant, any person the officer reasonably suspects to be guilty of other offence. It may be argued that money laundering is included in the words 'any other offence'.

It must be noted that the Act does not empower the DCEC to investigate money laundering if it does not take place within public bodies. This is an unfortunate situation because, the DCEC, being an independent body with its own budget, can attract the cream of the crop to fight corruption and money laundering.

The possibility of conflicts over turf between the police and the DCEC cannot be ignored. An effective campaign against money laundering will require that the responsibility of dealing with money laundering be streamlined, so that technical capacity can be provided to the appropriate agency.

Section 8(1) of the PSCA empowers the Attorney-General to apply to a court, *ex parte*, for a restraining order where a person is charged with, or is about to be charged with, a serious offence. The investigating officer must state that he reasonably believed that the defendant received or derived proceeds from the commission of an offence and he must identify the property that he reasonably believes to represent the proceeds received or derived by the defendant from the offence. However, the use of restraining orders has proved difficult in practice.

Section 2 of the PSCA defines the term 'serious offence' as an offence for which the maximum penalty is death or imprisonment for less than two years. This definition is not helpful to financial institutions in that most offences fall within it. It can be argued that the legislature, when enacting the law, did not have all offences with imprisonment for less than two years in mind. Therefore the legislature must narrow it to financial crimes including money laundering and terrorism offences.

In so far as cross-border issues are concerned, section 20 of the PSCA provides for mutual assistance by countries in relation to confiscation and restraining orders regarding offences equivalent to a serious offence in Botswana, as defined in the Act.

Section 3 of the MACMA empowers the Minister to make regulations for mutual assistance in criminal matters to any country with which Botswana has made arrangements. The objectives of the Act are to facilitate the provision to, and offer by, Botswana of international assistance in criminal matters, including obtaining evidence, documents' location and identification of witnesses or

suspects or property that may be confiscated, freezing of assets and execution of requests for search and seizures. Section 30 (a) provides for a request by a foreign country for search and seizure of tainted properties situated in Botswana. The Act does not define 'tainted property'.

Prosecutors have identified practical difficulties in implementing the provisions of section 3.

Capacity of financial and related institutions to discharge their responsibilities effectively

The PSCA and the Banking (Anti-Money Laundering) Regulations provide for capacity building by the financial institutions and for them to designate an officer as a money laundering officer and to train members of staff on money laundering issues. However, research revealed that some employees of financial institutions were not aware that there was such a designated money-laundering officer, or the requirement to appoint such an officer.

Compliance with the minimal statutory requirement may also not be good enough. The legislative requirement to have one person designated as a money laundering officer means that if that person, who is likely to be a senior bank official, is away from the bank, there will be no-one to deal with money laundering related issues. It is advisable to designate two persons so that one is always available. Failure to do so may be interpreted as banks not taking money laundering seriously.

At the time of writing, there were still banks without training programmes on money laundering, or with training programmes of which employees were not aware. e no designated money laundering. In the insurance industry, as in the commercial sector, there were no designated money-laundering officers and employees did not seem to know what money laundering is all about.

Though the DCEC's independent budget makes it likely to attract qualified staff such as forensic financial investigators, financial lawyers, economists, etc., it cannot offer the salaries demanded by professionals in these areas. As with other public sector employees, the DCEC staff salary scales are set by Central Government.

It is therefore suggested that according the DCEC the kind of independence enjoyed by institutions such as the Serious Fraud Office (SFO) in England would

go a long way to ensure that it is able to develop the capacity and the technical skills to effectively discharge its added responsibilities.

Further, even though the Banking Act refers to the DCEC as the Financial Investigating Authority, the Act in terms of which the DCEC was established does not conceive of it in this way. This raises the possibility of the DCEC's powers as the FIA being called into question. There is a need to rectify this anomaly.

The capacity of the police force to discharge its responsibilities is also limited. Money laundering, especially in its layering and integration phases, can take sophisticated forms. To untangle some of the conceivable schemes requires police officers who are specially trained in the investigation of financial crime. Insofar as the police do have the technical capacity to prosecute money laundering cases, such cases may be referred to the Attorney General's Chambers. However, only a few members of Chambers have been exposed to money laundering.

Money laundering is an offence that is linked to terrorism. Terrorists launder money by, for example, buying and selling properties and using the funds derived from such sales to finance terrorist attacks. However, currently there are no legislative provisions linking money laundering and terrorism. It is common cause that terrorists may launder money by establishing schools, charitable organisations or non-governmental organisations (NGOs), churches as well as mining consortiums. But the law in Botswana is silent on terrorism despite the fact that Botswana has ratified all terrorism-related conventions.

Ordinary citizens do not seem to think that terrorist attacks could occur in Botswana or that locals might be used during such attacks. The terrorist attack on 7 August 1998 in Tanzania bears witness to the fact that terrorism has no respect for borders, religious affiliation, ethnic origin or political affiliation. The public in Botswana, however, seems unaware of this.

Further, there seems to be no exchange of information in Botswana society relating to money laundering and terrorism in the domestic and international context. Anecdotal evidence suggests that sham marriages by potential terrorists may be an emerging phenomenon in Botswana, but the implications of such marriages are not fully understood by locals.

In relation to the UN Security Council Resolution 1373 of 28 September 2001, no legislation has been drafted to incorporate the mandatory decisions taken

in the Resolution into law. In a report dated 22 December 2001 to the UN Security Council, pursuant to paragraph 6 of Resolution 1373 concerning counter terrorism, Botswana reported that it had taken steps to implement the Resolution. However, the report revealed steps taken before 2001 and no legislation on counter-terrorism measures has been enacted post-September 2001. Botswana committed itself to fully and effectively implementing the Security Council resolutions on terrorism, as evidenced by the establishment of the National Anti-Terrorism Committee (hereafter the Committee). However, Committee members revealed a lack of serious commitment and direction by the government. For example, no ministry is designated a focal point in the event of a terrorist attack.

The Committee comprises officials from:

1. the Ministry of Foreign Affairs, which chairs the Committee;
2. the Office of the President;
3. the Attorney-General's Chambers;
4. the Department of Civil Aviation;
5. the Botswana Defence Force;
6. the Botswana Police;
7. the Department of Customs and Excise;
8. the Department of Immigration and Citizenship; and
9. the Bank of Botswana.

Botswana reported that the Committee's mandate was to enforce financial laws and regulations, immigration control, aviation security, asylum control and other law enforcement measures. It was not explained how the Committee works with law enforcement organs and the Committee is not empowered by any law.

Botswana further said that it had instituted strict measures to ensure that funds owned by Botswana nationals or funds in the territory of Botswana are not used to support terrorist activities. This was done through a circular issued by the Bank of Botswana to all financial institutions, instructing them to take all measures necessary to ensure that they do not provide "safe harbour for terrorist actions or activities and to freeze without delay funds and other financial assets

of persons who may be suspected of participating in terrorist activities". The government further reported that no activities had been detected to suggest that Botswana's financial institutions could have been used to make funds, financial assets or financial services available, directly or indirectly, for the benefit of persons involved in terrorist activities. This, it was said, was largely due to the country's strict laws on money laundering.

However, the existing money laundering laws have loopholes that need to be tightened to ensure that they are indeed strict. No country is immune to money laundering and terrorism. Saying that no money laundering activities has been detected does not necessarily mean that financial institutions in Botswana cannot be used to launder dirty money.

Recommendations for legislative and institutional measures

To meet the requirements of Resolution 1373 and the 12 UN counter-terrorism conventions, the following legislative and institutional measures should be taken:

1. members of the public should be encouraged to be vigilant and aware of money laundering and terrorism;
2. multi-disciplinary task forces should be established and empowered to investigate money laundering and terrorism;
3. capacity of law enforcement agencies should be developed to enable them to investigate and enforce money laundering as well as the adoption of counter-terrorism measures;
4. Botswana's long and porous borders should be patrolled;
5. a cross-border exchange of information relating to money laundering and terrorism should be encouraged;
6. money laundering should be clearly defined and linked to terrorism;
7. money laundering and counter terrorism measures should be incorporated into domestic laws;
8. money laundering regulations should be made applicable to all financial institutions, not just banks. This would require all anti-money laundering legislation to be brought together into one piece of legislation rather than being scattered in different pieces of legislation.

9. anti-money laundering measures must be put in place by all financial institutions; and
10. banking institutions must, as a matter of urgency, have anti-money laundering training programmes in line with the Banking (Anti-Money-Laundering) Regulations.

CHAPTER 3 THE CONTROL OF MONEY LAUNDERING AND TERRORIST FUNDING IN KENYA

George Kegoro

Introduction

The control of money laundering in Kenya requires action at two levels. At the first level, measures are required to detect, punish and control economic crime, which generates the money that then needs to be laundered. An earlier study identified the principal sources of proceeds of crime, which include corruption, drug trafficking and violent crime. Measures to control offences related to these activities will have a direct and beneficial impact on the control of money laundering in Kenya. The first part of this study is, therefore, devoted to a review of the arrangements in place for the control of criminal activity whose motive is financial gain.

At the second level, measures are needed to address the problem of money laundering directly, as an independent and logical result of economic crime. An evaluation of the institutional and legislative arrangements necessary to achieve the desired controls is needed. The second part of this study attempts to review existing institutional and legal controls on money laundering with a view to suggesting reforms where deficiencies are detected.

The control of money laundering is the subject of increased interest as a result of the events in the United States (US) on 11 September 2001. It is recognised that terrorism would be checked by controlling terrorists' financial capacity to organise. This requires detecting the movement of money that would be used in assembling the accessories of terrorism. Money laundering control is, therefore, important for the purpose of controlling terrorism. In response to the threat of terrorism, the United Nations (UN) Security Council passed Resolution 1373 (hereafter the Resolution) on 28 September 2001, which imposes a number of obligations on member states with regards to combating terrorism. This study will review the adequacy of Kenya's compliance with the Resolution.

Apart from the attacks in the US, Kenya has had two serious terrorist attacks of its own: on 9 August 1998 and again in December 2002. These attacks have raised a home-grown concern over terrorism, which is independent of the concern brought about by the more famous attacks in the US. This study will, therefore, review existing institutional and legislative controls against terrorism and give a comment on their adequacy.

Part I: The control of corruption

Kenya is perceived as one of the most corrupt countries in the world.¹ Corruption accounts for the largest amounts of illegally earned wealth in the country, ahead of the illegal trade in narcotics and other forms of organised crime. For example, it is claimed that the sum of Ksh600 billion held in foreign accounts by ten of Kenya's political elite is all the proceeds of corruption.²

Historically, institutions to fight corruption in Kenya have been weak, enjoying little official support. Until 2003, when it was repealed, the sole legal basis for fighting corruption was the Prevention of Corruption Act. Enacted in 1956, the Act made it an offence for a public official to accept a bribe or other inducement as consideration for the performance of official duties. Until 1991, however, there was little attempt to enforce the Act. Then, in 1991, the Act was amended to provide stiffer sentences for corruption. Again, there was still no attempt to enforce the Act. In 1993 the government set up an anti-corruption unit within the police force only for this to be disbanded two years later, following a mysterious fire which destroyed its headquarters. Then in 1997, the government, in fulfillment of donor conditionalities, amended the Prevention of Corruption Act to establish the Kenya Anti-Corruption Authority (KACA) as an independent anti-corruption authority. Its first director was appointed the same year, and when, the following year, the authority sought to prosecute a number of ranking public officials from the Kenya Revenue Authority for the non-collection of Ksh230 million in taxes, its director was dismissed by the President.

Public opinion at the time was that attempts to prosecute the public officials had interfered with vested political interests, which prevailed against KACA through the tribunal process.³

When KACA sought to prosecute other corruption cases under a new director the High Court intervened, declaring that the authority's statutory power to conduct prosecutions was unconstitutional.⁴

In the intervening period the High Court delivered another decision, in December 2001,⁵ discharging a cabinet minister from prosecution for corruption on the grounds that there had been undue delay in commencing the prosecution. In arriving at the decision, the High Court interpreted a provision of the Constitution of Kenya requiring that criminal prosecutions, once started, should be concluded quickly, as also requiring that where there had been a long intervening period before a person was charged, irrespective of when the offence was discovered, such a prosecution would be unconstitutional.

The two decisions, rendered a year apart, are considered to be part of a tendentious misinterpretation of the Constitution to build a body of jurisprudence that is hostile to the fight against corruption. The Judiciary has, thus, displayed its dislike for the enforcement of anti-corruption legislation, some of which it has selectively struck down as unconstitutional.

The new anti-corruption arrangements

Following declarations by the judiciary that existing anti-corruption legislation was unconstitutional, the National Assembly, after several unsuccessful attempts, finally enacted two pieces of legislation that represent a fresh basis for the fight against corruption. These are the Anti-Corruption and Economic Crimes Act, 2003⁶ and the Public Officer Ethics Act, 2003.⁷ As these two statutes are of significant relevance to the control of money laundering, their provisions will be discussed at some length.

The Anti-Corruption and Economic Crimes Act came into force only in May 2003. The Act establishes the Kenya Anti-Corruption Commission⁸ (hereafter the Commission) as an independent body in charge of the fight against corruption. The Commission's director is appointed by the President on the advice of an advisory committee and with the approval of the National Assembly.⁹

The Act requires the appointment of special magistrates, conferred with exclusive jurisdiction to try offences under its provisions.¹⁰ They have the power to pardon any person on condition of their making a full and true disclosure of the whole circumstances within their knowledge relating to an offence under the Act.¹¹

The Commission is empowered to carry out many functions of which two are of relevance to this discussion. Firstly, the Commission has power to investigate

conduct constituting corruption or economic crime and to assist other law enforcement agencies to do so.¹² Secondly, the Commission has power to investigate the extent of liability by public officials for loss or damage to public property and to institute civil proceedings for the recovery of such property. The Commission may institute recovery proceedings even if the property is outside Kenya.¹³

The Commission may, by notice, require persons reasonably suspected of corruption or economic crimes to furnish, within a reasonable time, a statement enumerating the suspected person's property and when and how it was acquired. It is an offence punishable by a fine or imprisonment to fail to respond to a notice issued by the Commission or to provide false or misleading information in a declaration. The Commission may, in addition, require associates of a suspected person to provide similar information about the suspected person's property.¹⁴ The Commission is empowered to require the production of records held by third parties if they relate to the property of a suspected person and to take and keep copies of such records. Records, for clarity, include bank accounts and other accounts. The Commission may also require a person in whose possession is property that is the subject of its investigation, to produce such property for its inspection.¹⁵

It is an offence to knowingly deal with property acquired through corruption. Dealing with such property is defined as including holding, receiving, concealing, using or entering into any transaction in relation to such property.¹⁶ Where a person corruptly derived a quantifiable benefit or the public made a loss as a result of dealing by any person with property acquired through corruption, the Act provides that, in addition to the fine of Ksh100,000 or imprisonment for up to ten years, the offender shall be liable to a mandatory fine equivalent to twice the value of the quantifiable benefit or the loss to the public.¹⁷

The Commission may commence civil proceedings against a public official or a former public official, if, after investigation, it finds that he has unexplained assets about which, after he has been afforded reasonable opportunity to explain their source, he is unable to provide an adequate explanation.¹⁸ Where such proceedings are brought, the court may order the person to pay compensation equal to the unexplained assets to the government.¹⁹ For the purpose of such proceedings, assets include those held in trust for the person and assets given away by the person as gifts or loans without compensation. For purposes of evidence, unexplained assets may be taken as corroboration that a person corruptly received a benefit.

The Commission may apply to court, *ex parte*, for the preservation of property pending litigation.²⁰

The Public Officer Ethics Act also came into force in May 2003. The Act establishes a code of conduct and ethics to which all senior public officials must subscribe.²¹ The code prohibits public officials from engaging in improper enrichment and from accepting any personal benefit in the performance of public duty and requires officials to declare personal interests if these conflict with official duty.²²

The Act requires that every public officer to whom it applies shall annually submit a declaration of the income, assets and liabilities of himself, his spouse and dependent children under the age of 18.²³ By August 2003 public officials are expected to submit the initial declarations under the Act.

Declarations received from public officials are to be held in confidence and should not be disclosed to the public. Information contained in the register of declarations may only be disclosed to law enforcement agents or for purposes of judicial proceedings.²⁴

A competent authority may investigate, whether on its own initiative or after a complaint, if a public official has contravened the code of conduct and ethics. After investigation the authority may take disciplinary action or refer the matter to another authority for its action.²⁵

A comment on the anti-corruption legislation

The attacks by the judiciary against the prosecution powers that were vested in the original KACA have convinced the authorities to segregate this power, leaving the new Commission only with the role of investigating corruption cases and initiating civil recoveries. Prosecution will now be conducted by the office of the Attorney-General, which also prosecutes all the other crimes. The argument behind conferring the KACA with prosecution authority was that the office of the Attorney-General had exercised its power to prosecute offences of corruption in an unaccountable manner, leaving deserving cases not prosecuted. For better or worse, therefore, investigation and prosecution have been segregated, the former being conferred on the Commission and the latter on the Attorney-General. As a check on his exercise of this power, the Attorney-General is required to make annual reports to the National Assembly explaining his decisions on the cases referred to him for prosecution.²⁶

The poor record of the judiciary in enforcing the previous anti-corruption legislation has led to the creation of special magistrates' courts with exclusive jurisdiction to try offences under the Act. Presumably only persons with the highest integrity will be appointed as magistrates under the Act. However, the right of appeal, which would have to be exercised in the existing judiciary, provides a potential threat to the enforcement of the legislation.

If enforced, the provisions in the Act concerning unexplained assets will contribute to the fight against money laundering. Unexplained lifestyles, which are a product of economic crime, are directly targeted by the provisions. The power to seize assets and to confiscate proceeds of economic crime will, if enforced, also strengthen the fight against money laundering by promoting a culture that questions the sources of all property and wealth. The strategies for enforcing the anti-corruption legislation, including the freezing of assets and the power to compel third-party disclosures and confiscation, are all part of typical anti-money laundering procedures. The introduction of these measures into legislation will, therefore, add to the existing body of legislative measures that empower public authorities to question sources of wealth and to confiscate wealth whose acquisition was the result of crime. Anti-money laundering measures will easily fit into, and will be reinforced by, the existing laws which target the proceeds of corruption.

The Public Officer Ethics Act provisions requiring the declaration of assets and liabilities will provide law enforcement with invaluable financial intelligence, which is of crucial importance from the point of view of money-laundering control. Further, if properly enforced the provisions will act as a deterrent against economic crime since a framework now exists that questions the sources of wealth.

The importance of the provisions in the Acts in the fight against money laundering must, however, not be overstated. Ultimately, as history has shown, good legislation is easily defeated by political indifference and even hostility. Moreover, a number of weaknesses exist in this latest legislation, including the following:

- The Public Officer Ethics Act requirements that exclude the public from access to information contained in the register of declarations severely undermine the purposes of the legislation. Without public involvement it is unlikely that the legislation will be enforced with the requisite robustness.
- There should have been a requirement that all family members of a public official, not just dependents, should declare their assets and liabilities.

- Declarations are to be made on a prescribed form, which is not structured to extract the greatest possible amount of information from public officials.
- There are no provisions under the Act to obligate the authorities responsible for receiving the declarations to make adequate administrative arrangements for processing the information declared. It is likely, therefore, that enforcement of the legislation will be hampered by administrative inadequacies.
- There is no requirement or provision for the training of public officials who will be responsible for the enforcement of the legislation.

However, unlike in the past the new Kenyan government, which came into power at the beginning of 2003, has made strong statements against corruption and has promised that the fight against it will be a top priority. Political support in the fight against corruption, which has previously been doubtful, is now promised in abundance.

The control of narcotics and psychotropic substances

Kenya is an important country in the trafficking of narcotic drugs and psychotropic substances. Its geographical location makes the country an important mid-way point between Asia, the source of a large amount of narcotic drugs, and Europe and North America, which are the main markets. Kenya is, therefore, an important trans-shipment point where narcotics are repackaged for onward trafficking to Europe and North America.

Estimates indicate that the trade in narcotics represents millions of US dollars every year.²⁷ Studies have continually linked trade in narcotics with elements in the Kenyan state, making this an important political problem.

Arrangements for the control of drug trafficking are based on the Narcotic Drugs and Psychotropic Substances Act, enacted in 1994.²⁸ The Act prohibits the possession of and trafficking in narcotic drugs and psychotropic substances and the cultivation of certain plants. It provides stiff sentences for offences in relation to these prohibitions.²⁹ For example, a person who is found in possession of any narcotic drug or psychotropic substance is liable to imprisonment for 20 years if the drug or substance is for his own use and, in every other case, an additional fine of not less than Ksh1 million or three times the value of the prohibited substance, whichever is greater.

Any land on which a prohibited plant is cultivated is to be forfeited to the state,³⁰ as are machinery, equipment, implements, pipes, utensils or other articles and conveyances (aircraft, vehicles and vessels) used for the commission of any offence under the Act.³¹

The Attorney-General is empowered to apply to the High Court for an order restraining the property of any person who has committed an offence under the Act. The transfer of any property after the Attorney-General's application is void. The Court may direct the respondent to submit, within a reasonable time, a statement of his assets and liabilities and failure to do so is itself an offence. The Court is empowered to make any interim orders that would secure the ends of justice. The forfeiture of property is, however, subject to the claims and interests of innocent third parties against such property.³²

The Act empowers the government to enter into any arrangement with the government of any other country for the recovery and handing over of possessions to the government of Kenya of any property in respect of which an order of forfeiture has been made and which is in that country, and for tracing and preserving any property in that country owned or under the control of any person who has, or is suspected to have, committed an offence under the Act.³³

The government of Kenya may similarly enter into any arrangements, on a reciprocal basis, with the government of any other country in respect of recovery and handing over of possession to the government of that country of any property in Kenya which is confiscated by or forfeited to the government of that country in consequence of any commission of an offence against a corresponding law of that country.³⁴

The Act then makes provisions against the laundering of the proceeds of drug trafficking.³⁵ It is an offence for any person to conceal or disguise any property which, in whole or in part, directly or indirectly, represents his proceeds from drug trafficking. It is also an offence if any person converts or transfers any property or revenue from Kenya which is the proceeds of drug trafficking for purposes of avoiding prosecution. Further offences relate to the acquisition of such property for no or inadequate consideration.

These offences are to be punished by imprisonment for up to 14 years, and such punishment is in addition to, and does not derogate from, any other punishment for related offences already provided in the Act.

A comment on the Act

The Narcotic Drugs and Psychotropic Substances Act met with instant resistance upon implementation in 1994. The principal criticism was that it was enacted without any form of public consultation, which served to alienate the public once implementation started. The judiciary initially interpreted the Act as prescribing minimum sentences for the possession of 'soft' drugs, a fairly common problem in Kenya that receives widespread judicial leniency. The courts, therefore, interpreted the legislation as taking away their discretion on sentencing and requiring them to deal with inappropriate harshness with offenders convicted for 'soft' drug offences.³⁶

A workshop convened to review the Guidelines for Kenyan Drug Control Master Plan held in 1999 summarised experiences in implementing the Act as follows:

- Large numbers of suspects released on bail while awaiting trial, abscond. As a result, an amendment was included in the Constitution taking away the right to bail for drug-related offences, as a specific derogation from the right to bail which is constitutionally guaranteed.
- Poor investigation of cases leads to a large number of acquittals.
- Corruption, a pervasive problem in the judiciary, is especially noticeable in relation to drug-related cases, in which the stakes are typically high.
- Relatively low understanding of drug-related jurisprudence by the judiciary and the private legal profession leads to poor enforcement of the Act.³⁷

To oversee the enforcement of the Act, the government has established the Interministerial Drug Co-ordinating Committee (IDCM), an informal committee bringing together law enforcement personnel from various government departments. The IDCM is responsible for:

1. the development and implementation of a national plan of action for drug control;
2. implementation of provisions of the Single Convention on Narcotic Drugs, 1961, the Convention on Psychotropic Substances, 1971 and United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988;
3. updating and implementing drug control laws and regulations;

4. enforcing drug control, precursors and drug-related money laundering laws, without prejudice to the operational role of the Central Drug Enforcement and Anti-Money Laundering Services;
5. monitoring drug abuse and public information for the youth, for families, educators and the general public, and by supporting other initiatives in the files of information and prevention;
6. establishing a viable data collection and analysis system on drug abuse and drug trafficking at the national level;
7. ensuring the development of treatment and rehabilitation programmes for drug addicts;
8. undertaking research on drug addiction;
9. ensuring the training of personnel in charge of measures dealing with drug abuse and drug trafficking, money laundering and precursors;
10. promoting and ensuring the promotion of international co-operation in combating drug abuse and drug trafficking; and
11. ensuring co-ordination and support of activities of non-governmental organisations and associations participating in drug abuse control.³⁸

Commenting on the IDCM the workshop remarked that its establishment had 'noble' intentions. However, it noted that being only a committee the IDCM "has got no statutory existence, no executive authority, no budgetary allocation and no visible public presence". It was therefore recommended that a master plan on drug control in Kenya should establish a working secretariat on a short-term basis and "put in place arrangements for research to compile indicative data as to the drug abuse situation in Kenya" on a medium-term basis. It was also recommended that in the long term, "drug control in Kenya should have a visible and committed political leadership".³⁹

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

of the Act. The Crucial Properties Case, as it was called, is discussed later in this chapter.

Part II: The control of money laundering

Anti-money laundering legislation in Kenya has developed on a piecemeal basis. Before 1994 there was no legislation against money laundering. During that year the Narcotic Drugs and Psychotropic Substances Act was enacted, which made it an offence to launder the proceeds of drugs. It thus covered only the proceeds of drug trafficking, excluding money earned from other criminal activities. The Anti-Corruption and Economic Crimes Act was only enacted in 2003, extending anti-money laundering legislation to the proceeds of corruption and economic crime.

It needs to be stated that these statutes merely create offences in relation to the laundering of proceeds of the criminal activities that they set out to control, that is corruption, economic crimes and drug trafficking. The statutes neither intend nor attempt to set up institutions to detect and punish money laundering, which may occur notwithstanding their provisions. What therefore remain to be explored are the arrangements, if any, that have been put in place to detect and deter money laundering. These will be considered next.

The financial sector

The Central Bank of Kenya

The existing anti-money laundering arrangements exist as part of the regulatory framework in the financial sector. The Central Bank of Kenya (CBK), which is key in the regulatory arrangements, is not surprisingly given a central role in detecting and reporting money laundering. The CBK is required by the Central Bank of Kenya Act to formulate and implement monetary policy aimed at achieving and maintaining stability in the general levels of prices. The CBK is empowered, among other things, to formulate and implement foreign exchange policy, to hold and manage foreign exchange and to act as banker and advisor to, and as fiscal agent of, the government of Kenya.⁴⁰

The Act empowers the CBK to issue directions for the maintenance of a stable and efficient banking and financial system. In exercise of these powers, the CBK has made the Regulation on Money Laundering, which is the most deliberate attempt under Kenyan law to address the money-laundering problem at present.⁴¹

The Regulation on Money Laundering

The Regulation applies to banks, financial institutions and mortgage companies licensed under the Banking Act.⁴²

It is the intention of the Regulation to provide guidance regarding the prevention, detection and control of money laundering activities. It clarifies that it is the responsibility of the board of directors and management of an institution to establish appropriate policies and procedures and to train staff to ensure adequate identification of customers and their sources of funds. Such policies, it says, should ensure the effective prevention, detection and control of money laundering activities.⁴³

The Regulation requires boards of directors to ensure that management obtains proper identification of customers wishing to open accounts or to make transactions, whether directly or through proxy, to obtain and maintain adequate records regarding the sources of funds and details of transactions in order to establish identification of unusual or suspicious transactions and to reconstruct individual transactions, and to submit to the CBK a report of any suspicious transactions or activities which may indicate money laundering or other attempts to conceal the true identity of customers or ownership of assets.⁴⁴

The Regulation then prescribes the minimum information acceptable for determining the true identity of customers wishing to open accounts or make transactions. In the case of personal accounts identification should include nationality and date of birth as evidenced by photographic identification, a national passport or national identity document, the address of current residence verified by a referee, verified employment or sources of income, written confirmation from the customer's previous bank, if applicable and, where there is to be more than one account holder, a statement from each that he has personally known the other for at least 12 months.⁴⁵

To open corporate accounts, certified copies of registration certificates are required as well as certified copies of board resolutions to open the account and an identification of the principal persons in charge of the corporation, together with audited financial statements for at least the previous year.⁴⁶

The Regulation then describes suspicious activities and transactions by giving examples of such transactions and requires an institution which becomes aware of a suspicious activity or transaction to report it to the CBK immediately. The reporting institution is required to maintain confidentiality in respect of the suspicious transaction and to report such a transaction only to the CBK.⁴⁷

Suspicious activity or transaction reports are to be made on a form provided by the Regulation. The form requires the identification of the institution providing the report, personal details about the person (or entity) against whom the report is made and a statement of the relationship between the institution and the person (or entity). The statement should state whether the relationship is that of accountant, agent, appraiser, attorney, borrower, broker, depositor, etc.

Then the suspicious activity or transaction must be identified, including dates, amounts of money involved and the basis of the suspicion, e.g., large cash deposits or large deposit from abroad.

A statement is required identifying the witnesses to the suspicious transaction and the person who prepared the report.⁴⁸

Comment on the Regulation

The CBK Regulation is a simplistic attempt to make provision for the control of money laundering through the financial system. Its feeble attempts cannot surely be expected to have any success.

The first glaring problem is that the Regulation only applies to commercial banks, financial institutions and mortgage companies. All of these are defined and licensed under the Banking Act. However, these are not the only institutions in the financial system. Building societies, savings and credit societies, foreign exchange bureaux, micro finance institutions and money remitters all play an important role in the financial system and present justifiable concern from a money laundering point of view. However, these are left out of the scope of the Regulation.

The form prescribed for making suspicious transactions reports appears to contemplate a larger scope than that allowed by the Regulation. Whereas the Regulation concentrates on the relationship between a banker and its customer, the form requires reports to be made of all types of suspicious transactions, even those involving persons who are not customers of the bank. For example, suspicious transaction reports may be made of accountants, attorneys, agents, employees, shareholders, etc. None of these is covered by the Regulation itself. It is therefore unclear how a bank could ever be competent to make a report on them if they are not customers.

The Regulation merely requires the boards of directors of the institutions to which it applies to “establish appropriate policies and procedures” to ensure

the identification of customers and the sources of their funds. The Regulation does not prescribe or describe those policies and, therefore, leaves it to individual institutions to determine, surely in a subjective manner, what is suitable for them.

There are no sanctions in the Regulation for failure to comply with the requirements of the Regulation. In the circumstances, it is wholly unclear how breaches are to be punished or corrected. Further, the Regulation does not reserve to the CBK, as it should have reasonably done, the right to inspect the institutions to which the Regulation applies for purposes of ascertaining the level of compliance with the Regulation.

The Regulation does not contemplate, and therefore fails to make provision for, the possibility that money that is already in the financial system could have questionable sources and may, therefore, need to be subjected to the due diligence that the Regulation prescribes for money that has not entered the system. For example, the Regulation does not require institutions to ensure that other institutions whose money they may handle have carried out similar anti-money laundering checks on money that the regulated institutions may receive.

It is wholly unclear and there is no provision for what is to happen to suspicious transaction reports which the CBK may receive under this Regulation. The Regulation imposes no duties on the CBK and makes no provision whatsoever regarding its handling of any reports that it may receive from the regulated institutions.

This Regulation, which is only part of subsidiary legislation, suffers from a low profile and poor publicity. Outside the financial institutions to which it applies there is little awareness of its existence and requirements. The assumption on the part of the CBK, it seems, has been that its work is discharged merely by enacting the Regulation. The CBK has therefore not found it necessary to engage in any noticeable advocacy to improve awareness of, and therefore compliance with, the Regulation. Concern by the CBK over money laundering has, at best, been perfunctory.

The Regulation requires banks to ensure that sufficient training is accorded to staff to enable them to identify and report on suspicions transactions. The form of training, however, is not identified with any precision. It is therefore left to each institution to make its own training arrangements without the benefit of a benchmark of what may be considered adequate. The assumption, clearly, is

that the CBK has the competence to handle suspicious transaction reports which it may receive under the Regulation. This, as the Crucial Properties Case (reported below) shows, is not necessarily a safe assumption.

The Crucial Properties Case⁴⁹

In January 2001 Charter House Bank reported to the CBK, as required by law, the receipt of US\$25 million into the account of a company called Crucial Properties. Following this notification, the fraud investigation unit (hereafter the unit) of CBK applied for a magistrate's order freezing the account of Crucial Properties and for warrants of search to enable the unit to investigate the account. The unit stated in its application that it believed the money to be proceeds of a theft.

After the account was frozen the head of the unit wrote to Charter House Bank asking to be furnished with all the information relating to transactions that had taken place through the account. Charter House Bank, however, declined the request, claiming it had no legal obligation to co-operate with the unit. The bank further asserted that it was bound by the requirement to keep its customers' affairs confidential.

The unit continued with its investigation, notwithstanding this setback. The investigation established that Crucial Properties had been incorporated in Kenya in May 1998 with two directors. In December 2000 the company opened a foreign currency account at Charter House Bank and then passed a resolution to introduce Humphrey Kariuki as an additional director. Kariuki was to be the star player in the court cases that followed the report of money's receipt by Charter House Bank. Soon after Kariuki became a director, the money was remitted into the account.

Questioned about the source of the money, Kariuki claimed that it was transferred from Jersey "for property development and trading within Africa".

The unit, however, asserted that the source of the money was not Jersey, as claimed, but Liechtenstein, in Europe. The unit also asserted that Kariuki had failed to provide a proper explanation as to the source of the money which, the unit now said, was the proceeds of drug trafficking.

Crucial Properties then made an application in the High Court for the lifting of the magistrate's order freezing its account. That application

was never heard as the unit voluntarily caused the magistrate's order to be discharged and then applied to the High Court for an order to restrain the money under the Narcotics Drugs and Psychotropic Substances Act. The High Court initially granted this order.

The Narcotics Act provides that the High Court may make such an order to freeze money if it is suspected to be the proceeds of a specified offence. A specified offence is defined to include all the serious offences in relation to drugs trafficking under the Act, with a provision that the Attorney-General may add to the list of specified offences. Money laundering, although an offence under the Act, was not a specified offence at the time the money was received in Kenya. Since the unit claimed to be investigating the offence of money laundering, it sought a restraint of the money, only to then realise the legal deficiency. This it sought to cure through a belated notice in the *Gazette* declaring money laundering a specified offence, so that it could avail itself of the power to restrain the money through a court order.

The proceedings that followed degenerated into a farce. The Attorney-General's belated notice making money laundering a specified offence was declared a nullity by the High Court on the grounds that it amounted to a retrospective application of criminal law. The unit, it turned out, had assumed that Jersey, the claimed source of the money, was the same as New Jersey in the US, and therefore directed its investigation to the US.

The High Court grew impatient over the failure by the unit to substantiate its claim that the money had come from Liechtenstein and the further claim that it was the proceeds of drug trafficking. The judge, rather spectacularly, declared that money laundering was, after all, not an offence in Kenya due to the previous failure to declare it a specified offence. He concluded that, in any case, he had "no reason to believe that these highly reputed international banks can engage in money laundering", and ordered the money to be released to Crucial Properties.

With the money gone, the unit had no strong incentive to go on with the case and closed its investigation.

Other financial service providers

The following financial service providers are not covered by the Regulation but raise concern and merit consideration for money laundering control.

Foreign exchange bureaux

Commercial banks offer services as foreign exchange bureaux in Kenya. These services are regulated for purposes of money laundering since the CBK Regulation applies to all the services offered by commercial banks. Commercial banks are, however, not the only providers of services as foreign exchange dealers. Since 1995 there has been a policy of licensing independent foreign exchange dealers. The licensing and, presumably, the control of these independent bureaux is the responsibility of the CBK. According to the CBK, the licensing of forex bureaux was meant to make the foreign exchange market more competitive.⁵⁰

To regulate the non-bank forex bureaux, the CBK has issued the Forex Bureau Guidelines (the Guidelines) with which all such bureaux must comply. The guidelines prohibit any person from engaging in business as a foreign exchange bureau without a licence. They require bureaux to deposit US\$5,000 with the CBK as security for compliance with the Guidelines and to open and maintain, with a commercial bank, an account or accounts, designated 'Forex Bureau Foreign Currency Account'. A bureau is required to immediately pay into its account all foreign exchange remittances it receives.⁵¹

The Guidelines require bureaux to engage only in "spot transactions" and "not in transactions involving forward cover". Bureaux may buy and sell foreign exchange. They may also buy travellers' cheques, personal cheques and bank drafts but may not engage in the sale of these instruments without specific approval.⁵²

The role of forex bureaux in Kenya as channels through which money is laundered has been noted. One report claimed that Pakistani-run bureaux in Nairobi are linked to the laundering of money through the *hundi* system.⁵³ In 1999 a couple was arrested at the Jomo Kenyatta International Airport while attempting to smuggle Ksh50 million in foreign currency out of the country. The couple had been illegally running a foreign exchange business in Nairobi.⁵⁴ The connection between foreign exchange dealers and money laundering is made clear by this case.

Other than the formal foreign exchange dealers, a number of underground foreign exchange outlets exist in the big cities especially Nairobi, Mombasa and Kisumu. These arose during the time when exchange controls existed in Kenya and they managed to undercut formal sources of foreign exchange, because of their relatively low costs, including through tax evasion. Even after the liberalisation of foreign exchange, they have stubbornly remained in

business, although they have now lost their competitive advantage. However, they try to make up for this by opening for longer hours.

Clearly, these dealers also pose risks from a money laundering point of view. The volumes with which they deal are impossible to ascertain, given the informality of their business. Strictly speaking, these dealers operate illegally since a licence from the CBK is required to handle foreign exchange.⁵⁵

It is difficult to imagine that authorities are not aware of their existence, since they carry out their business relatively openly. It would be easy to curb this underground source of foreign exchange, if the authorities were interested in so doing.

A comment on the Guidelines

The Guidelines specifically require dealers to only engage in spot transactions. There is no requirement to keep records other than such as will enable the conduct of a proper audit of the accounts of a dealer. Such audits as may be conducted by the CBK are from the perspective of monitoring the movement of foreign exchange, rather than for controlling money laundering.

Although the Guidelines mention the need to ensure that such records leave a paper trail, there is no specific requirement to identify the persons with whom bureaux may deal. It is thus impossible, under existing arrangements, for dealers to be in a position to know their customers in the event of a need to do so.

Dealers are required to open and maintain bank accounts with commercial banks. This enables banks to receive money from persons whom neither they nor the dealers can identify. The possibilities of mischief are numerous. According to a bank manager in Nairobi, some commercial banks have been expressing concern over the banking, by their bureaux customers, of large sums of money whose sources cannot be explained. Such banks have, as result, been reluctant to keep bureaux as customers. Clearly, a strong case exists for bringing alternative foreign exchange dealers into some form of control against money laundering.

Money remitters

Informal money remitters of several varieties operate in Kenya. The increasing number of Kenyans living abroad is thought to have led to the increased use of informal methods to remit money back to Kenya. There is, however, no evidence as to the volumes of money remitted in this manner and it is necessary to

conduct further investigation before any formal intervention can, if necessary, be suggested.

After the banks, the postal system is the premier money transmitter in Kenya. A variety of services is offered for the transfer of money locally and also between Kenya, Uganda and Tanzania. Postbank, a state-owned commercial bank, in addition, offers such services internationally as an agent of Western Union, a US corporation involved in money transfers. In its turn, the Postbank uses the services of the postal system as a sub-agent of Western Union. Similar relationships for the transfer of money exist between other commercial banks and money remitters.⁵⁶

According to the United Nations Drugs Control Programme (UNDCP), “there has been an increasing resort to postal money orders for purposes of money laundering” in Nairobi. The UNDCP claims that criminal organisations are increasingly using postal orders to transfer huge incomes generated from illicit activities into foreign countries, very often those that apply bank secrecy.⁵⁷

The postal system is also used as a conduit for smuggling cash, which is sent as parcels or mail. To deal with this problem, there has been increased training for postal personnel and the use of modern equipment to detect cash being smuggled through the postal system.⁵⁸

The CBK regulates money transmitters who handle convertible foreign exchange. Its control is, therefore, from a foreign exchange perspective, consistent with the strong statutory emphasis as contained in its constitution. Where no convertible foreign exchange is involved, for example within East Africa, there is no regulatory mechanism. It follows that there is immediate need to put in place anti-money laundering procedures to govern money remitters.

The realisation that the postal system can be used for laundering money has caused the signing of a memorandum of understanding between the police and the postal authorities in Kenya for the control of this problem. Unfortunately, it was not possible to have access to the memorandum for purposes of this study.⁵⁹

What is clear, however, is that a lacuna exists in this area in terms of money laundering control. The memorandum, whatever its contents, is only an internal document between the two public authorities concerned and lacks the force of law and the ability of universal application. It only serves to emphasise the need to put in place a legislative framework to control money laundering through money remitters.

Building societies and micro-finance institutions

Building societies are formed in order to raise funds by subscription of members, from which to make advances to members secured through land.⁶⁰ Co-operative societies operate on the same principle, except that the security for advances is based on the shares held by the borrower and personal guarantees by other shareholders.

Building societies operate virtually like commercial banks except that they do not go to the clearing house. However, they have a range of financial instruments that, in practical terms, make them as good as banks. For example, they can raise money by issuing bonds and they open accounts for their customers and issue cheques.

At present there is no attempt at regulation of these institutions for purposes of money laundering⁶¹ and the scope of the CBK Regulation excludes them.

Micro-finance institutions are in an even worse position from the point of view of regulation. These are relatively new in Kenya and operate outside any form of regulation. In theory, micro-finance institutions are set up to provide credit to the lower end of the market, in which commercial banks are not interested. In practice, however, there is pressure to also advance credit to the higher end of the market, as no regulation exists against doing so. There is no form of control for micro-finance institutions, which are not subject to regulation by the CBK.

Anti-money laundering control is clearly needed in respect of these forgotten financial institutions as well.

Secrecy

Secrecy is an important issue in the anti-money laundering discourse. Secrecy provides a shield that money laundering schemes can exploit to avoid detection. The state of banking, corporate and lawyer/client secrecy in Kenya is relevant to the design of effective anti-money laundering procedures and is discussed next.

Corporate secrecy

Kenyan law allows for the creation of the corporation as a legal entity in order to provide business people with an opportunity to conduct their business with measured risks. The corporations that can be registered under Kenyan law

include companies (with or without limited liability), trusts, firms (which are unincorporated concerns which are allowed to use corporate names), and societies, etc.

It is a feature of Kenyan law to require the disclosure of the names and addresses of all persons responsible for the registration of a corporation. It is also a feature to provide for the establishment of public registers where such information is to be held and to allow public access to such information.

Corporate secrecy, a feature of many of the financial havens which are often associated with money laundering schemes, is shunned by Kenyan law which requires the disclosure of sufficient information to avoid anonymity.

Notwithstanding the law, it is possible to erect schemes that protect the identity of the true owners of a corporation by vesting its control in agents, including legal representatives. Such schemes ultimately rely on fear on the part of the agent, which would in all likelihood also prevent law enforcement from taking steps to identify the true owners.⁶²

The state of the public registries that hold and process information on corporations registered in Kenya is, however, a matter of very great concern. The relevant public records are held in a central registry in Nairobi, called the Companies Registry. The Companies Registry is poorly maintained, making it very difficult to register new corporations and to retrieve information on those that are already registered. There are also reports of incidents, induced by corruption, in which officials conceal information that should be available to the public. Notwithstanding the formal provisions of the law, there is a *de facto* state of secrecy created by the chaotic handling of information and petty corruption. In designing effective anti-money laundering procedures, it will be necessary to greatly improve the handling of information at the Companies Registry and to eliminate petty corruption, which can lead to quite serious lapses in accountability. Information technology would certainly need to be employed in the place of the existing manual systems.⁶³

Lawyer/client secrecy

Kenya, a common law jurisdiction, emphasises lawyer/client confidentiality and exempts lawyers from disclosing information held by them about their clients. Draft anti-corruption legislation published in 2001 proposed to limit lawyer/client confidentiality as a barrier to investigating corruption cases.⁶⁴ However, Kenya's powerful legal profession successfully campaigned against the inclusion of such a clause. Subsequent drafts of anti-corruption legislation

eliminated such proposals. The Anti-Corruption and Economic Crimes Act contains no limitations on lawyer/client confidentiality. The Narcotics Drugs and Psychotropic Substances Act also imposes a blanket cover for information held on a lawyer/client basis which, it provides, is exempt from law enforcement scrutiny.

It is suggested that the Kenyan approach to lawyer/client confidentiality is perhaps too dogmatic. Some form of disclosure obligations will have to be imposed on lawyers if an effective anti-money laundering system is to be established. The extension of anti-money laundering procedures to legal service providers will have to anticipate strong opposition from the legal profession, which has remained very conservative and which would, in all likelihood, view such measures as an unacceptable intrusion into the age-old privileges that the profession considers its right.

Bank secrecy

The Regulation on money laundering issued by the CBK prescribes the minimum amount of information that banks must obtain from persons who are allowed to hold accounts. The information to be disclosed has already been discussed above. If complied with, the Regulation is sufficient to ensure the proper identification of the customers of a bank.

However, questions arise in relation to trust accounts. Several businesses operate trust accounts and the money held in such accounts is easily masked from scrutiny of its true ownership. A lawyer who opens a trust account can probably successfully maintain a claim of client/lawyer confidentiality if law enforcement authorities raise questions about the beneficiaries of the account. Foreign exchange bureaux that are required to maintain client accounts would probably not be able to sustain such a claim, but would in any case be unlikely to know their customers since they are not obliged to do so. The true nature of secrecy at this point, therefore, is not of a banking nature but of a lawyer/client nature. The need to review this form of confidentiality has already been indicated.

Where a bank is compelled by anti-money laundering law to gather sufficient information to identify its customers, such information is not useful unless law enforcement authorities can have access to the information if needed. The barriers, if any, that banks can maintain against third parties (especially law enforcement authorities) with a legitimate interest in the identity of their customers, are of paramount importance in achieving accountability, which is what establishing the true identity of banks' customers is supposed to achieve. It has been argued that bank secrecy ultimately only serves to delay law

enforcement enquiries into a given financial transaction, rather than to defeat such enquiries altogether. Delay, however, can lead to significant harm as it can allow time to move money out of a bank and thus defeat the interests of law enforcement. The inquiry as to bank secrecy should therefore concern itself with whether, firstly, it is possible to have access to information held by banks and secondly, how easily this can be achieved.

In Kenya there is no specific legislation on bank secrecy. In practice, however, banks maintain strict confidentiality about their customers' transactions. The High Court has held that it is actionable for a bank to release information on its customers to unauthorised third parties. Law enforcement can, however, access information held by banks using a simple procedure contained in the Criminal Procedure Code (hereafter the Code).⁶⁵

The Code empowers a magistrate to issue a written search warrant when it is proved that something that is connected to, or necessary for, an investigation into an offence, is suspected to be in any place, building, ship, vehicle, etc. The warrant may be issued to an authorised police officer who, with such a warrant, may enter such a place and conduct investigations into an offence. The officer may seize and take before the courts anything found in the place that is relevant to the offence under investigation.

In practice, this simple procedure is used by law enforcement to gain access to information held by banks. Where this is done, law enforcement agents approach magistrates and need not comply with any formal legal procedures to be issued with search warrants.

Thus in practice law enforcement agents are able to restrain transactions in given bank accounts without further procedural formalities on the basis of only a search warrant. This seems blatantly illegal, however, and would probably not be sustainable against sophisticated criminals who have access to good legal advice. In the Crucial Properties Case, discussed above, these simple procedures were used to freeze the money but subsequent to the restraint the bank refused to co-operate with investigators who sought information on the account. When lawyers entered the scene, the procedure used for restraining the money came under question, forcing law enforcement to make the ill-fated application under the Narcotics Act for a restraint order.

At a practical level existing bank secrecy procedures are tilted heavily in favour of law enforcement agents who can easily access bank records with minimum delay. What seems necessary is to make legal provision for the restraint of the

funds held in such accounts. Due process, however, seems necessary if such drastic powers are to be formalised.

The Intercon Services Case, whose facts are narrated below, demonstrates some of the dynamics involved in the enforcement of banking secrecy in Kenya.

The Intercon Services Case⁶⁶

One Friday in 1985, James Nderitu received a cheque for Ksh17 million from the Department of Customs and Excise. At the time this was a very large sum of money. Later on the same day the manager of the local branch of the Standard Chartered Bank visited Nderitu's restaurant, as he had often done, and after some discussion Nderitu disclosed his possession of the cheque which, it was agreed, Nderitu should deposit in the bank the following day.

This he did. The cheque was drawn in favour of Intercon Services, a company of which Nderitu was the managing director and the sole signatory to its account at the bank. Nderitu was also the managing director and sole signatory to the accounts of three other companies that had accounts with the bank, of which one was called Interstate Communications and a second was called Swiftair.

The following Monday, the bank manager telephoned Nderitu to inform him that his superiors had queried the cheque and needed to know the source of the money. The manager asked him for any documentary evidence he may have which could show the underlying transaction.

Nderitu took the payment voucher that had accompanied the cheque from the Department of Customs and Excise to the bank. On examination of the voucher, it turned out that there were minor discrepancies between the amount of money in figures and in words. Nderitu attributed this to a clerical error. It also turned out that the company to which the cheque should have been paid was Interstate and not Intercon, although both companies were owned by Nderitu, who explained that the cheque had been written in favour of the latter company at his request. The accounts for the four companies had been opened during the same month. Intercon's account had only been opened eight days previously and this very large deposit was its first transaction.

Even as the bank made these queries, it received the funds represented

by the cheque from the Kenya Commercial Bank, the bankers of the Department of Customs and Excise.

The Standard Bank manager paid the proceeds of the cheque into Intercon's account. Nderitu immediately transferred the funds to Swiftair's account, except for a small amount which he withdrew. He then instructed the bank to transfer the money to a different bank where Swiftair held an account. However, before this could be done, law enforcement intervened.

Meanwhile, the bank manager was proceeding with further inquiries into this transaction, which the bank considered most unusual. He telephoned the Department of Customs and Excise and spoke to one of the signatories to the cheque who confirmed that the payment to Nderitu was valid. Not satisfied, the manager called the second signatory who also confirmed the transaction. Still unsatisfied, he made a call to the fraud section of the CBK.

The CBK quickly moved in with the police, who froze all the accounts of the four companies, arrested Nderitu and charged him with the theft of the money that had been paid to him by the Department. Eventually Nderitu was convicted by a magistrate but, on appeal, the High Court set aside the conviction.

Subsequently, Nderitu sued the bank in 1988 for breach of customer confidentiality, taking the form of the various reports the bank manager had made to the public authorities, one of which had triggered his arrest and prosecution.

There was a very great delay in the trial of the suit, which was only heard in 2002. Nderitu claimed special damages of more than Ksh600 million which, he asserted, represented the loss of business resulting from the disruptions associated with his arrest.

At the trial, the parties consented to a determination of the question of liability and then, if necessary, the assessment of damages.

It emerged during the trial that Nderitu had had several other criminal cases brought against him around 1985 but was acquitted in all of them. The Department of Customs and Excise, the presumed complainant, was emphatic during the trial that the payment to Nderitu had been regular, although its head subsequently wrote that an offence had occurred which the Department found it difficult to prove. The

bank was prevented, at the trial, from proving that the money, which was paid to Nderitu as export compensation, was legally not payable, as none of his companies was involved in export business.

The judge held that:

- (i) the bank was entitled to make inquiries into the payment especially since it was unusually large, had been made into a new account and, further, since there were queries about the proper payee of the cheque (Intercon or Interstate);
- (ii) the fundamental question, however, was the extent to which a bank could be allowed to go to establish the truth. It is not the role of a banker to assume the role of an investigator of its customers' affairs or to turn itself into a policeman;
- (iii) the report to the CBK went far too far out of the bank's remit of reasonable inquiries and directly led to the suffering which Nderitu subsequently underwent. This report was a breach of the confidentiality that the bank owed Nderitu, as a customer.

The non-financial sector

The rudimentary anti-money laundering procedures existing in Kenya only target financial institutions. Non-financial institutions, it has been realised, are just as important in money laundering terms. For example, the European Union Directive on Money Laundering now requires anti-money laundering procedures to be extended to such institutions as antique dealers, auctioneers, casinos and other gambling businesses, dealers in property and high-value items and companies and trust providers.

A study on money laundering typologies in Kenya that preceded the current study, identified casinos and dealers in property and high value items as possible conduits through which money laundering may be occurring in Kenya. It is, therefore, necessary to examine whether any safeguards exist against the use of these as money laundering avenues.

Casinos

The regulation of casinos in Kenya is provided for under the Betting, Lotteries and Gaming Act. The Act does not define a casino and only defines gaming premises as "premises kept or used (whether on one occasion or more than

one) for gaming, and to which the public has or may have access for playing therein of a game of chance, whether the game of chance be unlawful or not”.

No person may carry on the business of gambling without a licence. The Act establishes a board to issue licences and to supervise gaming premises and empowers it to make regulations to protect persons playing in the premises against fraud.

Subsidiary legislation made under the Act requires the maintenance of records to show the total amount of money that a player puts down as stakes or pays by way of losses or exchanges for tokens used in playing the game.

Comment on casino legislation

Existing legislation on casinos has no concern with the possibility that they could be used as avenues of money laundering. Casinos in Kenya have traditionally had strong links with the political establishment, whose patronage they have found difficult to shake off. For example, a government directive was issued requiring all gambling in casinos to be conducted using foreign exchange. This was at a time when foreign exchange control existed in Kenya and access to such exchange itself required political connections. Casino owners without such connections were, naturally, disadvantaged by this policy which, it was thought, was introduced in order to give the political elite a chance to own casinos.

In 2000 legislation was introduced which exempted casinos from taxation. It is wholly unclear why such legislation could have been necessary. The legislation was only repealed in 2003.

According to the US Department of State International Narcotics Control Strategy Report of March 1996, the casino industry in Kenya is suspected to be an avenue through which narcotics-related money laundering occurs.

Other reports have also linked casinos to money laundering activities in Kenya. For example, Said Masoud Mohammed, a fugitive from Kenya law enforcement authorities in connection with drug-related crimes, was also a casino owner in Kenya.

At the moment, however, there are virtually no anti-money laundering controls against casinos, but, by the evidence, they are in great need.

Dealers in high-value property

As mentioned, a study on the typologies of money laundering in Kenya established that a number of dealers in high-value property are exposed to money laundering. The properties include real estate and motor vehicles. A report on the laundering proceeds of drugs, for example, claimed that organised crime syndicates are involved in the purchase of land in Mombasa and the development of holiday facilities, using the proceeds of crimes committed in Europe.

Informants interviewed for the earlier study said they believed that proceeds of drugs are, at least in part, invested in up-market developments and contribute to the continued investment in this sector. As a result, property on the coast, especially in Malindi, is fairly expensive notwithstanding a general business downturn in the same area.

Motor vehicle dealers are similarly highly exposed to money laundering. The earlier study established that they are especially vulnerable because, firstly, their trade involves an import/export element for which criminal money can be brought into the country in the form of motor vehicles, and, secondly, because motor vehicles in themselves are items of high value. Motor vehicle purchases are often conducted in cash, exposing financial institutions to the possibility of subsequent receipt of tainted money.

Estate agents and other real estate dealers clearly need to be subjected to anti-money laundering control. The same applies to other dealers in high-value items, of whom motor vehicle dealers are the most important.

Company and trust providers

People who provide advice on the establishment of businesses, including companies and trusts, are also exposed to money laundering. The example of the Karura Forest saga demonstrates the point: Karura Forest is a large natural forest on the outskirts of Nairobi which, as the only such forest in Nairobi, is of immense environmental importance. In 1998, it emerged that a large portion of the forest had been secretly alienated as private property in complete contravention of the Forests Act. Following a public outcry, it became necessary to establish the beneficiaries of this alienation.

A search at the Lands Office, where land transactions are registered, revealed that the forest had been allocated to 36 limited companies. A search of the companies register was necessary to establish who the directors of the companies were. It emerged that all the companies had been registered on the same day

by one law firm. However, the information on the directorships was unavailable in the registry because those behind the scandal had arranged for its concealment. Asked to provide information on the companies' directors, the law firm, naturally, claimed privilege and declined to give this information to the interested authorities.

Legal practitioners, accountants and certified public secretaries are the primary company and trust providers in Kenya. Legal practitioners enjoy lawyer/client privileges, which have already been discussed above. The others do not and would, in theory, be compelled to disclose information that comes to them to public authorities if it is relevant for law enforcement. However, none are presently obliged to report suspicious transactions from a money-laundering point of view. Also, none are the subject of any specific anti-money laundering obligations, for example, the duty to know their clients, the duty to maintain records of transactions to enable reconstruction where necessary, etc.

There can be little doubt that these service providers should be legitimate targets for anti-money laundering controls.

Part III: Terrorist activities

The United Nations Security Council Resolution 1373 (2001)

This Resolution is concerned with terrorism and terrorist acts. It is also concerned with the connection between international terrorism and transnational organised crime, illicit drugs and money laundering.

It calls for the prevention and suppression of the financing of terrorist acts and the criminalisation of the willful provision or collection, by any means, directly or indirectly, of funds with the intention that the funds are to be used for the funding of terrorist acts. It calls for the freezing of funds and financial assets of persons who commit or facilitate the commission of terrorist acts.

The Resolution requires states to co-operate to ensure that terrorism is prevented at all costs through the exchange of necessary information and preventing the financing, planning or facilitation of terrorist acts.

Kenya has taken steps to implement the decisions in the Resolution through domestic legislation. Money laundering in connection with corruption, economic crimes and drug trafficking is criminalised, as discussed above.

Further initiative is seen in the Suppression of Terrorism Bill, 2003, which is discussed below.

The Suppression of Terrorism Bill

The long title of the Bill declares it to be "an Act of Parliament to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (commonwealth countries) Act and Extradition (contiguous and Foreign Countries) Act; and for related purposes". Terrorism is defined in clause 3 of the Bill to mean the use or threat of action where:

- (a) the action used or threatened:
 - (i) involves serious violence against a person;
 - (ii) involves serious damage to property;
 - (iii) endangers the life of any person other than the person committing the action;
 - (iv) creates a serious risk to the health or safety of the public or a section of the public; or
 - (v) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological case;

Provided that the use or threat involves the use of:

- (i) firearms or explosives;
- (ii) chemical, biological, radiological or nuclear weapons; or
- (iii) weapons of mass destruction in any form, shall be deemed to constitute terrorism.

Clauses 4–8 of the Bill deal with terrorist offences and make a wide range of conduct illegal, including providing weapons and training, directing terrorist organisations, possessing articles for terrorist purposes and collecting information for terrorist purposes. The maximum sentence for these offences ranges from ten years in certain cases to life imprisonment in others.

Clause 9 empowers the Minister to declare that an organisation is concerned in terrorism by notice published in the *Gazette* and may revoke any notice previously published under this provision.

Any person who is a member of, or who supports or invites others to support, a declared terrorist organisation, is guilty of an offence.

Also guilty of an offence is any person who publicly wears any clothing in a public place capable of reasonable suspicion that such a person is a member or supporter of a declared terrorist organisation. The police may arrest such a person without a warrant.

The Bill then attempts a definition of terrorist property as “money or other property which has been or is intended or is likely to be used for purposes of terrorism” (including the resources of a declared terrorist organisation). Terrorist property also includes proceeds of acts of terrorism and proceeds of acts carried out for the purpose of terrorism. Several offences are created in relation to terrorist property including fundraising for terrorist purposes, the receipt of money or any other property for terrorist purposes and the use or possession of terrorist property. Any financial arrangement to make money available for terrorist purposes is an offence, as is the removal, transfer or concealment of terrorist property.

The police are allowed to receive information in the knowledge of any alleged terrorist activities and a person does not commit an offence in relation to terrorist property if his conduct has the express consent of the police.

The Attorney-General may, on reasonable grounds of suspicion, apply to the High Court for an order compelling a person to deliver up any document or record relevant to identifying, locating or quantifying any property belonging to a person suspected of terrorism; or requiring a bank, any other financial institution or trustee to produce all information and deliver up documents and records regarding any business transaction conducted by or on behalf of the person concerned.

An authorised officer may seize any cash upon reasonable belief that it is being imported into or exported from Kenya, or is being brought to any place in Kenya, for the purpose of being exported from Kenya as terrorist property. Such seizure is allowed notwithstanding that only part of it is suspected to be terrorist property.

The Attorney-General may apply to the High Court for a provisional order of attachment of terrorist property. Such an order may prohibit third parties from making property available to a terrorist organisation.

The court before which a person is convicted of an offence related to terrorism may order the forfeiture of any property connected with terrorism, or used for an offence.

Authorised officers are also allowed to apply to the High Court *ex parte* for a detention order with respect to the cash seized under the suspicious circumstances. Authorised officers include the Commissioner of Customs and Excise, the Commissioner of Police and the Attorney-General.

The Commissioner of Police is empowered to apply to a judge of the High Court for the issue of a warrant for the purpose of a terrorist investigation.

In case of urgency the police may lawfully make an arrest without a warrant. Customs and immigration officials are empowered to make arrests in the same way as the police.

It is an offence for any person to disclose to another person anything likely to prejudice the investigation, or interfere with material that is likely to be relevant to the investigation.

A person suspected of a terrorist offence may be detained until investigations are completed, without prejudice to the right to legal representation.

The Bill proposes several measures by way of mutual assistance, including the exchange of information at the request of a competent foreign authority where such disclosure is not prohibited by any provision of law and will not be prejudicial to national security.

Further, where a request is made by a state for assistance in the investigation or prosecution of an offence related to terrorism or for the tracking, attachment or forfeiture of terrorist property located in Kenya, the Attorney-General, as the agent of the government, is required to co-operate with the requesting state. Similarly, the government may also make a request to any foreign state to provide information or evidence relevant to an offence under the Act, or for the tracking, attachment or forfeiture of terrorist property located in that state.

Comment on the Bill

The Suppression of Terrorism Bill was, at the time of this study, the subject of robust public debate in Kenya. The publication of the Bill coincided with an announcement by a government minister, quoting intelligence sources, that

Kenya was targeted for a terrorist attack. Kenya has already been the subject of two serious terrorist attacks, each of which led to the loss of life and the destruction of property. The announcement, therefore, was received with widespread public belief.

The minister's announcement led to immediate reaction by the governments of the US and Britain, each of which issued advice to its citizens to avoid non-essential travel to Kenya. As a result, airlines originating in Europe and destined for Nairobi cancelled flights, triggering, in turn, massive cancellations on the part of tourists who, but for the advice, would have visited Kenya. Kenya relies heavily on tourism as a source of livelihood and as the main source of foreign exchange. These cancellations have, therefore, had an adverse economic impact in the country, which has led to public disquiet. In the face of all this the public reaction is ambivalent: on the one hand, it is appreciated that a terrorist attack may occur in Kenya and precautions are necessary to avoid such an attack; on the other hand, the disruptions resulting from the negative publicity the country has attracted have been the source of public concern and anger.

Kenya has been under pressure to enact anti-terrorism laws as a basis for reassuring the international community that a legal framework to fight terrorism is in place and that, therefore, Kenya need not be isolated. The advice by western governments to their citizens not to visit Kenya is, however, viewed as an attempt to isolate a country whose close relations with the West have already extracted a heavy price in terms of terrorism.

Public authorities in Kenya have attempted to demonstrate seriousness in the fight against terrorism by making arrests of those allegedly responsible for the latest terrorist attacks in Kenya. However, controversy always accompanies such efforts, with the country's sizeable Muslim population claiming that it is being targeted for harassment and unfounded official reprisals under the guise of fighting terrorism. It is this political background against which public response to the proposals in this Bill must be understood.

Not unexpectedly, the public has mostly been hostile to the Bill's proposals. Its definition of terrorism has been one of the important points of criticism. According to Dick Maragia, a Kenyan lawyer resident in the US, "there is little doubt that the current Bill is not clear on what constitutes terrorism and how this can be distinguished from ordinary offences under the Penal Code or other statutes".⁶⁷ Tom Ojienda, a Nairobi lawyer, has written that the definition of terrorism in the Bill "is vague and open to several interpretations with the possibility of unlawful incarceration and sacrifice of fundamental human right".⁶⁸

Macharia Gaitho, a journalist with the *Daily Nation*, a local newspaper, has termed the Bill "a rather outrageous piece of anti-terrorism legislation that is not only a shameless product of the US Attorney-General, but the most unconstitutional document and affront to civil liberties we have ever had foisted upon us".⁶⁹

His opinion represents a widely held view in Kenya that the Anti-Terrorism Bill is an American piece of legislation that is being forced on Kenya irrespective of Kenya's own needs or realities.

Clause 18 of the Bill creates immunity for persons who would otherwise be guilty of terrorism if they were "acting with the express consent of a member of the police force". This provision is viewed as intended to provide room for informers and spies to be planted in organisations with a view to exposing terrorism. One commentator wrote in reference to this provision, that "once this law is passed, you cannot trust anybody; you can never know if they are working for Big Brother".

Other concerns include the provisions which make it an offence to wear uniform or clothing associated with terrorism or terrorists. The Muslim community has viewed this provision with grave concern, fearing that it will target people who wear Islamic dress. The community has tried to make it clear that it is terrorists who wear Islamic dress and not Muslims who wear terrorist dress. The provision is therefore viewed as highly prejudicial and an unacceptable form of patronage by the West, which seeks to prescribe how people may dress.

The Attorney-General, who published the Bill, has been the subject of criticism in, among others, the following words:

By drafting this Bill and presenting it to Parliament for debate, he has caused taxpayers' money to be wasted on a futile exercise, well aware that what he is asking Parliament to debate is unconstitutional and a violation of Kenya's integrity and sovereignty. He has rendered himself unfit and incompetent to continue holding the office of the Attorney General, and as such should resign.⁷⁰

The perception in Kenya is therefore that the country needs anti-terrorism legislation, but not in the form in which it has been proposed through the Bill. Given the massive rancour which the Bill has aroused, it is highly unlikely that it will be enacted in its present form. It is even possible that the Bill may be withdrawn and re-drafted to take into account the concerns raised.

Notes

- 1 The Corruption Perception Index (CPI) is published annually by Transparency International, the leading global anti-corruption organisation. In 1996 it ranked Kenya as the third most corrupt country in the world. Since then it has been ranked as one of the most corrupt countries, year after year.
- 2 For example, a Cabinet Minister made claims of recoveries of money previously held abroad as proceeds of corruption. See also 'Sh15b recovered in war on graft', says Kiraitu, *Daily Nation*, 3 March 2003.
- 3 See, for example, Otsieno Namwaya, The big issue, *East Africa Standard*, 8 December 2003, p 3. It is claimed that in respect of the removal of the Director of KACA, John Harun, "Mwau's fate was seen to have been orchestrated by powerful political forces that loathed his self-conceited crusade against corruption that appeared to threaten their interests".
- 4 In *Stephen Mwai Gachiengo v. Republic* (unreported), High Court Miscellaneous Application No. 302 of 2000.
- 5 In *Republic v. Attorney General ex parte Kipng'eno arap Ngeny* (unreported).
- 6 Act 3 of 2003.
- 7 Act 4 of 2004.
- 8 Anti-Corruption and Economic Crimes Act, section 6(1).
- 9 Section 8.
- 10 Section 3.
- 11 Section 5(1).
- 12 Section 7(1)(a)(b) and (c).
- 13 Section 7(1)(h).
- 14 Section 27.
- 15 Section 28(8).
- 16 Section 47.
- 17 Section 48.
- 18 Section 55(2).
- 19 Section 55(6).
- 20 Section 56.
- 21 The Public Officer Ethics Act, section 5.
- 22 Section 11 and 12 generally.

- 23 Section 26(1).
- 24 Section 30.
- 25 Section 35.
- 26 The Anti-Corruption and Economic Crimes Act, Section 37.
- 27 See, for example, A Odera, Kenya turned into a haven for drug barons, *Expression Today*, 11 February 1999, p 1.
- 28 Act 4 of 1994.
- 29 For example, the penalty for possession of prohibited substances for own use is imprisonment up to 20 years (section 3(2)(b)) and in every other case it is a fine of not less than Ksh1 million or three times the value of the prohibited substance, whichever is the greater, or imprisonment for life, or both such fine and imprisonment.
- 30 Section 7.
- 31 Section 20(1).
- 32 Proviso to Section 20(2).
- 33 Section 59(1).
- 34 Section 59(2).
- 35 Section 49.
- 36 The courts routinely handed down sentences of not less than ten years for all convictions under the Act, this being the minimum sentence that they considered themselves bound to give. Previously, such offences would typically attract only light penalties.
- 37 Unpublished report on the workshop on legal and institutional arrangements in guidelines for the Kenya Drug Control Master Plan, held at the Kenya College of Communication and Technology, Mbagathi, Nairobi, on 12 May 1999.
- 38 Ibid.
- 39 Ibid.
- 40 Central Bank of Kenya Act, section 4.
- 41 Regulation No. CBK/PG.12.
- 42 Chapter 488 of the Laws of Kenya.
- 43 Regulation on Money Laundering, Part II, paragraph 1.
- 44 Ibid, Part IV, paragraphs 1 and 2.
- 45 Ibid, paragraph 2.1.

- 46 Ibid, paragraph 2.2.
- 47 Ibid, paragraph 6.
- 48 Ibid, paragraph 5.
- 49 *Republic v Crucial Properties Ltd.*
- 50 Central Bank of Kenya, Forex Bureau Guidelines, p 2.
- 51 Ibid, paragraph 3.3.
- 52 Ibid, paragraph 3.5.
- 53 A Odera, How drug money is laundered in Kenya, *Expression Today*, 11 February 1999, p 3.
- 54 Ibid.
- 55 Central Bank of Kenya, op cit, paragraph 1.2.
- 56 Interview with a member of staff of the Postal Corporations of Kenya, July 2002.
- 57 Email correspondence with Mickel Edwerd of the United Nations Drug Control Programme, July 2002.
- 58 Ibid.
- 59 Ibid.
- 60 Under the Building Societies Act, Chapter 489, Laws of Kenya.
- 61 The Regulation only covers financial institutions as defined in the Act, which do not include building societies.
- 62 In the Goldenberg scandal, (Kenya's worst financial scandal), it has been claimed that the known architect of the scandal acted not only for himself but also for the then-ruling elite in Kenya with whom he had arrangements based on fear.
- 63 The chaotic state of Kenya's land and company registers is discussed by the author fully in a previous unpublished paper prepared for the Institute for Security Studies, entitled 'Typologies of laundering in Kenya'.
- 64 See, for example, the Anti-Corruption and Economic Crimes Act, 2003.
- 65 Chapter 75, Laws of Kenya.
- 66 *Intercon Services Limited v Standard Chartered Bank* (unreported), High Court Civil Case No.761 of 1985.
- 67 Bosire Maragia, The pitfalls of the Anti-Terrorism Bill, through email, 8 July 2003. Maragia is a Kenya lawyer working in the US.

- 68 Tom Ojienda, The Anti Terrorism Bill: Is it valid? Unpublished paper submitted for a seminar on the Bill held by the Law Society of Kenya, Nairobi, 2003.
- 69 Macharia Gaitho, Kenyans must reject Anti-Terrorism Bill, *Daily Nation*, 2 July 2003.
- 70 Harrison Kinyanjui, Anti-terror law will roll back Kenya's civil liberties, *The East African*, June 30 to July 7 2003, p 4.

CHAPTER 4

THE CAPACITY OF FINANCIAL INSTITUTIONS AND THE BUSINESS SECTOR IN LESOTHO TO DETECT AND CONTROL MONEY LAUNDERING

Mokhibo Nomzi Gwintsa

Introduction and international framework

In this Chapter money laundering is defined as encompassing:

all activities to disguise or conceal the nature or source of, or entitlement to money or property, or rights to either, being money or property or rights acquired from serious economic crime or corruption, as well as all activities to disguise or conceal money or property that is intended to be used in committing, or to facilitate the commission of, serious crime.¹

The primary objective of money laundering is to convert 'dirty' money into some other legitimate asset, to conceal the illegal source or origin of income from such activities as drug trafficking, arms smuggling and financial crime. Globalisation, communication and technology serve to facilitate easy and speedy movement of money all over the world, thus making the detection of money laundering more difficult.²

The quest to combat money laundering stems from increasing recognition of the link between money laundering and serious crime. Successful money laundering activities not only enrich criminals but also assist in funding more serious criminal activity. Money laundering is closely linked to economic crimes such as fraud, bribery, corruption, exchange control violations, tax evasion and, more seriously, to international terrorism.

In recent years, Lesotho has been under the international spotlight over a variety of criminal and civil cases arising from the corruption and bribery of a top official by a number of international companies. Some major international banks were used to facilitate the laundering of the proceeds. The revelations brought into question the integrity of these institutions and had a potentially damaging effect on their reputation.

Lesotho has now been placed in a position where it has to keep up the momentum to portray a genuine and sustained commitment to fight corruption. This, of necessity, requires a commitment to put in place institutional mechanisms to fight not only corruption, but also money laundering, which has been shown to facilitate other crimes.

The international community has become increasingly aware of the dangers posed by money laundering. The United Nations (UN) and other international organisations have committed themselves to playing a more effective role in fighting money laundering.

The twelve major multilateral conventions on terrorism that have been adopted in the last three decades set out states' responsibilities in combating terrorism. Lesotho signed the 1999 International Convention for the Suppression of the Financing of Terrorism. The Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, with the intention or knowledge that any part of the funds may be used to carry out an offence. State parties are required to take appropriate measures, in accordance with domestic legal principles, for the detection and freezing, seizure or forfeiture of funds used or allocated for purposes of committing the offences. State parties also have an obligation to establish their jurisdiction over offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, co-operate in preventive measures and exchange information and evidence needed in related criminal proceedings.³

Lesotho also signed and ratified the United Nations Convention Against Transnational Organized Crime in 2000, thus assuming an obligation to combat money laundering and to criminalise the laundering of proceeds of crime. Another important obligation is that of instituting a comprehensive regulatory and supervisory regime for banking and non-banking financial institutions which are susceptible to money laundering.⁴

The United Nations Security Council unanimously adopted Resolution 1373 of 28th September 2001. Under the Resolution, all states are obliged to prevent and suppress the financing of terrorism as well as to criminalise the willful provision or collection of funds for such acts. Provision is also made for freezing the funds, financial assets and economic resources of both those who commit or attempt to commit terrorist acts, or participate in or facilitate the commission of terrorist acts, and those persons and entities acting on behalf of terrorists.

States are also expected to afford one another the greatest measure of assistance in criminal investigations or proceedings relating to the financing or support of terrorist acts. Note has been taken of the close connection between international terrorism and transnational organised crime, illicit drugs, money laundering and the illegal movement of nuclear, chemical, biological and other deadly materials.⁵

Lesotho has not only shown commitment by signing the various international instruments but is also putting in place measures to implement them through domestication. Consultations are currently ongoing among all relevant stakeholders on the process and modalities of domestication. A committee has been formed to spearhead this process.⁶ Information is also being compiled by the different stakeholders, specifically towards implementing Resolution 1373, on individual sector needs as well as programmes in place to address money laundering.

Methodology

An audit was undertaken of all laws which have potential implications for money laundering. This process facilitated the development of data collection tools, as the dearth of legislation on money laundering showed that structured questions would work better for the commercial and business sector, while questionnaires would work well for the banking institutions. Group and individual interviews were used for both the questionnaires and the structured questions.

What emerged early in the research process was that quite a number of the relevant institutions, with the exception of the banks, initially did not understand the concept of money laundering, particularly at the micro level where it is likely to affect most of them. The few that did understand it believed that their operations were not exposed to money laundering, as it is a phenomenon often associated with international transactions in large amounts of money.

Supervisory/regulatory regime: The Central Bank of Lesotho

Central Bank of Lesotho Act, 2000

The purpose of the Act is to continue the existence of the Central Bank of Lesotho (the Central Bank), to enable it to ensure price stability and to provide for its administration and control.

The functions of the Central Bank, as set out in section 6, are:

- a) To foster the liquidity, solvency and proper functioning of a stable market-based financial system;
- b) To issue, manage and redeem the currency of Lesotho;
- c) To formulate, adopt and execute the monetary policy of Lesotho;
- d) To formulate, adopt and execute the foreign exchange policy of Lesotho;
- e) To license or register and supervise institutions pursuant to the Financial Institutions Act 1999, the Money Lenders Act 1989, the Building Finance Institutions Act 1976 and the Insurance Act 1976;
- f) To own, hold and manage its official international reserves;
- g) To act as banker and adviser to, and fiscal agent, of the government of Lesotho;
- h) To promote the efficient operation of the payments system;
- i) To promote the safe and sound development of the financial system; and
- j) To monitor and regulate the capital market.

Section 47 designates the Central Bank as:

- the Commissioner of Financial Institutions in terms of the Financial Institutions Act 1999 and the Money Lenders Act 1989;
- the Commissioner of Building Finance Institutions in terms of the Building Finance Institutions Act 1976; and
- the Commissioner of Insurance in terms of the Insurance Act 1976.

Financial Institutions Act, 1999

This Act provides for the authorisation, supervision and regulation of financial institutions, agents of financial institutions and ancillary financial service providers. The Act defines a financial institution as “an institution which performs banking business or credit business”.⁷ In terms of the Act, the Central Bank serves as Commissioner of financial institutions. In the exercise of this function, the Central Bank licenses financial institutions, agents of financial institutions and ancillary financial service providers such as foreign exchange dealing services, electronic fund transfer services etc. In terms of Section 49, the Central Bank is also responsible for the supervision of financial institutions and other licensed institutions.

Section 26 provides for secrecy of information of a non-public nature relating to a licensed institution or any customer of such an institution.

Financial Institutions (Anti-Money Laundering) Guidelines, 2000

In pursuance of its function as Commissioner of financial institutions, the Central Bank of Lesotho prescribed the Financial Institutions (Anti-Money Laundering) Guidelines, 2000 (hereafter the Guidelines).

The objectives of the Guidelines are:

- to require financial institutions to establish and maintain specific policies and procedures to guard against the use of the financial system for the purpose of money laundering;
- to enable financial institutions to recognise suspicious transactions and to provide an audit trail of transactions with customers who come under investigation; and
- to require financial institutions to submit reports and to disclose information on large cash transactions and suspicious transactions.

The Guidelines define money laundering as:

Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.

Anti-money laundering programmes

Sub-guideline 5 provides that financial institutions shall develop programmes against money laundering. These programmes are to include, inter alia, internal controls, policies and procedures including the designation of compliance officers at management level. The programmes furthermore have to provide for customer identification procedures, record keeping, recognition and reporting of suspicious transactions and education and training of relevant employees.

There are two commercial banks in Lesotho: the Standard Bank Group and Nedbank Lesotho. Interviews were held with compliance officers of both these banks and with senior officers of the Central Bank in the policy and exchange control division. The information provided was that Nedbank Lesotho acts in

conformity with the 2000 Guidelines and that, as part of the Nedcor Group (RSA), implements the Nedcor Group policy of 2001 on money laundering. The Standard Bank Group similarly implements the Guidelines as well as an anti-money laundering control policy for the Standard Bank Group in the whole of Africa. Both banks' policies are said to have more or less similar components to the Guidelines.

The compliance officers interviewed showed that Nedbank Lesotho exercises self-regulation on money laundering by ensuring compliance with legislation, internal controls, policies and procedures. These processes are rolled out to all staff members, including those at branches in Maseru and other districts. The officers concerned state that they also conduct training for all staff members in the appreciation of the background to money laundering, the primary purpose of which is to raise awareness of money laundering. The content of the training includes defining what constitutes money laundering, the most common forms of money laundering, achieving comprehensive knowledge of the client, the detection of suspicious transactions, dealing with large cash transactions, the possible link between investment-related transactions and international activity to money laundering.

Customer identification and record keeping

Sub-guideline 6 prohibits financial institutions from keeping anonymous accounts or accounts in fictitious names. The Guidelines further enjoin financial institutions to identify their customers when establishing business relations or conducting transactions. This identification has to be based on official or other reliable identifying documentation and records. Specific reference is made under this sub-guideline to the following transactions:

- the opening of accounts or passbooks;
- fiduciary transactions;
- the renting of safety-deposit boxes;
- the use of safe custody facilities;
- large cash transactions.

Sub-guidelines 8 and 9 require financial institutions to maintain a record on customer identification, such as copies of official identification documents, account files and business correspondence, for at least ten years after an account is closed. Records which can enable financial institutions to comply with

information requests from competent authorities are also to be kept for a minimum period of ten years. Such records are to be kept in such a form as to enable reconstruction of individual transactions as evidence in criminal proceedings.

A further requirement under sub-guideline 10 is for financial institutions to review and properly document the background and purpose of all complex, unusually large transactions and all unusual transactions which have no apparent economic or visible lawful purpose.

The Guidelines have been enacted in terms of Section 71 of the Financial Institutions Act and are by their very nature subsidiary to the main Act. The Central Bank of Lesotho has enacted the Guidelines pursuant to its mandate in terms of the Act, to make, among others, such guidelines as are necessary for the better or more convenient implementation of the Act. Section 26 of the Act provides for non-disclosure of information of a non-public nature relating to bank customers. Sub-guideline 6 prohibits banks from keeping anonymous accounts or accounts in fictitious names.

Banks have to balance customer secrecy against their banking reputation where such secrecy renders them vulnerable to misuse. It is in the interest of banks to be seen to be attracting honest customers and investors and to be dealing in legitimate funds. The draft Money Laundering and Proceeds of Crime Bill has a clause which specifically overrides secrecy obligations and other restrictions on disclosure of information.

In terms of sub-guideline 7, where a customer or client conducts a transaction on behalf of another person, the Bank is obliged to require that the true identity of the person on whose behalf the account is opened or transaction conducted be disclosed. This requirement extends, for example, to attorneys in respect of trust funds.

Reporting requirements

Sub-guideline 11 requires financial institutions to report to law enforcement authorities and to the Central Bank any transaction that the institution suspects may form part of a criminal activity or that otherwise constitutes a suspicious transaction. Under sub-guideline 18, reports are also immediately to be made to the Central Bank pertaining to any knowledge or suspicion of money laundering related to a specific customer or transaction.

Financial institutions are also required to report to the Central Bank any transaction above M100,000 within 30 days of month-end. These are transactions which involve cash or 'near cash', for example, travellers' cheques, bearer bonds and other easily negotiable monetary instruments.

In the quest to protect themselves from misuse by potential launderers and in order to preserve the bank's reputation, the Standard Bank Group policy requires that suspicious transactions are reported to the Bank's head office in Johannesburg. The reports are handled by the Group's anti-money laundering officer, who in turn reports to the South African Reserve Bank. A person who conducts suspicious transactions could be declared a *persona non grata* within the Group. It was also stated that branches of the Standard Bank have established their own internal controls over and above those required, to deal with what they term "unusual transactions". These are transactions with an unusual pattern from that expected by bank officials and which are therefore checked.

The Guidelines make provision for a bank to apply to the Central Bank for exemption from reporting some clients in terms of the large cash transaction sub-guideline. These would be clients who frequently deal in large amounts of money. This provision renders banks vulnerable to money laundering as all that a money launderer has to do is establish a pattern in his/her transactions which automatically protects him from scrutiny. It would also seem to open the banks up to the risk of employees being too lax about such customers to even pay attention when the customer begins to transact in an unusual manner. In practice, however, bank officials say they have not sought this exemption. It was further revealed that the issue is being mooted with a view towards removing the exemption.

Another potentially problematic area seems to be the reporting of suspicious transactions. It would seem that large cash transactions are routinely reported, while the same diligence cannot be said of suspicious transactions, especially when it comes to reporting to law enforcement agencies. The perception is that bank officials do not report suspicious transactions as they are enjoined to do for fear of reprisals as there is a lack of faith in the police to deal with reports in confidence and to protect the identities of the officials who report. Members of the Fraud Unit of the Lesotho Police Service conceded that reports of suspicious transactions were very few in number.

The Guidelines do not empower law enforcement officials to compel bank officials to report suspicious transactions. It is only the Central Bank that has powers to impose penalties where a bank fails to observe the Guidelines in a

flagrant manner. The Anti Money-Laundering and Proceeds of Crime Bill establishes the Anti Money-Laundering Authority which will serve as the country's financial intelligence unit (FIU). The fact that the Bill still has to be passed into law has led to an arrangement whereby some members of the Fraud Unit have been designated as contact points for reports of suspicious transactions. These officers are not specially trained to deal with issues of money laundering and they are also supposed to deal with suspicious reports as well as other duties pertaining to fraud. The Fraud Unit also has no mechanisms for initiating investigations unless a report of a suspicious transaction has been made to it.

Interviews were conducted with bank customers to verify controls that the financial institutions purport to have put in place and to also determine the extent to which the public is aware of the concept of money laundering. A random selection of customers was made among individuals and business people. From information provided, it seems that the banks are consistent in the documents they require for purposes of opening bank accounts in order to verify customers' identities. In the case of businesses, the banks are said to require documents such as a certificate of incorporation of a company as well as the memorandum of the company and articles of association.

Some business people who usually transacted in large amounts of money complained of a lack of consistency within the banking industry in terms of requirements for bank transfers and banks cheques. It emerged that bank tellers often made different requirements for similar transactions. According to information provided by bank officials, all bank employees are trained in compliance procedures. The aim is to standardise the way work is carried out and to implement new requirements pertaining to issues such as detection and control of money laundering. This means that minimum requirements have to be met, regardless of which teller or bank official a customer deals with. Consistency and uniformity in implementation are necessary to ensure the effectiveness of control measures.

A major complaint by customers was that banks do not provide them with sufficient information when introducing changes. Customers say they often discover only when they try to undertake a transaction that they can no longer do so. A majority of customers were surprised that some transactions they routinely undertook could constitute suspicious transactions. A common understanding of money laundering also turned out to be that it was associated with huge amounts of money and serious international crimes, such as drug trafficking, and that it therefore did not affect the ordinary person.

Banks have traditionally operated on the basic premise of ensuring customer confidentiality. It stands to reason, therefore, that it poses a challenge to them to balance the interests of their clients to confidentiality with the requirement to report what may look like an unusual or suspicious transaction, particularly as it may turn out to be a false alarm. A lot of effort is required to emphasise the advantages for banks to keep a clean image and to protect themselves from misuse by criminal elements.

Central Bank of Lesotho (Collective Investment Schemes) Regulations, 2001

The objective of these Regulations is to introduce, for the first time, a framework for regulating collective investment schemes with a view to encouraging the growth of such capital instruments without compromising investor protection. The Regulations are aimed primarily at regulating such as unit trusts, which were set up in Lesotho only a few years ago.

A 'collective investment scheme' is defined as a scheme, in whatever form, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and which scheme has the following characteristics:

- two or more investors contribute money or other assets to hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and
- the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed.

The Central Bank of Lesotho is the Registrar and has supervisory authority over collective investment schemes. The Registrar's powers include appointing examiners to investigate and examine books, documents, accounts and transactions of collective investment schemes, with a view to ensuring compliance with the Regulations and to safeguard the interests of investors. The Central Bank only embarked on programmes to implement these Regulations in 2003.⁸

Insurance Act, 1976 and Insurance Regulations, 1985

The main aim of the Insurance Act, 1976 is to provide for the regulation and supervision of insurance business in Lesotho. It therefore focuses on setting out conditions and requirements of conducting insurance business.

Insurers and insurance intermediaries can become susceptible to money laundering through the purchase of life policies, personal investment products and general insurance.⁹ Insurance business usually involves large amounts of money, which renders the industry vulnerable to misuse by money launderers. In spite of this vulnerability, legislation regulating insurance business is silent on money laundering.

Information provided by insurers for this research shows that the primary concern of insurers is not how a client obtained his/her money, but whether a client can pay and continues to pay for cover. Client companies owned by the Chinese, in particular, are said to transact mostly in cash. Most short-term insurers concede that they have no mechanisms in place for screening clients. The only requirement for companies is that they produce papers of registration or a trading licence.

The Central Bank has regulatory powers over the insurance industry. This function is carried out by the Central Bank's Financial Institutions Supervisory Division, through on-site auditing of insurers and off-site analysis of returns submitted by insurers in terms of the Act. According to the bank's officials, they take cognisance of their obligation to detect and control money laundering in undertaking this analysis. The Central Bank is also said to be looking into revising the Insurance Act and the Regulations, in order to address current challenges such as that of money laundering.

The insurance industry falls under the definition of 'cash dealer' under the Money Laundering and Proceeds of Crime Bill. The vulnerability of this industry to money laundering illustrates the need for enactment of the Bill into law so that the industry can discharge its obligations towards the Anti-Money Laundering Authority.

Money Lenders Order, 1989 (as amended by the Money Lenders Act, 1993)

Prior to 1989, money lenders operated freely in Lesotho and often charged their clients exorbitant interest rates. In 1989, the government enacted the Money Lenders Order to require the licensing of money lenders and to regulate money lending operations.

In 1993, the Order was amended to introduce a clause on the revocation of money lenders' licences. It empowers the Commissioner of Financial Institutions (the Central Bank), to revoke a licence if the holder:

- fails to commence operations within a period of one year;
- fails to comply with the conditions of the licence;
- is in breach of any provision of this Act; or
- ceases to carry on the money lending business.

The Amendment also requires that quarterly returns show the assets and liabilities of the holder. Every money lender must produce records and information relating to the business for examination. These include any books, minutes, accounts, cash, securities documents and vouchers. Furthermore, every licensed money lender has to appoint an auditor, approved by the Commissioner, to audit the accounts and report upon on an annual basis the annual balance sheet and profit and loss account. The Central Bank analyses these audited financial reports in order to pick up any irregularities.

In interviews with some of the licensed money lenders, they stated that most of their clients are government employees as well as employees of private organisations. The reason for this is to minimise the risk of non-payment as the money lenders arrange stop-order facilities with the employers for regular withdrawals from the salaries of their employees to pay off their loans.

A common perception is that money laundering does not really feature in this industry as it commonly deals with relatively small amounts of money, for example, maximum amounts of about M10,000.00). The most frequent users of money lending activities are lower-income employees, while other clients use the facility once in a while as a temporary stop-gap measure while awaiting some funds.

Money lenders could themselves engage in money laundering by using tainted funds which they would then get back as clean funds, plus interest. This, however, would require diligence on the part of the regulating authority in issuing licences.

Institutional mechanisms

Anti-money laundering authority

Money Laundering and Proceeds of Crime Draft Bill, 2001

Lesotho's Money Laundering and Proceeds of Crime Draft Bill has been in existence since 2001. The Central Bank of Lesotho is the custodian of the draft Bill. It has taken an inordinately long time to be processed. Initially the

explanation for the delay was that consultations were being held, including with the International Monetary Fund.¹⁰ At the time of writing this report, in mid-2003, the Bill was still at a stage where comments were being incorporated, after which it was going to be forwarded to the office of Parliamentary Counsel. The office of Parliamentary Counsel was at the time already in consultations with the Central Bank on the draft Bill. The next step would be to seek cabinet approval, after which the Bill could then be placed before parliament. In spite of international pressure being brought to bear on Lesotho to enact this Bill into law and contrary to indications that it would have been placed before parliament and passed before the end of 2003, the Bill had still not been placed before Parliament by mid-2004.

The Money Laundering and Proceeds of Crime draft Bill attempts to legislate on money laundering in a comprehensive manner. The preamble sets out the purpose of the Bill as being to enable the unlawful proceeds of all serious crime to be identified, traced, frozen, seized and eventually confiscated.

Money laundering is defined as:

any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from a legitimate source.

The draft Bill furthermore brings financial institutions and cash dealers within the ambit of its operation. Cash dealers are defined as insurers, insurance intermediaries, securities dealers, futures brokers, operators of gambling houses, casinos or lotteries, persons who carry on a business of issuing, selling or redeeming travellers' cheques, money orders or similar instruments, of dealing in bullion or of collecting, holding and delivering cash as part of a business of providing payroll services, and trustees or managers of unit trusts.

The obligations currently imposed on financial institutions by the Financial Institutions (Anti-Money Laundering) Guidelines, 2000, are also extended to cash dealers under the draft Bill. These obligations include verifying the identity of a customer, establishing and maintaining customer records, reporting suspicious transactions, establishing and maintaining internal reporting procedures and providing training to employees in the recognition and handling of money laundering transactions. Enforcement of legislation on money laundering will, in terms of the draft Bill, now lie with the Anti-Money Laundering Authority. Financial institutions still retain the obligation to adopt prudent measures to combat money laundering, as well obligations to report to the

Central Bank by virtue of the Central Bank's supervisory role over financial institutions.

The Bill also makes provision for seizure of suspicious imports or exports of currency, has overriding effect over secrecy laws or other restrictions on disclosure of information and provides immunity for action taken in good faith by financial institutions and cash dealers and their employees or representatives. Provision is also made for confiscation of tainted property and for pecuniary penalty orders.

Part II of the draft Bill sets up an Anti-Money Laundering Authority (hereafter, the Authority). This Authority is the Directorate on Corruption and Economic Offences established pursuant to the Prevention of Corruption and Economic Offences Act, 1999.

In terms of Section 11(2) of the draft bill, the Authority:

- shall receive reports of suspicious transactions issued by financial institutions and cash dealers pursuant to section 14(1);
- shall send any such report to the appropriate law enforcement authorities, if, having considered the report, the Directorate also has reasonable grounds to suspect that the transaction is suspicious;
- may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept pursuant to section 14(1), and ask any question relating to such record, make notes and take copies of whole or part of the record;
- shall send to the appropriate law enforcement authorities, any information derived from an inspection carried out pursuant to paragraph (c), if it gives the Directorate reasonable grounds to suspect that a transaction involves proceeds of crime;
- may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Directorate;
- may compile statistics and records, disseminate information within Lesotho or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Minister accordingly;

- shall create training requirements and provide such training for any financial institution in respect of transaction record-keeping and reporting obligations provided for in section 13(1) and 14(1);
- may consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties under paragraph (e), (f) or (g); and
- shall not conduct any investigation into money laundering other than for the purpose of ensuring compliance by a financial institution with the provisions of this part.

One of the major weaknesses of this section is that, by using the word 'may', it does not always impose an obligation on the directorate to enforce its responsibilities. The fact that the Authority can only conduct investigations for purposes of ensuring compliance by a financial institution is a weakness as it does not make provision for investigations to lead to enforcement, which may be a necessary follow-up.

Prevention of Corruption and Economic Offences Act, 1999

The Prevention of Corruption and Economic Offences Act, 1999 establishes the Directorate on Corruption and Economic Offences which will serve as Lesotho's Anti-Money Laundering Authority. The Act further makes provision for the prevention of corruption and confers power on the Directorate to investigate suspected cases of corruption and economic crime.

The functions of the Directorate are, among others, to:

- receive and investigate any complaints alleging corruption in any public body;
- investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Lesotho; and
- undertake any other measures for the prevention of corruption and economic offences.

Section 2 of the Act defines a 'serious economic offence' as any offence that, in the opinion of the Director of Prevention of Corruption and Economic

Offences, calls for different treatment in relation to investigation and prosecution because of the amount of money involved or the complexity and nature of the transaction. Section 8 of the Act empowers the Director to obtain information to assist or expedite investigations into offences of corruption or economic offences. Such information shall be furnished by suspected persons, persons whom the Director believes that the suspected person has any financial or business dealings with and the manager of any bank. Persons served with a notice under this section shall comply with the requirements of the notice notwithstanding any oath of secrecy that they may have in place.

In terms of Section 36 of the Act, the Director may hold an inquiry if he has reason to suspect that a serious economic offence has been or is being committed or that an attempt has been or is being made to commit such an offence. The Director shall also hold an inquiry referred by the Attorney-General in relation to the alleged commission or attempted commission of a serious economic offence.

Section 37 entitles the Attorney-General, upon the request of the Director and upon obtaining a court order to that effect, to seize or freeze bank accounts or assets of any person the Director reasonably suspects to have committed an offence under the Act.

Section 49 makes it an offence for any person to disclose without lawful authority or reasonable excuse, to any person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under the Act, the fact that he is subject to such an investigation or any details of such investigation, or to publish or disclose to any other person the identity of any person who is the subject of such an investigation.

All indications are that there are no immediate plans to establish a separate unit from the Directorate to serve as the Anti Money-Laundering Authority. In discussions held with the Director of the Directorate on Corruption and Economic Offences, the importance of having the draft Bill passed into law was emphasised, so as to enable the Directorate to discharge its functions as the Anti-Money Laundering Authority. Among others there are plans for a unit that will deal specifically with money laundering. It was pointed out that the Directorate had already submitted some comments on the draft Bill to the Central Bank and that plans were already in place for recruitment of relevant staff as well as identification of training needs in order to enhance capacity to undertake the Directorate's statutory functions.

The Directorate, which has only been functional since April 2003, has been established as a public office, pursuant to Section 3(1) of the Act. The Directorate and its staff are regulated by the Public Service Act, 1995 with necessary modifications or as set out in the establishing Act. The Minister of Justice, Human Rights and Rehabilitation is responsible for the Directorate and receives annual reports from it.

The fact that the Directorate is a public office renders it accountable to government, even though it can be argued that it is functionally independent in the discharge of its functions. While the Directorate has been functional for a relatively short period, one can, however, posit that it will not be immune from challenges such as undue influence. Factors that can contribute to this vulnerability include the fact that members of staff of the Directorate are public officers who may have to take unpopular action over persons in authority over them. The Directorate is empowered to investigate allegations of corruption of public officers, and under the Act, these include Cabinet Ministers, holders of statutory public office and members of Parliament.

The Directorate has to go through normal government budget systems and allocations. This can be a hindrance as the public service is renowned for its bureaucracy and inefficiency, which will not necessarily take into account the exigencies of the Directorate's operations. The fact that the public service is not usually a great remunerator may also hamper the Directorate's efforts or desire to attract high calibre staff as they will naturally demand remuneration that is commensurate with their qualifications and experience as well as the demands of their work. Conducive working conditions also serve to minimise internal corruption as well as to act as an incentive to attain a high degree of performance.

The Directorate has taken cognisance of the need for confidence building between itself and the different stakeholders. This includes, but is not limited to, financial institutions, law enforcement agencies, the Central Bank, the Lesotho Revenue Authority and the general public. This confidence building is crucial in order to enhance mutual co-operation which is so necessary in dealing with money laundering. The Directorate also needs confidence building from Government in order for it to have the clout necessary to discharge its functions without fear of favour or prejudice. So far Government has portrayed its political will to address issues of corruption through enactment of legislation and the Directorate's establishment. This has to go hand in hand with the provision of adequate resources and non-interference in the discharge of the Directorate's functions.

Commentary on the Sole case

On 3 December 1999, Masupha Sole, a former chief executive of the Lesotho Highlands Development Authority (LHDA) was indicted, together with 18 other accused, on charges of bribery, fraud and perjury. The charges arose out of allegations of bribery of the chief executive by various international firms, partnerships and joint ventures involved in the multi-million dollar Lesotho Highlands Water Project (LHWP).

Evidence led in the case before the High Court showed that between 1991 and 1999 there was already dissatisfaction among some of Mr. Sole's colleagues regarding the awarding of some contracts under the project and favouritism displayed towards contractors' staff over Basotho nationals. It is also common cause that at the material time, the activities of LHDA and the LHWP were of national interest as it was the first project of its magnitude in the country and one of the biggest projects in Africa.

The Prevention of Corruption and Economic Offences Act came into force in 1999. However, the Directorate only became functional in April 2003. If the Directorate had already been functional, the case would have fallen squarely within its ambit as its functions include, among others, to receive and investigate any complaints alleging corruption in any public body and to investigate the conduct of any person which in its opinion may be connected with or conducive to corruption. The Directorate also, importantly, has the function of advising heads of public bodies of changes in practices and procedures which are necessary to reduce the likelihood of corrupt practices. An early investigation would perhaps have detected irregularities in the chief executive's execution of his duties or could at least have deterred further transgression.

The magnitude of the LHWP should have awakened the government of the country to the need to guard against corruption. Numerous public authorities whose activities could render their employees susceptible to corruption are putting in place policies which require employees to declare their assets and keep track of any signs of unexplained wealth or changes in lifestyle. The government needs to consider putting legislation in place or, at least, seeking amendments to legislation that sets up public and private bodies, to require all employees and holders of public office to declare their assets. This would go a long way as a preventive measure and would be preferable to waiting until there are signs of corrupt practices before taking action..

Lesotho Revenue Authority

The Lesotho Revenue Authority (LRA) was established by the Lesotho Revenue Authority Act, 2001. It is the main body responsible for the assessment and collection of specified revenue on behalf of government and for the administration and enforcement of laws relating to such revenue.

One of the functions of the LRA is to take necessary measures to counteract tax fraud and other forms of fiscal evasion. The LRA also has to provide for the establishment, maintenance and application of systems for identification of taxpayers. The Directorate on Corruption and Economic Offences has the duty, among others, to investigate allegations or suspected contravention of the fiscal and revenue laws of Lesotho. The two bodies have to co-operate in their respective duties, which will increase the likelihood of identifying money laundering activities.

As already mentioned, there is often a close link between money laundering and other economic offences. In a number of cases, money laundering is detected in the process of investigating offences like tax evasion and vice versa. Money laundering is also facilitated through the use of shell companies. Lesotho lacks a system of keeping track of companies once they are registered, so that it is easy for a company to exist on paper only or to be engaged in activities totally different from those stipulated on paper. If the LRA functions properly, it should be able to ensure that such companies and individuals do not escape scrutiny for contravention of revenue laws or money laundering activities.

The commercial sector

Investment promotion

The bulk of investment in Lesotho consists of export-oriented manufacturing industries. These industries, which are largely textile and apparel industries are dominated by Chinese nationals. Most of the Chinese traders who do business in Lesotho reside in the neighbouring South African town of Ladybrand. They generally receive their capital through banks in Lesotho, which they withdraw and move to South Africa. They therefore become responsible for most of the cross-border movement of money from Lesotho into South Africa, which in turn increases the risk of money laundering in the country.

Banks generally acknowledge that they are aware of the way in which Chinese traders do their transactions but this seems to have been accepted as normal. As such, it is not unreasonable to assume that a lot of what would constitute suspicious transactions is not really followed up due to this aura of normality.

Travel agents

Although the exchanging of cash for travel tickets is a common method of moving money from one country to another, the travel agents interviewed indicated that this is not a common practice in their industry. The information provided is that there is no limit to the number of tickets one can purchase and that travel tickets can be cancelled before the departure date. However, there are penalties involved, depending on the price of the ticket and the airline involved. Where a refund is due, it is not issued by the agent but by the airline itself and takes several weeks to process.

In theory nothing stops a launderer from purchasing travel tickets worldwide and for extended periods and then either using the tickets or canceling them before the date of departure and then obtaining a refund from the airline.

Estate agents

Estate agents have no regulatory body in Lesotho. All that is required is that one should hold the relevant licence.

Dealing in property can be a way for money launderers to invest illicit funds or as a vehicle for laundering activities. Such property dealings can be undertaken through estate agents using a variety of means. An example is the use of shell companies which are registered in such a way that there is no apparent connection with the launderer, even though, in reality, the launderer will actually own the company or have an interest in it. The end result is that it becomes difficult to link the launderer with either the company or the property, which makes confiscation difficult.

The cost of property is normally high enough to discourage dealing in cash. Estate agents can minimise their being used by launderers by insisting on payment by cheque or at least on the cash being deposited by the buyer into a bank account. This would then render the transaction reportable in most cases, or would at least facilitate an audit trail.

Other relevant legal measures

Companies Act 25, 1967

The Companies Act makes provision for the constitution, incorporation, registration, management, administration and winding up of companies and other associations.

In the past, accountants and lawyers could register companies on behalf of clients. A recent directive from the Office of the Registrar-General has removed these powers.

The Companies Act stipulates that foreigners are only able to register companies if they have a local counterpart. In the process of facilitating registration of such companies, lawyers sometimes end up being shareholders. This can result in lawyers unwittingly being shareholders in shell companies that are set up merely to facilitate illicit activities, such as money laundering. This situation is made easy by the fact the once a company is registered, there is no follow-up from the registering authority on whether the company is actually functioning or whether it is undertaking the activities it was registered to undertake. Many of these companies are used internationally to make fictitious payments and move money that is, in most cases, tainted.

Accountants can be involved in money laundering, sometimes without their knowledge, in the provision of their professional advice on investments and services. Accountants may be used to assist in converting illicit funds into legitimate ventures such as purchase of property, goods and investment products.

Privatisation Act, 1995

The Privatisation Act was established to provide for the privatisation of parastatals and for the establishment of the privatisation unit. Under this Act, after the approval of the privatisation scheme, the privatisation unit must identify a potential purchaser. A 'purchaser' is defined as an individual, a lessee, an investor or a contractor who acquires an interest in a parastatal or any asset which is owned by parastatal or in which a parastatal has an interest.

This means that anybody can be a purchaser, especially as the Act does not have a screening process for the potential purchaser.

Casino Order, 1989

The purpose of this legislation is to provide for the management, control and licensing of casinos. It contains no screening requirements. It merely states that citizens of Lesotho can operate only on a cash basis (section 26), which includes travellers' cheques but excludes personal cheques, credit cards and other forms of credit. What this means is that foreigners can use any currency and there is no limit on the amount of cash that can be used in the hotels.

The fact that anyone can walk into a casino and gamble using an unlimited amount of cash renders the industry susceptible to money laundering. A launderer can purchase casino chips for a large amount of money and cash them back, thus enabling him to exchange tainted money for clean money. Casinos state that, in practice, they exchange casino chips for the currency which a person used to purchase the chips. However, this does not minimise money laundering as the purpose is not necessarily to acquire a different currency.

Lotteries Act, 1975

The purpose of the Lotteries Act is to provide for the establishment, promotion and conduct of state and other lotteries. Lesotho has not had any lotteries in recent years. Money launderers can use the guise of lottery winnings to explain illegally acquired funds. In terms of the Money Laundering and Proceeds of Crime Draft Bill, a person who operates a lottery falls under the definition of a cash dealer. This means that such an operator would be obliged to adopt measures as stipulated in the Bill to help combat money laundering.

Legal Practitioners Act, 1983

In terms of the Legal Practitioners Act, lawyers are empowered to set up trust accounts into which clients' moneys are deposited. The definitions of financial institution and cash dealer as accountable institutions in the draft Money Laundering and Proceeds of Crime Bill seem to have excluded lawyers. The rationale for this exclusion is not quite clear, as lawyers can unwittingly be involved in money laundering activities in their various professional roles. The Central Bank is of the opinion that they have tried to use broad terminology which seeks to include all possible accountable institutions. However, the fact that the Bill does not include a comprehensive list of accountable institutions is a weakness as a number of institutions that are susceptible to money laundering are left out.

As a means of giving effect to the Financial Institutions (Anti-Money Laundering) Guidelines, banks now require lawyers to transact in their own names in respect of trust accounts and to disclose the true identity of a person on whose behalf they undertake a transaction, unlike previously when they could transact fully in clients' names in respect of trust accounts.

In the absence of a specific provision rendering them an accountable institution, lawyers can only come under scrutiny in respect of reportable large cash or suspicious transactions. Lawyers' clients, however, enjoy less scrutiny, while also having a route into a bank account. Clients can also pay a retainer to their lawyers, which can be done in lump sum or through regular or periodic payments. These payments may be in genuine anticipation of future incurring of legal expenses, but they may also be used by launderers to hide illicit money.

Conclusion and recommendations

The process of domestication of international obligations to which Lesotho is signatory is not as fast as may be desirable. However, as already pointed out, efforts are being made to implement these obligations. The Draft Money Laundering and Proceeds of Crime Bill is an attempt to meet international standards on money laundering. It is however, a weakness that the Bill is still in draft form, almost three years since its inception. That the Bill is crucial in enhancing legislative and institutional capacity to detect and control money laundering is a factor acknowledged by all relevant respondents. It is also a positive step towards implementing the mandatory obligations of United Nations Security Council Resolution 1373, 2001 as well as other international instruments on money laundering and the financing of terrorism.

Financial institutions have made some progress towards implementing legislative and administrative controls on money laundering but much more still has to be done to ensure full compliance and enforcement of laws. Even if the banking industry is effective in detecting money laundering, the second leg of that process has to be enforcement of civil and/or criminal sanctions as deterrents to would-be launderers and as a punishment to launderers.

It is imperative that the Money Laundering and Proceeds of Crime Bill be passed into law to enable the Anti-Money Laundering Authority to become functional. The Fraud Unit lacks the capacity and resources to effectively combat money laundering. There is already an appreciation of the fact that the intricacies of criminal activities like money laundering require specialised skills from institutions that are mandated to deal with the problem. While government

has shown its political commitment to addressing issues of corruption and economic offences through the establishment of the Directorate, it is hoped that this commitment will be carried further by providing the necessary financial and human resources to equip the Directorate with the capacity to carry out its duties. As the Directorate is designated by law as the country's Anti-Money Laundering Authority, this requires that it be augmented with a variety of skills such as specialised investigative techniques, forensic auditing, banking practices and prosecution.

Notes

- 1 Definition agreed on at a workshop held for researchers commissioned by the Institute for Security Studies (ISS), Cape Town, 8 March 2003.
- 2 Global Programme Against Money Laundering, <www.unodc.org/unodc/money_laundering.html>.
- 3 United Nations Treaty Collection, accessible at <www.untreaty.un.org/English/tersumen.html>.
- 4 SP Sakoane, Research project on money laundering in Southern Africa: Final report on Lesotho, unpublished paper prepared for the ISS, 2002.
- 5 UN Security Council Resolution 1373, 2001, accessible at <www.un.org/news/press/docs/2001/sc7158.doc.htm>.
- 6 According to information provided by the Legal Services Section of the Ministry of Foreign Affairs.
- 7 Financial Institutions Act, 1999, Section 2(b)(iii).
- 8 According to information provided by the Bank's Supervisory Section.
- 9 S Thornhill and M Hyland (MHA Consulting), *Combating money laundering: A model of best practice for the financial sector*, Commonwealth Secretariat, UK, 2000.
- 10 Interview with the Head and a senior officer of Policy and Exchange Control.

CHAPTER 5
AN EVALUATION OF INFRASTRUCTURE TO
DETECT AND CONTROL MONEY LAUNDERING
AND TERRORIST FUNDING IN MALAWI

Jai Banda

Introduction

Over the centuries it has been important for criminals to legitimise the proceeds of their criminal activities by converting the funds derived from criminal activity to funds that appear to be legitimately obtained. Preventing criminals from using the financial institutions to launder the proceeds of crime has therefore become a standard feature of the fight against crime. After the tragic events that took place in the United States on 11 September 2001 a number of governments called for a rapid and co-ordinated effort to detect and prevent the use of the world financial system by terrorists. This was based on the general recognition that effective efforts to combat money laundering cannot be carried out without the co-operation of financial institutions, their supervisory authorities and law enforcement agencies. Launderers are continuously looking for new routes for laundering their funds. Economies like that of Malawi, with growing or developing financial centres but inadequate controls, are particularly vulnerable. There is therefore a need for money laundering to be fought in Malawi by establishing a comprehensive anti-money laundering regime and by providing the necessary legal or regulatory tools to the authorities charged with combating the problem, acting in liaison with all the institutions susceptible to money laundering. This chapter evaluates infrastructure in Malawi to detect and control money laundering.

What is money laundering?

Taking effective measures to combat money laundering requires one to have a good idea of this crime and how it is carried out. The goal of a larger number of criminals' acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to

disguise their illegal origin. The following definition of money laundering is adopted in this chapter:

All activities to disguise or conceal the nature or source of or entitlement to money or property, or rights to either, being money or property or rights acquired from serious economic crime or corruption, as well as all activities to disguise or conceal money or property that is intended to be used in committing or facilitate the commission of serious crime.¹

In terms of clause 19(1) of Malawi's proposed Money Laundering and Proceeds of Serious Crime Bill, 2002, a person launders money if he or she:

- (a) acquires, possesses or uses property, knowing or having reason to believe that the property is derived, directly or indirectly, from acts or omissions:
 - (i) in Malawi, which constitute a serious offence.
 - (ii) outside Malawi, which had they occurred in Malawi would have constituted a serious offence.
- (b) directly or indirectly, renders assistance to another person for
 - (i) the conversion or transfer of property derived, directly or indirectly, from acts or omissions referred to in paragraph (a) with the aim of concealing or disguising the illicit origin of that property or of aiding any person involved in the commission of the offence to evade the legal consequences thereof.
 - (ii) concealing or disguising the true nature, location, disposition, movement or ownership of the property derived directly or indirectly from acts or omissions referred to in paragraph (a).

It is noted from both definitions that the process of disguising money is of critical importance as it enables the criminal to enjoy the profits of crime without giving away the source. Illegal arms sales, smuggling and the activities of organised crime, including armed robbery, drug trafficking and prostitution, can generate huge sums of money. Embezzlement, insider trading and bribery schemes can also produce large profits and create the need to 'legitimise' the ill-gotten gains through money laundering. When criminal activity generates substantial profits, the individual or group involved must find a way to control the funds without attracting attention to the underlying activity or the persons involved. Criminals do this by disguising the sources of the money, changing its form, or moving funds to a place where they are less likely to attract attention. By so doing, they commit the crime of money laundering.

Exposure of commercial, financial and other sectors in Malawi to money laundering

The formal retail and mercantile commercial sector in Malawi continues to deal mainly in cash transactions. Most shops, concentrated in the commercial cities of Blantyre and Lilongwe, prefer dealing in cash. Malawians of Asian descent, who are the bulk of retail traders, generally do not accept cheques, hence the widespread use of cash. This provides a wide-open playing field for money launderers. The growing trend of refusing payment by cheque has "raised concern among industry captains, who say the practice frustrates the country's efforts to move towards a cash-free financial system if left unattended."² For many shops the amount of cash is immaterial to the transaction. An interview with some leading merchants showed that they do not keep proper records of their transactions, which heightens their vulnerability to becoming part of the money laundering chain. It is widely known that criminals can use cash from the sale of drugs, armed robbery or any other illicit trade to purchase items from retail outlets.

There are a few motor vehicle dealers in Malawi. As with other parts of the commercial sector, people can buy vehicles using cash. Further, the dealers do not require any form of proof of identity from purchasers, nor do they verify purchasers' identity. Anyone can buy a vehicle by merely stating his name and address, upon which the seller can give the purchaser a letter of change of ownership. This is then submitted to the Road Traffic Authority to effect the change of ownership into the purchaser's name. This practice exposes the motor vehicle trade to the laundering of tainted money.

Foreign exchange bureaux are highly exposed to money laundering. An observation of the way transactions are carried out in one such bureau revealed that in some instances, no record of transactions is entered in any books. It is at the discretion of the customer whether the transactions should be recorded or whether his passport should be stamped to indicate the transaction. This exposes the bureaux to money laundering. Furthermore, the bureaux are not obliged to report any cash transactions to the police, regardless of the amounts involved.

The Fiscal Police, with headquarters in Blantyre, is the police unit that deals with economic crimes. The unit has 10 members. It is not clear what measures, if any, it has put in place to detect and control money laundering. The concept of money laundering seems still to be only vaguely appreciated within the unit, which clearly compromises the unit's capacity.

The sale by banks of bearer certificates makes them susceptible to abuse for money laundering purposes. In Malawi bearer certificates can be traded and negotiated after maturity for a bank cheque or cash. Money launderers can use banks to deal in bearer certificates.

Institutional mechanisms to detect and control money laundering

In South Africa, the Financial Intelligence Centre Act No. 38 of 2001 (FICA) is the most direct legislation dealing with the proceeds of unlawful activities. Apart from strict measures introduced against offenders, FICA places onerous obligations on all accountable institutions, including authorised foreign exchange dealers. Malawi does not yet have the legislative equivalent of FICA. The Money Laundering Bill, which has twice been tabled in parliament, has not been passed on account of being insufficiently explained: legislators have complained that they do not understand it. The Attorney-General indicated that the Bill would be tabled again before the end 2003,³ but this had not yet occurred at the time of writing.

The Money Laundering Bill refers to financial institutions or cash dealers. 'Financial institution' covers a wide range of business activities. In this chapter the following institutions are examined: boards of executors, trust companies, travel agents, estate agents, police, banks, gambling establishments, lawyers, forex bureaux, accountants and investment promotion agencies. Most of them would fall under the proposed definition of financial institutions.

The mechanisms in place to detect and control money laundering in these institutions are varied. Since money laundering is not yet a crime in Malawi, it is still a matter of speculation whether these mechanisms are in fact intended to detect and control money laundering, or whether they are primarily aimed at some other purpose.

Banking institutions

In many cases, banks and other financial institutions may be the only entities capable of tracing the assets of launderers and terrorists and of preventing them from being used to finance terrorism or the other criminal activities. Accordingly, it is important that mechanisms to be put in place to detect money laundering by these institutions. The Reserve Bank plays an important role in this regard.

The Reserve Bank of Malawi

The Reserve Bank of Malawi is established under the Reserve Bank Act 1964, Chapter 44:02 and its principal objectives include the:

- promotion of a sound financial structure in Malawi, including payment systems, clearing systems and adequate financial services able to detect and control money laundering;
- collection of economic data from the financial and other sectors for research and policy purposes. The research assists in bringing new, counter-money laundering perspectives to respond to ever changing methods of money laundering.
- supervision of banks and other financial institutions to ensure their activities are carried out lawfully with the Reserve Bank providing the necessary checks and balances on money laundering.

Supervision of banks and other financial institutions is in terms of Section 48 (i), which stipulates that:

The Bank shall supervise banks and other financial institutions to safeguard the liquidity and solvency of such institutions and ensure their compliance with the monetary regulations under the Act.⁴

The Reserve Bank has the power to call upon commercial banks and other financial institutions to submit financial and other statements regarding their business and any additional information the Bank may require. This allows it to evaluate the commercial banks' activities and determine if there are any suspicious activities taking place.

With regard to the liquidity and solvency and sound management of banks and other financial institutions, the Reserve Bank issues guidelines, regulations and directives. Each bank or financial institution is required to comply with them or risk certain penalties.

In addition to setting out the basic elements for banks to follow, the Bank also monitors the application by the commercial banks of sound 'know your customer' procedures.

The Reserve Bank's inspectors can investigate the affairs of any bank or financial institutions at any time.

Commercial banks

There are six commercial banks in Malawi, namely National Bank, Stanbic Bank, Finance Bank, First Merchant Bank, Loita Bank and Indebank. Their measures to detect and control the laundering of tainted money are more or less the same. At the biggest bank, National Bank, the following mechanisms are used:

Opening of accounts

Customer identification is essential before any account is opened.⁵ The bank takes reasonable measures to satisfy itself as to the true identity of anyone seeking to enter into a business relationship with it by requiring the applicant to produce an official record reasonably capable of establishing his or her true identity, such as a passport, driver's licence, a letter from employers with proof of remuneration, or references from account holders. In the past the National Bank took such references at face value but now it has to verify them.

The bank generally does not establish a banking relationship until the identity of a new customer is verified. With regard to companies or trusteeships the bank not only requires the certificates of incorporation but also checks on the identity of the directors. The same applies to trusteeships of any charitable organisation.

Stanbic Bank has more or less the same requirements for opening an account as the National Bank. The operations manager indicated that the bank endeavours to get as much information as possible from clients when they open accounts. Stanbic has now gone further and is currently working on requiring customers to get authenticated letters of recommendation from notary publics before the bank will open an account for them. As there are no national identity cards in Malawi, Stanbic Bank sometimes accepts personal identity cards for individuals.

However, the banks do not verify the authenticity of some of the documents regularly relied on for identification, such as passports and driver's licences, with the relevant institutions, namely the Immigration Department and Road Traffic Department respectively. The Immigration Department has been known to issue passports to non-Malawians, particularly Zimbabweans.

Record keeping

The National Bank of Malawi has an archiving system that is used in keeping records for the bank and a booklet that defines what they mean by 'records'. The statutory requirement for keeping records in Malawi is seven years but the National Bank may keep key documents for as long as 20 years. Stanbic Bank

keeps records for seven years, after which they are stored in a data bank. The records are never destroyed. The banks revealed that all records relating to transactions are kept to enable them to comply swiftly with information requests from the Reserve Bank of Malawi. The records are sufficient to permit reconstruction of individual transactions.

Reporting system

Banks in Malawi are not obliged by law to report regular transactions and they are invariably not keen to do so. The tendency is to uphold secrecy practices. National Bank's approach is to discuss any potentially problematic matter with a customer before reporting it to law enforcement officers. Within the bank any officer who is confronted with a suspicious transaction reports to quality assurance officers, who have the responsibility of co-ordinating unusual transactions arising in the bank. They refer the matter to the bank's Risk and Security Department, which is mandated to investigate and check such transactions.

At Stanbic Bank any bank official confronted with an unusual transaction refers the matter to the internal auditor, who in turn refers it to the Operations and Administration branch of the bank. In respect of other new banks, such as First Merchant and Finance Bank, reports are made to the manager of the bank.

No banks allow the operation of anonymous bank accounts.

Screening of employees

It is important for banks to screen employees lest they employ individuals who then connive with the launderers. Screening of potential new employees takes place through interviews and by writing to the previous employers or former education institutions for references.

Staff training

Though most bank employees of National Bank and Stanbic Bank receive training each year in the banks' general operation, not much time has been devoted to specialised training on money laundering or its detection. Proper training is required if laundering is to be detected. Bank officials can only detect laundering if they have knowledge of what it entails.

Cash transactions

The financial sector in Malawi deals predominantly in cash transactions. The banks thus rarely report any cash transactions, although National Bank said that suspicions are aroused in the case of cash deposits of a million kwacha or more.

The banks in Malawi do not allow anonymous bank accounts. Each account is assigned to an existing person. However, as pointed out above, banks such as the first Merchant Bank and Finance Bank that sell bearer certificates do not require identities for anyone purchasing them. This practice is a loophole which can be used by criminals to disguise their tainted money.

Other commercial institutions

Estate agents

Most estate agents in Malawi do not understand what money laundering is about and thus have not put in place mechanisms to control and detect it. The estate agents regard it as nothing unusual if a person brings in a million kwacha in cash to purchase a property. They do not even profile their customers. Most estate agents carrying on business in Malawi are not registered with the Estate Agents Board.

It is difficult for estate agents to detect the laundering of tainted money. Most are simply interested in selling properties, regardless of the source of funds. They are not required by law to question a client's source of funds or to verify the identity of any individual, hence their capacity to detect laundered proceeds is next to zero.

Lawyers

Five law firms surveyed had no measures to detect and control the laundering of tainted money. No profiling or identity verification of clients was undertaken. There is no doubt that lawyers are well positioned to acquire information relating to money laundering and even to facilitate it. However, because of client confidentiality, lawyers cannot effectively discharge their responsibilities in the detection of money laundering. In Malawi lawyers are not obliged to make any reports, hence their capacity to detect money laundering is to no avail.

Insurance organisations

The insurers in Malawi have also not put in place any measures to control or detect money laundering. Interviews with officials⁶ from insurance companies revealed that they were generally unfamiliar with the concept of money laundering. The insurance companies did not care to probe the source of income of their customers or verify with foreign jurisdictions whether or not motor vehicles being insured were stolen.

The capacity to detect money laundering is made more difficult for insurance companies in cases where they have to pay out for accidents, some of which are not genuine. Sometimes drivers of company vehicles connive with unscrupulous individuals and stage accidents, for insurers are required to pay. The insurance companies do not have the capacity to deal with such situations, which nonetheless provide an opportunity for money laundering.

Gambling institutions

Gambling institutions are a new phenomenon in Malawi and have only been in the country since 2002. Blantyre has one casino. There are no mechanisms to detect and control the possible laundering of tainted money and other illicit proceeds through the casino. Gamblers can visit the casino with millions in cash without anyone raising an eyebrow. Money launderers can thus 'clean' as much money as they want through the casino without any fear of detection. Casinos are not required to get the identity of their customers or question the source of customers' funds.

Government departments and institutions

Registrar of businesses, trusts and companies

Money launderers can register firms, companies or trusts and use the same to disguise their clandestine activities.

The clerk who processes registration of these entities indicated ignorance of the term 'money laundering' and was not aware that entities can be registered for illicit purposes. The only mechanism which can be said to be in place to control money laundering is the requirement of some of those who register business names to furnish their identities, copies of which are kept in the respective files of the registered entity. In regard to the registration of companies or trusts, no trustees' or directors' identity documents are required whatsoever.

Malawi Revenue Authority and Department of Customs and Excise

The Malawi Revenue Authority is the government department empowered to collect revenue in Malawi. The department is more interested in collecting revenue than it is in mechanisms to detect or control money laundering. It finds it difficult to determine whether the correct tax is being collected since most traders do not issue receipts.

The main mechanism to detect and control money laundering is in action at the country's borders, through the Department of Customs and Excise, though its chief aim is in fact to collect duties payable on goods entering Malawi.

Customs officials at the borders are required to inspect all goods entering Malawi and determine the duty payable. However, they find it very tough to detect whether invoices for such goods are genuine or not. Attempts have been put in place to use organisations such as the 'Société Générale Desuiveillance (SGS) to determine the correct prices of goods, but it is still very difficult to determine their true values. Sometimes money is laundered through under-invoicing in respect of cross-border trade.

As criminals can purchase volumes of commodities using cash and with no receipts being issued, it is very difficult to detect the laundering of tainted money.

Even if goods manage to slip through the border, the Malawi Revenue Authority has road blocks in place along the roads leading to the major towns, such as Blantyre, Lilongwe and Mzuzu, to inspect goods that pass through them.

Tax evasion is rampant in Malawi. The Malawi Revenue Authority can, however, visit any institution and inspect the books to determine if there are any illegal activities taking place.

In regard to purchase and sale of properties in Malawi, no property can be transferred unless the seller can produce a tax certificate that he has been paying tax and such tax certificates are only issued by the Malawi Revenue Authority.

The Immigration Department

For African countries no visas are required to enter Malawi, making it difficult for the Immigration Department to control and investigate such visitors to the country. However, the Immigration Department has intensified scrutiny of all those entering Malawi from outside the continent, and monitors the movement of all those suspected to have terrorist inclinations, with the assistance of the National Intelligence Bureau.

The police

The capacity of the police to detect money laundering is diminished because most do not understand what it entails. In interviews with the Fiscal Police, the branch that is meant to deal with laundering, only two out of eight policemen interviewed had any idea of what money laundering is all about.⁷ For the police to be able to effectively discharge their duties they first require training.

Their capacity to detect money laundering is further limited because they are not allowed by law to tap telephones when investigating matters, though they

did do this during the one-party dictatorship of Kamuzu Banda in an attempt to clamp down on political opponents.

Malawi Investment Promotion Agency

The main function of the Malawi Investment Promotion Agency is to encourage investment in Malawi. The organisation has no mechanisms to check the sources of finance for investment projects, or to detect or control the laundering of tainted money through such projects.

Forex bureaux

Forex bureaux are vulnerable and susceptible to abuse by money launderers. Individuals, both foreign and national, can undertake large transactions as there is no limit on the amounts that can be transacted in the bureaux. It is thus surprising that they have not put in place any mechanisms to detect or control money laundering. The forex bureaux do not have the capacity to detect fake passports so anyone, including foreigners, can exchange money by producing any passport. In this way the proceeds of crime can be easily transferred to other countries. It should be noted that individuals can also buy forex, even if they are not travelling, unlike the situation in banks where production of a bus or airline ticket is required before the issue of travellers' cheques and banks do not sell foreign exchange just to anybody but only to established customers.

Limitations on institutions' capacity to detect money laundering

Since money laundering touches different sectors, a multi-disciplinary approach is required to detect it. On paper the police, the Malawi Revenue Authority, the National Intelligence Bureau, the Anti-Corruption Bureau and the Director of Public Prosecutions are required to work together. However, it is noted these institutions do not appear prepared to do so. There have been cases that have been investigated by the Anti-Corruption Bureau but which the Director of Public Prosecutions has inexplicably declined to prosecute.

These institutions are reluctant to share information as a result of lack of trust between them. There is the usual fear that information could be leaked to wrong persons. The Anti-Corruption Bureau and the Director of Public Prosecutions, and the National Intelligence Bureau and the police, regard themselves as rivals and this results in a weakness in the control of money laundering.

The capacity of the institutions that are required to detect the laundering of tainted money and other illicit proceeds to effectively discharge their

responsibilities is very limited since the government has not yet established a comprehensive set of benchmarks.

Money launderers' tools range from complex financial transactions carried out through webs of wire transfers and networks of shell companies, to currency smuggling, under- and over-invoicing and tax evasion.

One of the major obstacles to the successful fight against money laundering is that many institutions still do not understand the concept. The staff of relevant institutions do not have the necessary skills to determine when money laundering is taking place and thus their capacity to implement counter measures is limited. Just as banks and other financial institutions have to identify their clients, they are also called upon to develop the ability to know whether identity documents are real or fake. The capacity to do this is narrow.

The banks further have an enormous task if they are really to get to know a customer with a number of different businesses. The capacity to profile not just the customer, but his family dependants and beneficiaries, is an onerous one to procure and the cost of profiling customers extensively is costly for Malawian institutions.

Some institutions, such as the Registrar of Companies, have poor record maintenance practices, with the result that files can easily go missing. There is also an absence of records in the files of some business entities. Notable is the lack of filing of annual returns. It is therefore difficult to determine if a business entity was established for legal purposes or for the purposes of laundering proceeds and carrying out illicit activities.

The absence of company records makes it difficult to collect, evaluate, process and investigate financial information relating to financial and business transactions.

The Registrar of Companies, like most government agencies, still uses outdated forms of storage analysis and communication of information.

Formal, structured co-operation is clearly lacking between financial institutions and government departments. If money laundering is to be detected, then a multi-disciplined approach between government agencies and financial institutions is desirable, but the capacity to carry out this approach is hindered because:

- an unwillingness to share information is common among government agencies and is usually the result of lack of mutual trust which gives rise to fear of possible leakage of sensitive material to unauthorised persons;

- there is a reluctance on the part of the financial institutions to provide government authorities with information that might be related to, but is not patently indicative of, crime. The financial institutions are wary of being called as witnesses in court proceedings and would prefer to do what they can to avoid going to court;
- there are differences in the levels of technology being applied by the relevant institutions and in the skills levels of their personnel. This often acts as a barrier to effective and efficient information exchange; and
- resource limitations limit the capacity of government agencies to effectively exchange information among themselves and with private financial institutions, such as banks, which have at their disposal comparatively sophisticated information technology systems.

Capacity of institutions to supervise the implementation of money laundering control

The regulation of primary money laundering control points by their mother institutions is done with full knowledge that there is no legislation on money laundering in Malawi. Hence, the supervision is general and not specifically relative to countering money laundering as a distinct crime. This section discusses the relevant institutions and their capabilities. There is no duty on the supervisory authorities to disclose or cause to be disclosed to any body any information that a person may be engaged in money laundering.

The Reserve Bank

As noted one of the principal objectives of the Reserve Bank of Malawi is to supervise other banks. The Reserve Bank has the capacity, and is empowered, to appoint inspectors who may at any time investigate the affairs of any bank or other financial institutions at such institution's premises. An attempt to discuss the Reserve Bank's supervisory capacity was refused by the bank's lawyers.

The big banks themselves believe that the Reserve Bank officers are more interested in protecting bank clients than in checking if any money laundering activities are taking place. Further, the Reserve Bank officers do not just arrive at a bank to investigate it but only do so after prior arrangement, thus diminishing their own money laundering detection capacity by giving the banks ample time to put their houses in order before being investigated.

The Reserve Bank is able to determine that banks have adequate policies, practices and procedures in place that promote high ethical and professional standards. Should any bank not comply with these, the Reserve Bank can, in theory, revoke the bank's licence, although in practice this has never happened. The Reserve Bank can also report any criminal activity detected to the fiscal police.

In respect of documentation and policies of identification of customers, the Reserve Bank has the capacity to check on these by visiting the banks and requesting the documents at any time.

The Reserve Bank can further direct any financial institution to direct how any bank official can operate, even a money laundering officer.

The Reserve Bank's capacity to enforce civil/criminal legislation is cumbersome as it has to pass through the Law Reform Commission and the Ministry of Justice. Although this can be done, it takes time.

The Law Society

The Law Society was established under Section 25 of the Legal Education and Legal Practitioners Act Chapter 3:04 and has the power to make rules dealing with standards of professional conduct with which every legal practitioner is required to comply.⁸

An attempt was made by the Law Society to establish a committee to inspect the books of any firm of legal practitioners at any time. However, the proposal to do so was rejected by the Law Society's members.

Despite having the power, on paper, to deal with professional misconduct, it is difficult for the Law Society to enforce administrative measures.

It should further be noted it would be difficult for the Law Society to supervise lawyers since the executive members of the Law Society are also practising lawyers who have the interests of their own firms at heart.

With no specific legislation on money laundering it is difficult to evaluate the capacity of the Law Society to regulate or supervise lawyers.

The Law Society has the capacity to enforce mutual legal assistance, despite the present legislation that only covers Zimbabwe and Zambia.⁹ In regard to

the forfeiture of property, it can enforce this through the courts. Such forfeiture is conditional on conviction.¹⁰

Society of Accountants

The mission of the Society of Accountants is to produce properly trained accountants. The Society's Secretary indicated that it is, in practice, difficult to really check or supervise how accountants carry out their duties. Nor does the Society have the capacity to enforce administrative measures in relation to mutual legal assistance, or the freezing and forfeiture of proceeds of crime.

The Anti-Corruption Bureau

The Anti-Corruption Bureau has the capacity to seize or freeze any property which is the subject of an investigation or a prosecution in relation to any offence alleged or suspected to have been committed under the Act.¹¹ This is done with the assistance of the police. However, surveillance laws cannot be enforced and the Anti-Corruption Bureau cannot put measures in place since the laws have not been enacted.

The Anti-Corruption Bureau also needs to train its staff to understand the whole concept of money laundering.

Implications of Security Council Resolution 1373

The United Nations (UN) Security Council Resolution 1373 was taken after the terrorist attacks of 11 September 2001. Among other things, the Resolution called on states to work together urgently to prevent and suppress terrorist acts, including through increased co-operation and full implementation of the relevant international conventions relating to terrorism.

The Security Council, acting under chapter VIII of the Charter of the UN, took some mandatory decisions in respect of all nations, which are worth repeating here in some detail. It was decided that all nations shall:

Prevent and suppress the financing of terrorist acts;

- (a) Criminalise the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

- (b) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the directions of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (c) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities action on behalf of or at the direction of such person;

...2.

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other states or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflect the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.¹²

In addition, states were also called upon to:

- (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- (b) Exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts;
- (c) Co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9th December 1999;
- (e) Increase co-operation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);
- (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
- (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.¹³

We now turn to an examination of whether the decisions taken in this Resolution have been implemented in Malawi through domestic legislation.

The first decision taken is in respect of the prevention and suppression of the financing of terrorist acts. For terrorists to act they require funding and funding in turn requires laundering facilities. No legislation has been put in place in Malawi to prevent and suppress the financing of terrorist acts and nor has the willful provision or collection of funds by Malawians with the intention that the funds should be used in order to carry out terrorist acts been criminalised. The Money Laundering Bill still remains to be promulgated into Law.

In regard to freezing of funds, under the Corrupt Practices Act No. 18 the Minister may make regulations for the disposal of recovered gratification under the Act. In terms of Regulation 3 of the Corrupt Practices (Disposal of Recovered Seized or Frozen Property) Regulations, any recovered, seized or frozen property which comes into the possession of the Anti-Corruption Bureau shall vest in the state if it cannot be returned to the rightful owner. There is no other legislation which provides for the freezing of funds, financial assets or economic resources of persons who commit or participate in the commission of terrorist acts. The act referred to above is only in respect of corruption. Malawians' making of funds and other resources available for the benefit of terrorists is also not criminalised.

No legislation has been put in place to complement the UN decision that all states would refrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.

In regard to the provisions in respect of mutual legal assistance, there are no provisions of warning to other countries by exchange of information. Resolution 1373 also decided that terrorist acts be established as serious criminal offences but this has not been incorporated into Malawi's domestic laws and regulations.

Although there is no legislation compelling Malawi to assist another state in connection with criminal investigations or to provide assistance in obtaining evidence relating to financing or support of terrorist acts, the police do assist each other in practice through the Southern African Regional Police Chiefs' Co-operation Organisation (SARPCCO).

In regard to border controls, though no visas are required from any country in Africa and there is no legislation in respect of national identity cards, traffic in arms is controlled through the Firearms Act.

All in all, the decisions taken in Resolution 1373 have not been enacted into domestic legislation. The legislation that is in place is not adequate as it does not specifically refer to terrorism.

Recommendations to meet the requirements of Resolution 1373

Malawi needs to enact the necessary legislation to establish terrorism as a criminal offence and should incorporate all aspects of Resolution 1373 into its domestic law. The Bill on money laundering, which has twice failed to pass through parliament, should quickly be made into law. Malawi should further ratify and implement the remaining conventions and protocols relating to terrorism. The institutional measures should include the prevention of recruitment to terrorist groups, movement of terrorists, establishment of terrorist safe havens and/or any other forms of passive or active support for terrorists or terrorist groups. Institutional measures should also include:

- (a) police and intelligence structures to detect, monitor and apprehend those involved in terrorist activities and those supporting terrorist activities. This means the Malawi Police and National Intelligence Bureau should work hand in hand;
- (b) improving the capacity of police, customs, border guards, the military and the judiciary through the provision of training for officials;
- (c) establishing exchange programmes with counter-terrorism operatives and officials from within the SADC region and other regions;
- (d) establishing a data base and communication systems for monitoring and controlling the movement of terrorist weapons, such as firearms;
- (e) establishing inter-agency working groups involving police, military, customs, home affairs and other agencies to improve policy co-ordination, information sharing and analysis at the national level regarding explosives, firearms and ammunition;
- (f) developing surveillance procedures by the police, army, immigration and the National Intelligence Bureau to secure the country's borders against infiltration;
- (g) creating systems by the police, army and National Intelligence Bureau to protect vital installations and the safety of diplomatic and consular persons and missions; and

- (h) supporting the National Intelligence Bureau and its intelligence activities enhanced aimed to expose terrorist groups and thwart their designs.

With these measures in place the requirements of Resolution 1373 would be met.

Conclusion

If money laundering is to be detected and controlled in Malawi, the country's infrastructure has to be developed as at the moment it is haphazard. The first steps would be to enact the proposed Money Laundering Bill into law and put in place legislative and institutional frameworks spelling out the measures that institutions must adopt to detect and control money laundering.

Institutions in Malawi should be required to build a comprehensive system that can support an effective, multi-disciplined approach for combating money laundering. Malawi should further establish centralised structures to follow up any reported suspicious transactions. Malawi needs to create an intelligence unit for the purpose of receiving and analysing suspicious transactions. This institution should be autonomous and have adequate resources to be able to function.

The police must prioritise economic crime in order to fight money laundering, without being hampered by political pressure. The need for training to equip them to deal with complex money laundering schemes cannot be overemphasised. Training has to be extended to other institutions and government departments.

Notes

- 1 This definition was agreed to by commissioned researchers at an ISS workshop on combating money laundering in the SADC region, held at Holiday Inn Arcadia, Pretoria on 19th January 2002 (see page 2).
- 2 *Nation Newspaper*, 25 April 2002.
- 3 *The Daily Times*, 4 November 2002.
- 4 Reserve Bank Act, Section 48(i), 1964.
- 5 Under Section 49 of the Banking Act any director, manager, officer or employee of a bank who makes or permits to be made any transaction including the opening of an account without taking reasonable steps to verify

the true identity of the person concerned on the transaction, shall be guilty of an offence.

- 6 Mr Uka is a senior insurance salesman with Old Mutual
- 7 See Jai Banda, Money laundering in Malawi: Contemporary trends, seminar paper presented to ISS Regional Seminar, Developing strategies and mechanisms against money laundering in East and Southern Africa, Leriba Lodge, Centurion, 22 and 23 November, 2002.
- 8 Section 36 of the Legal Education and Legal Practitioners Act, 1965, Chapter. 3:04.
- 9 Service of Process and Execution of Judgments Act, 1956, Chapter 4:01.
- 10 Section 30 of the Penal Code.
- 11 Corruption Practices (Disposal of Recovered, Seized or Frozen Property) Regulations 6N 39/1999.
- 12 United Nations Security Council, S/Res,1373(2001), <www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf> p 2.
- 13 Ibid, p 3.