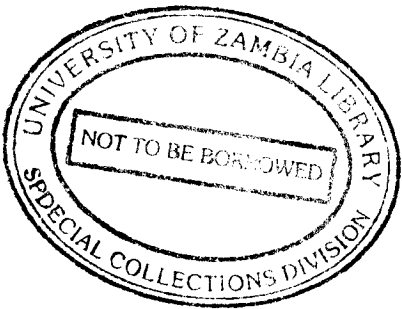


***THE CHALLENGES OF COMBATING MONEY LAUNDERING AND
TERRORISM FINANCING IN SOUTHERN AFRICA; DEVELOPING
REGIONAL STANDARDS AND COOPERATION***



BY

SIAKAMWI CHIKUBA

UNZA

2006

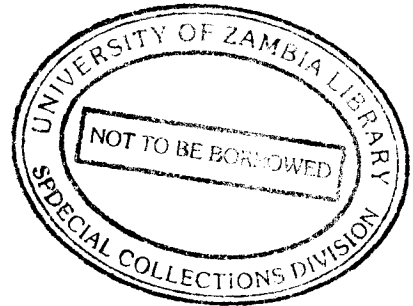
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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the Obligatory Essay under my Supervision by Siakamwi Chikuba entitled:

***THE CHALLENGES OF COMBATING MONEY LAUNDERING
AND TERRORISM FINANCING IN SOUTHERN AFRICA;
DEVELOPING REGIONAL STANDARDS AND COOPERATION***

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SUPERVISOR

***THE CHALLENGES OF COMBATING MONEY LAUNDERING
AND TERRORISM FINANCING IN SOUTHERN AFRICA;
DEVELOPING REGIONAL STANDARDS AND COOPERATION***

An Obligatory Essay (L410) submitted to the University of Zambia in partial fulfillment for the award of the Degree of Laws (LL.B).

BY

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14TH DECEMBER, 2006***

DECLARATION

I declare that the contents of this dissertation are my conceived ideas, based on my research makings with due acknowledgement given to the various scholars and associates and any person who contributed their ideas to the success of this work.

Accordingly, this work may not be used or reproduced in whole or in part without due acknowledgement or permission.

S. Chikuba

16/01/06



DEDICATION

I dedicate this work to my father and mother, who have been, still are and for as long as I live will be the spine of my life. In Token of the great respect and admiration I have for them for their selflessness and great parenting.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank the almighty God for all he has been to me and humanity at large. Secondly, I would like to thank my supervisor Mr S.E. Kulusika for the brilliant comments and direction he gave me during the course of this work. I would also like to acknowledge his dedication, humility and boldness which have inspired me through out the itinerary of my studies in Law School.

I would like to show my gratitude and indebtedness to my father and mother who have given me unwavering support, patience and parental care through out my education. They have been my strength and motivation. I hope they will see the fruits of their labour and toil in this work.

I would also like to thank my older brothers and sisters for their support and guidance through out my life and education. They have all contributed to my education and welfare in different ways without which I would not be where I am today. Grateful is the least I can be! I pray we will always hold together as we have done in the past!

I would like to appreciate the role played by various colleagues whose names may not be listed exhaustively. Thanks guys and please be as good as you have always been.

Lastly, I would like to thank all the scholars whose work made this paper possible. Additionally, I would wish to, subject to the horizons of academic freedom at UNZA, state that I remain exclusively accountable for any blame or shortfalls this work may have.

TABLE OF CONTENTS

Title.....	I
Acknowledgements.....	VI
Abbreviations.....	VIII
Preface.....	IX

CHAPTER ONE

Transnational Crimes

	page
1.1 Introduction.....	1
1.2 What is Money Laundering and Terrorism Financing?	3
1.3 The Processes and Link between Money Laundering and Financing of Terrorism.....	5
1.4 Typologies of Money Laundering and Terrorism Financing.....	7
1.5 Background to the Problem of Money Laundering and Terrorism Financing in Southern Africa.....	8

CHAPTER TWO

Need for Action against Money Laundering and Terrorism Financing

2.1 Causes of Money Laundering and Terrorism Financing, and the Incentive for Action against the Scourges.....	11
2.2 Some International Obligations to Act.....	12
2.3 ML,TF and Development in Southern Africa.....	13
2.4 Benefits to be Derived from taking Action.....	23

CHAPTER THREE

Money Laundering and Anti-Terrorism Financing Regulations in Southern
Africa

3.1.0 Background.....	25
-----------------------	----

3.2.0 Current Legislation for Anti ML and TF in Southern Africa

3.3.0 Recommended Basic Regulations for ML and TF..... 34

3.4.0 Developing Regional Standards and Cooperation Regulations..... 40

CHAPTER FOUR

Recommendations and Conclusions

4.1 Guides in Regional Cooperation and Standard Setting..... 42

4.2 Recommendations..... 45

4.3 Conclusion..... 47

ABBREVIATIONS

ESAAMLAG.....	East and Southern Africa Anti-Money Laundering Group
FATF.....	Financial Action Task Force
FIUs.....	Financial Intelligence Units
IMF.....	International Monetary Fund
LDCs.....	Less Developed Countries
ML.....	Money Laundering
MLATs.....	Multilateral Treaties
TF.....	Terrorism Financing
UN.....:	United Nations

PREFACE

The dissertation looks at Money Laundering and Terrorism Financing in Southern Africa. The fight against Money laundering and terrorism financing has become greater than ever all around the world. The two scourges are a special concern for most developing nations in Southern Africa as they are a clog to the development tenets of those countries.

This dissertation shows the interrelation between money laundering and terrorism financing. It shows that money laundering activities are sometimes used to finance terrorism and this can stem from any country in the world. The fight against money laundering should be directed towards the various causes of crime. On the other hand, it should be noted that terrorism unlike most other crimes is not committed for financial gain but usually in order to induce fear and force a political opinion on a nation or organization. Money launderers exploit differences among national anti-money laundering and financing of terrorism systems and move their funds to jurisdictions with weak or ineffective laws such as Southern Africa. This makes regional cooperation and standard setting in Southern Africa imperative.

In addressing the subject of Money Laundering and Terrorism Financing in southern Africa, this dissertation consists of four chapters in the following order; In the *first chapter* the author introduces the topic by giving the introduction and background information about Money Laundering and Terrorism Financing as Transnational crimes. The *second chapter* deals with the need for action and the benefits to be obtained from regional cooperation. The *third chapter* looks at the inadequacies of legislation and other regulations that hinder cooperation and standard setting in the Southern African Region. The chapter also puts forward some solutions. The *Fourth and last Chapter* puts across some proposed legislation and regulations to promote regional standards and cooperation; thereafter the conclusion is given.

As money laundering and terrorism financing are geared towards secrecy, finding information and reliable statistics has been a limiting factor on the research. There are also very few books or documents that have been written about ML and TF in the Southern African Region. The author nevertheless got information by staging interviews with various stake holders and also covered known information that various scholars have written about.

It should borne in mind that Cross boarder flows of ‘dirty money’ from a country hinders development and can disfigure the image of all its geographical neighbors as it shows weakness of boarder control. Due to the fact that money laundering and terrorism financing is international by nature, investigation into cases of money laundering are rarely confined to one country. Regional Cooperation and Standard setting is therefore indispensable in the fight against the scourges. It is hoped that this paper will be helpful towards achieving that end.

CHAPTER ONE

1.0 TRANSNATIONAL CRIMES

The Chapter focuses on the following:

1.1 Introduction

1.2 What is Money Laundering and Terrorism Financing?

1.3 The Processes and Link between Money Laundering and Financing of Terrorism

1.4 Typologies of Money Laundering and Terrorism Financing

1.5 Background to the Problem of Money Laundering and Terrorism Financing in Southern Africa

1.1 INTRODUCTION

It is now a decade since the first formal and concerted international action to combat money laundering was taken. This was because countries realized that without effective international and regional coordination, there was little prospect of successful action to deprive criminals of proceeds of their crimes. Since then, the world has witnessed dramatic change at a rapid pace. We have witnessed fundamental changes in the use of information technology, in the nature of war, and in transnational crime, including money laundering and terrorism financing. This trend is introducing rudiments of crime which present new threats to the international community in the twenty- first century. The augmentation of international trade, expansion of the global financial system, increased international travel, and the surge in the internationalization of organized crime have pooled together to provide opportunities for converting illegal proceeds, through a

process known as money laundering, into what appear to be legitimate funds. These funds can be used to finance criminal activities such as terrorism.

Since the events of 11th September 2001, the funding of terrorist activities has been seen as having many features in common with money laundering. After the tragedy of 11th September 2001, the international community received an additional impetus to tackle in a more comprehensive way the scourge of terrorism, with swift and wide ranging results. This included a renewed drive to bring into force the 1999 International Convention for the Suppression of the Financing of Terrorism, the issuance of nine new special Recommendations of the Financial Action Task Force (FATF) on Terrorist Financing, and the establishment of the United Nations Counter Terrorism Committee (CTC) under Security Council Resolution 1373 (2001). Many countries that had already established anti-money laundering measures have now added to their laws and regulations so that activities designed to provide funding of terrorists now come under the same level of potential scrutiny as money laundering activities.

In the Southern African Region many countries are still labouring to achieve these standards due to technical and economic difficulties. This is so notwithstanding the fact that criminals are adapting and developing new ways in response to the counter measures that have been introduced. Failure to prevent money laundering and terrorism financing allows criminals to benefit from their actions thus making crime a more appropriate scheme for earning riches quickly.

1.2 WHAT IS MONEY LAUNDERING AND TERRORISM FINANCING

FATF which is recognized as the international standard setter for anti-money laundering (AML) efforts defines the term ‘money laundering’ succinctly as ‘the processing of criminal proceeds to disguise their illegal origin in order to legitimize the ill gotten gains of crime.’¹ The FATF definition encompasses a wider range of predicate offences than that covered by the United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention)² and the United Nations Convention Against Transnational Organized Crime (2000) (Palermo Convention).³

A ‘money laundering predicate offence’ is the underlying criminal activity that generated proceeds which when laundered, results in the offence of money laundering.⁴ The Vienna Convention and Palermo Convention limit predicate offences to drug trafficking. The FATF however is far reaching as it encompasses crimes like fraud, kidnapping and theft.

In its simplest form, money laundering involves a process by which proceeds from a criminal activity are disguised to conceal their illicit origin. When money is laundered, criminals conceal the criminal act that generated the illicit proceeds. For instance,

¹ FATF what is money laundering? Basic facts about Money laundering [http:// www.FATFGAFI.org/moneylaundering-en.htm](http://www.FATFGAFI.org/moneylaundering-en.htm)

² <http://www.incb.org/e/conv/1988/>.

³ <http://www.undcp.org/adhoc/Palermo/convmain.html>

⁴ Schott, A.P. 2004. **Reference Guide to Anti-Money laundering and Combating the Financing of terrorism**; Second Edition, Washington,D.C; Published by the World Bank, p.I-6

illegitimate drug money can be used to acquire legitimate assets like houses, furniture and vehicles in order to conceal the illegal source.

The meaning of terrorism is not internationally agreed due to significant political, religious and national implications that vary from one country to the other. Nevertheless, before the September 11th attack on the United States, the United Nations had in place the International Convention for the Suppression of the Financing of Terrorism (1999), which in Article 2 provides that:

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

2.....

3. For an act to constitute an offence set fourth in paragraph 1 above, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraph (a) and (b).

The international standard setter (FATF) does not specifically define the term terrorism financing. However, for efforts to combat the financing of terrorism, FATF sanctions this definition and encourages countries to ratify the convention.⁵ Thus the above definition is the one most countries have adopted for purposes of defining terrorism financing.

1.3 THE PROCESSES AND LINK BETWEEN MONEY LAUNDERING AND FINANCING OF TERRORISM

The process of money laundering and that of terrorism financing are similar. The object of money launderers and terrorist financiers is to convert typically small denominations of ill-gotten currency into bank accounts, financial instruments, or other assets. These ill-gotten gains may be produced by a vast range of criminal activities such as political corruption, illegal sales of weapons, and illicit trafficking in and exploitation of human beings. Regardless of the crime, money launderers and terrorism financiers resort to placement, layering and integration in the process of turning illicit proceeds into apparently legal monies or goods⁶. The first two are basically the same for both money laundering and terrorism financing while the third, integration, is undertaken differently in the two schemes.

I. Placement

This is the physical disposal of cash proceeds derived from illegal activity. This usually involves placement of illegally derived funds into the financial system, usually through a

⁵ Special Recommendations on terrorist financing number II

⁶ Opcit p.I-7

financial institution. Large amounts are broken down into smaller, less conspicuous amounts and deposited over time in different offices of a single financial institution or in multiple financial institutions. Furthermore, illegal funds may be converted into financial instruments such as money orders or cheques, and co-mingled with legitimate funds to divert suspicion. Additionally, placement is achieved by the purchase of a security or a form of an insurance contract.

II. Layering

This involves separating illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity.⁷ At this stage, the funds may be transferred by way of purchase of negotiable instruments such as cheques, money order or bearer bond or may be transferred electronically to other accounts in various jurisdictions. Launderers and terrorist financiers may also disguise the transfer as a payment for goods and services or transfer the funds to a shell company.

III. Integration

This is the provision of apparent legitimacy to criminally derived wealth.⁸ Money launderers at this stage integrate criminal funds into legitimate economy. On the other hand, terrorist financing schemes distribute funds to terrorists and their supporting organizations.

⁷ Economic Paper 70, 2005. *Combating Money Laundering and Terrorism Financing: A model for best practice* ; Commonwealth p.9

⁸ Ibid, p.9

It should be noted that the stages expatiated above are not cumulative constituent elements of money laundering and terrorism financing. The crimes can be committed without the stages being satisfied. However, it is improbable that layering and integration can occur without the occurrence of placement in the first place.

1.4 TYPOLOGIES OF MONEY LAUNDERING AND TERRORISM FINANCING

According to Charles Goredema⁹, it is convenient to consider the patterns of money laundering within East and Southern Africa Anti-Money Laundering Group (ESSAMLG), which includes southern Africa, as consisting of three dimensions. These are:

- *Internal money laundering*: characterised by the laundering of proceeds of crime committed within a given country or assets to be used in committing crime there;
- *Incoming money laundering*: in which the assets laundered are derived from crime committed outside the country, and thereafter introduced into the country; and
- *Outgoing money laundering*: in which the proceeds of crimes committed within the country are exported (to one or more countries) for laundering.

As money laundering and terrorism financing involve similar processes, it is incumbent that the above dimensions exist in terrorism financing. 'Dirty money' from a successful

⁹In *Money laundering in East and Southern Africa: An overview of the threat* ; 2003; p.3

money laundering transaction in any one of the above dimensions can be used to finance terrorism. The financing of terrorism could be, by analogy with the above;

Internal terrorism financing, whereby money from illegal activities such as money laundering or other money generating ventures within a territory are pooled together in order to finance terrorism within a country.

Incoming terrorism financing, characterised by laundered money and money from other ventures outside a territory being introduced into that region for purposes of financing terrorism.

Outgoing terrorism financing in which the proceeds of crimes committed within the country are exported (to one or more countries) for laundering and the proceeds used to finance terrorism.

However, the above instances are simplistic as it is possible to have a complicated combination of the above methods of financing terrorism.

1.5 BACKGROUND TO THE PROBLEM OF MONEY LAUNDERING AND TERRORISM FINANCING IN SOUTHERN AFRICA

The war against money laundering, like the war on terrorism and the war on fraud, is not going to go away¹⁰. Financial regulators and Central Banks around the world are in the front line of these "wars". Governments, led by the United States, have stepped up further their demands that all jurisdictions apply international standards and norms - and enforce them effectively. But this is easier said than done. With the best will in the world,

¹⁰ www.Global-Investor-Bookshop.com/How-to-Combat-Money-Laundering-and-Terrorist-Financing.htm

regulators often find these requirements very difficult to implement in practice. This is more so in less developed countries such as those in the Southern African region. These countries are characterised by high inflation and poverty levels, lack of schools and infrastructure, ridden by soaring corruption levels and poor governance. The above troubles are placed before anti-money laundering measures and combating terrorism financing. Experience has shown that the fight against the scourges of money laundering and terrorism financing should be taken together with development and poverty in order to achieve sustainable development.

In order to achieve their selfish purpose, Money launderers exploit differences among national anti-money laundering and financing of terrorism systems and move their funds to jurisdictions with weak or ineffective laws such as Southern Africa. Some money launderers come in the guise of forming Non-Profit Making Organizations thereby avoiding tax and possible scrutiny. The situation is made worse by the fact that Southern African governments encourage these organizations in order to supplement their limited capacity to provide basic services for all. In addition, money laundering and terrorism financing is international by nature, hence investigations of cases are rarely confined to one country. Owing to the international nature of these criminal activities, developing regional standards and cooperation is imperative and indispensable. An organized regional initiative with vital cooperation will assist regulators in designing a successful anti money laundering regime, complying with international standards and implementing them effectively. It will help countries in Southern Africa to achieve sustainable

development at a lesser cost while at the same time avoid them getting blamed for failures and terrorist attacks in other regions.

Threats from transnational crime emanate not only from within the borders of a country but also from beyond. Therefore, national efforts alone will not suffice to combat transnational crime. National efforts need to be supplemented by regional and global endeavours. It is in the spirit of cooperation in combating acts of terrorism that a number of initiatives and activities against money laundering and financing of terrorism are being pursued in the Southern African region. Among them are forums such as The Eastern and South African Anti Money Laundering Group (ESAAMLG).

ESAAMLG was founded in 1999 and includes Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. The ESAAMLG comprises fourteen countries from the Eastern region of Africa down to the southern tip of Africa. Two of its members are located in the Indian Ocean. With such a diverse region, communication is extremely difficult and very necessary. ESAAMLG countries agreed to prepare the necessary legislative framework to incorporate anti-money laundering and combating terrorism financing measures. As at now, the process has continued and there is still a lot of work to be done in order to develop effective regional standards and cooperation.

CHAPTER 2

2.0 NEED FOR ACTION AGAINST MONEY LAUNDERING AND TERRORISM FINANCING

The Chapter will look at the following;

2.1 Causes of Money Laundering and Terrorism Financing, and the Incentive for Action against the Scourges

2.2 Some International Obligations to Act

2.3 ML,TF and Development in Southern Africa

2.4 Benefits to be Derived from taking Action

2.1 CAUSES OF ML AND TF, AND THE INCENTIVE FOR ACTION AGAINST THE SCOURGES

According to the FATF, Money Laundering is inspired by the greed of criminals who want to get rich quickly. The scourge is also perpetrated by individuals or organizations which want to fund other criminal ventures like terrorism. On the other hand, terrorism is mostly inspired by, among a myriad of reasons, tribal, political, economic, religious, ideological differences, and vengeance between individuals or organizations. The British Broadcasting Corporation on 27th September 2006 reported that Senator John Kerry averred that the war on Iraq by the United States has motivated some sectors of the world to pursue terrorist attacks on the United States and its allies and that funding for such attacks can be engineered anywhere in the world. The September 11 attacks on the United States, and the US embassy bombings in Tanzania and Kenya in 1998 were caused by political and religious difference while the looming wars in Angola, Congo,

and the insurrection of the South African-supported Mozambique National Resistance, RENAMO rebels were due to political differences.

Money laundering and Terrorism financing, catalyzed by the global economy, is derailing development in many countries. Its effects are aggravated by the fact that it is geared towards secrecy and does not easily lend itself to statistical analysis as observed by the International Monetary Fund (IMF). The IMF has however estimated that the aggregate amount of funds laundered in the world could range between 2 and 5 percent of the world's Gross Domestic Product.¹¹ These funds may then be used to fund further crimes like terrorism. Consequently, by any estimates, the figures should rapture the concern of every developing country. The bane is continually becoming more sophisticated and has more seriously ravaged the less developed countries' (LDCs) prospects for future development.

2.2 INTERNATIONAL OBLIGATIONS TO ACT

As part of the effort to prevent people and organizations from providing or collecting funds to be used to commit terrorist acts, the International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly on December 10, 1999. Since 1999, the United Nations Security Council adopted a series of resolutions following up on Resolution 1267 (1999) and relating to the

¹¹ Vito Tanzi, "Money laundering and the international Finance System," IMF Working Paper No. 96/55(May 1996), at 3 and 4

Taliban, Al-Qaida or Usama bin Laden. Pursuant to these resolutions, the UN maintains a list of groups and individuals designated by a United Nations Security Council committee for their association with the Taliban, Al-Qaida or Usama bin Laden. All UN Members have the obligation to freeze the assets of listed entities and prohibit the provision of funds to them.

The General Assembly requested the Ad Hoc Committee established by General Assembly resolution 51/210 of 17th December 1996 to report to the Assembly at its fifty-ninth session in the event of the completion of the draft comprehensive convention on International Terrorism or the draft international Convention for the Suppression of Acts of Nuclear Terrorism. At its 35th meeting, on 1st April 2005, the Ad Hoc Committee finalized the draft International Convention for the Suppression of Acts of Nuclear Terrorism. All UN members are encouraged to ratify these treaties in order to promote the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States. Other international papers on anti ML and TF include the following; UN Security Council Resolution (SCR) 1373, UN Convention against Transnational Organised Crime, FATF 40 Recommendations, FATF Special 9 Recommendations on Terrorist Financing

2.3 ML, TF AND DEVELOPMENT IN SOUTHERN AFRICA

Criminal money in large amounts undermines the social, economic and political fabric of society and consequently affects the day to day life and environment of every citizen¹². A

¹² Supra note 7; p.12

relatively-crime free society with a sound and effective criminal justice system provides a healthier and safer environment in which to live and work. Therefore, if the blight of money laundering and terrorism financing is not taken as one of the serious issues of national development, the dream-cast in basic needs for all will be pursued but never attained. Launderers will get richer while the economies of their LDCs like those in southern Africa will collapse. Moreover, the zeal and efforts of the genuinely legitimate workers will eventually be frustrated.

An absent, weak or corrupt anti money laundering (AML) and terrorism financing(TF) regime in a particular country permits criminals to operate, using their financial gains to expand their criminal pursuits. While money laundering can occur in any country, it has particularly significant economic and social consequences for less developed countries such as the ones Southern Africa is comprised of. The underlying principle is that the markets of these countries tend to be small and therefore, more susceptible to disruption from criminal influences.¹³

Furthermore, many countries in Southern Africa have liberalized their economies. This has made these countries predisposed to money laundering and terrorism financing. Money can enter these countries in the guise of assisting ailing economies and increasing foreign investment through bogus Multinational Corporation or Non Governmental Organisations. When in actual sense, the money has been laundered and is going to affect the economy negatively. Launderers aim at passing the funds in as many financial

¹³ Supra note 4; p.II-2

institutions as possible in order to conceal their source effectively. The above is evidenced by a study prepared by Blum, Levi, Naylor and Williams, who the authors contended that LDC financial systems were identified as being amenable to manipulation by money launderers.¹⁴ Various components were found to be both characteristic and predisposing. The authors highlighted many factors, nine of which seem to be of particular importance. They are, not necessarily in order of precedence:

- an environment in which banking institutions can easily be established, with minimal due diligence investigations and where there is a preoccupation with basic capitalisation requirements;
- availability of instruments and mechanisms to facilitate anonymous conduct of investment business, while allowing the creator to retain a beneficial interest – examples are trusts, bearer shares and international business corporations;
- prevalence of bank-like institutions with the capacity to transfer funds rapidly, such as brokerages and *bureau de change*;
- banking secrecy laws, or laws that create formidable impediments to the discovery of beneficial holders of bank accounts;
- availability of mobile or walking accounts, these being accounts opened on the understanding that any funds above a certain amount credited to the account should be immediately transferred to another location. Funds can be transferred thereafter to one or more other accounts;

¹⁴ JA Blum, M Levi, RT Naylor and P Williams, Financial havens, banking secrecy and money laundering, a study commissioned by the United Nations Office for Drug Control and Crime Prevention, 1998, accessible at <www.imolin.org/finhaeng.htm>.

- proliferation of loosely regulated casinos;
- availability of free-trade zones such as the Southern Africa Development Community (SADC) and the Common Market for eastern and Southern Africa (COMESA);
- facilitation by intermediaries in establishing corporate entities, opening accounts dishonestly or without any kind of due diligence; and
- permissibility of shell companies.

A tenth factor can be added to the above, namely; the existence of correspondent banking relationships linking banks in the source or intermediate countries with those in destination countries.¹⁵ The above predisposing circumstances to ML and TF are common in most southern African countries. The unwitting acceptance of such factors can cause significant problems to LDCs' prospects of long term development as the funds frequently depart as swiftly as they arrive. The principal problems posed by money laundering to development tenets of LDCs include the following;

1. *Increased Crime and Corruption*

Failure to prevent money laundering makes crime a more attractive proposition as it is lucrative. Consequently, criminals multiply and they use bribery in critical gateways to make money laundering efforts successful. Among others, professionals targeted include financial institutions, police authorities, lawyers and courts. These officers are either corrupted or their privileges such as the lawyers' client accounts are taken advantage of. Corruption reduces the integrity of the legal institutions and as a result the confidence and trust that people had in these institutions is diminished. Furthermore unscrupulous

¹⁵

politicians and criminal organizations accumulate economic and financial power thereby undermining national economies and democratic institutions. In Zambia, there are ongoing cases of corruption involving allegations of corruption and embezzled funds being laundered into various luxuries and properties. These cases involve politically exposed individuals like former president Frederick Chiluba and some of his aides. Below are other examples;

Case Claims from ghost soldiers

Along with Zimbabwean and Angolan counterparts, the Namibia Defence Force (NDF) intervened in support of then President Laurent Kabila in the civil war in the Democratic Republic of Congo (DRC). During the conflict, the army sustained casualties, in respect of which the Ministry of Defence paid out certain benefits to next of kin. It emerged that some claims were fraudulent. 'Ghost soldiers' had been created, using false identification particulars lodged in the Ministry of Defence. The claims were made on the basis of the 'death' of the non-existent soldiers in action in the DRC and Angola. The Defence Force paid out several hundred thousand Namibian dollars. A number of senior officers in the NDF have appeared in court on allegations of fraud.¹⁶

Case; Surtax fraud

Goods which are bought in Malawi for export are not subject to the 20% surtax levied on those consumed locally. Dishonest companies have taken advantage by purchasing some commodities on the pretext that they are for export, even though they subsequently sell them locally, with a mark-up which includes surtax. The money meant for surtax is thereafter laundered. The Malawi Revenue Authority is investigating a large company for

¹⁶ R Goba.2002. *Money laundering in Namibia*; unpublished paper

this practice. The Anti-Corruption Bureau, working with the Malawi Police, exposed a wholesaler who evaded surtax estimated at over MK80 million (US\$1,052,631.00) in a 12-month period.¹⁷ These funds may have been used to finance terrorism and other criminal activities.

2. *Lower Foreign Investment due to Possibilities of ML and Acts of Terrorism, and Undesirable Blacklisting*

A country that is known for money laundering is less likely to receive foreign direct investment. Existing investors may also pull out of the country in order to safeguard their hoard. In Malawi, *bureau de change* accept casual foreign currency cash transactions without any due diligence inquiries. The same applies to Zambia. In 2001, the Reserve Bank of Zimbabwe directed banks to accept foreign currency deposits without querying their sources. The importation of foreign currency ostensibly for investment tends to be encouraged by open door policies promoted by state investment agencies. Such practices discourage would be investors as they perceive the country as being insecure.

In an act of terrorism, a terrorist bomb attack on the US Embassy in Dar es Salaam in August 1998 killed 10 people, all Tanzanians, and wounded more than 70 others. A second bomb exploded a few minutes later at the US Embassy in Nairobi, Kenya. It was thought that responsibility for both bombs lay with Islamic terrorists, in particular those associated with Osama bin Laden, a wealthy Saudi Arabian, and funding could have arisen from Money Laundering activities. Armed robbery is yet another act of terror

¹⁷ J Banda, *Money laundering in Malawi*, ISS Monograph Series, forthcoming.

ravaging Southern Africa and whose proceeds are laundered in order to disguise the crime.

Such funds and acts of terror distort cash flow. Foreign financial institutions may decide to limit their transactions with institutions from money laundering and terrorist havens and subject these transactions to extra scrutiny. Ultimately, these transactions become more expensive or lead to terminated correspondence and lending relationships altogether.

The FATF maintains a list of countries that do not comply with anti-money laundering requirements or that do not comply sufficiently in the fight against terrorism. This list, known as the 'Non Cooperating Countries and Territories' (NCCT), gives public notice that the listed countries do not have in place even the minimum standards.¹⁸ A slipshod, corrupt or absent anti money laundering framework make LDCs in Southern Africa predisposed to such adverse and detrimental pronouncements.

3. Weakened Financial Institutions

Weak anti money laundering framework engenders contempt for the law and large scale utilization of financial institutions for the vice. Money laundering thereby makes the integrity of individual financial and legal institutions negatively affected as a whole. As a result, money laundering has some adverse macroeconomic effects and affects the exchange rate through large transfers of capital flows that could lead to rent-seeking and

¹⁸ Opcit p.II-4

disturbed capital flows. The most basic mode of transferring the proceeds of crime, circumventing the financial services network, is to carry it out of the country. Movement of cash in bulk is common within and across the region. Reports from South Africa, Kenya, Zambia and Tanzania provide ample illustrations of the movement of assets in the form of bulk cash within and across borders. They also demonstrate the use of convertible assets as a mode of international laundering of funds.

The Zambian Drug Enforcement Commission's activities have revealed the use by drug traffickers of bank accounts opened with fictitious identity documents to facilitate outgoing laundering. *The People v De Souza and others*¹⁹ revolves around the opening of several bank accounts using a false name, between 1 January 1999 and 28 February 2001. The prosecution alleged that, acting in concert, the accused opened several bank accounts in Kitwe and Ndola on the Copperbelt, using fraudulently obtained documentation. Using these accounts, the accused externalised a total of US\$1,158,533.2 to the United States of America and Taiwan.

Case: The Widdowson funds

Although Widdowson was born in England, he had dual English and South African citizenship. During the period 1991 to 1997, he spent time working for Regent Security Services in England. He returned to South Africa in 1997, but continued to render services to the company on an intermittent basis. The company discovered that between May 1995 and April 1999, £667 480.09 (US\$1,001,220) was stolen from its bank account and transferred to Widdowson's three bank accounts in England. There were subsequent transfers to a bank account in South Africa. Widdowson then left England and returned to

¹⁹ (unreported) (CCR. SSP/8/2001)

South Africa. At no stage did he try to earn other income from employment in South Africa. He did, however, make various investments in South Africa, in both movable and immovable property. Following the discovery of the theft, a successful application was made for the seizure and forfeiture of Widdowson's assets.²⁰

4. Compromised Economy and Private Sector

Money launderers are known to use 'front companies'. These are business enterprises that appear legitimate and engage in legitimate business but are, in fact, controlled by criminals.²¹ Front companies mix the illicit funds and the legitimate funds as a way of hiding laundered money. Front companies' access to illicit funds allows them to subsidise the front company's products and services, even at below market prices. As an upshot, genuine business owners suffer as they find it difficult to compete with the front companies. Eventually, genuine businesses are booted out of competition.

Take the case of tanzanite, a blue gemstone found only in a tiny patch of graphite rock in Tanzania. Over the years, tanzanite has grown in popularity among US consumers, who now account for about 80% of its sales. There is evidence of under-declarations of exports and smuggling. In 1999–2000, the US recorded imports of \$328 million worth of tanzanite, but Tanzanian official figures show only US\$31 million worth of exports. Export figures recorded in 2002 reflected a decline, to US\$4 million. Yet India, to which most of the rough tanzanite was exported, showed exports to the value of US\$28 million

²⁰ Based on a presentation by the investigating officer, given at a law enforcement conference on money laundering in southern Africa, Morningside, South Africa, 22 February 2002.

²¹ Supra Note 7; p.7

for that year. Much of the difference between the export and import figures passes through the parallel economy and is eventually laundered.²²

5. Spoiled privatization efforts

Money launderers threaten the efforts of many less developed countries to reform their economies through privatization.²³ Legitimate individuals fail to match the excessive illicit sums of money offered by launderers. Consequently, launderers buy off most of the parastatals. When illicit proceeds are invested in this manner, criminals increase their potential for more criminal activities and corruption. By so doing, they deprive the country on what would have been a legitimate, market based, tax paying enterprise. In addition, some industrialists in Tanzania have been shown to have siphoned off capital abroad, declared their industries insolvent and then sold them to foreign proprietors, who paid them through foreign banks. In consequence, some southern African countries do not receive any tax from such transactions.

Case; Fraud: Cold Storage Commission bills²⁴

Following its commercialisation (a prelude to privatisation), the Cold Storage Commission (the commission) contracted the bank to raise funds on its behalf on the local money market. This was to be done through the floatation of commission bills. The

²² Current situation and counter measures against money laundering: Tanzania's experience, paper presented by the Tanzania delegation to the First Southern Africa Regional Conference on MoneyLaundering, Johannesburg, 26- 28 February 2002.

²³ Supra note 5; p.II-7

²⁴ Gordema, G. *Towards Effective Control of Money Laundering in Southern Africa; Some Practical Dilemmas in African Security Review* ; Vol 11 No. 1. 2002; p. 14

commission required Z\$413 million (US\$7.5 million). Government issued guarantees to the value of Z\$855.16 million (US\$15.55 million) as security during the floatation of the bills. The bank raised the amount required by the commission and remitted it. Thereafter the bank sold further bills worth Z\$1.263 billion (US\$22.96 million) on the local money market, and converted the entire amount to its own use. The founder and chief executive of the bank, Roger Boka, was found to have been at the centre of the illicit activities, with the assistance of five others. Boka died on 21 February 1999 before he could stand trial. Up to the time of writing it was not clear how much of the converted money had been recovered. In the short life of the bank, Roger Boka opened and operated several personal accounts at foreign banks in Botswana, South Africa, the United Kingdom, the United States of America, Germany, Luxembourg and France.

2.4 BENEFITS TO BE DEERIVED FROM ACTION AGAINST ML AND TF

A strong anti ML and TF institutional framework that includes a broad scope of predicate offences for money laundering helps to fight crime and corruption in general.²⁵ When money laundering itself is made a criminal offence, it deters would be money launderers from perpetuating the offence. Likewise, if crimes like bribes and embezzlement of public funds are made predicate offences, opportunities for criminals are reduced and money laundering and terrorism financing may be nipped in the bud.

Furthermore, effective action against ML and TF would reduce financial risks thereby ensuring public confidence in financial institutions and as a result their stability is enhanced. Potential loss from fraud is reduced. All in all, ML and TF have negative

²⁵ John McDowell and Gray Novis, Economic Perspectives, U.S state Department, May 2001.

effects on economic growth by diverting resources to less productive activities. Laundered funds are often placed into sterile investments to preserve their value or make them more easily transferable. Equally, financing terrorism is an antonym of development as the ultimate aim is destruction and inducing fear. Therefore, an effective anti ML and TF would provide a disincentive for criminal involvement in the economy and in turn, economic growth and development is improved.

In order for the above benefits to be attained, countries need to recognise the linkages between money laundering and terrorist financing, as well as between money laundering and other related criminal activities. They also need to recognise that many of the criminal and terrorist networks engaged in money laundering and terrorist financing activities were also involved in the trafficking of illicit drugs, document fraud, arms and people smuggling and other transnational crimes. They further need to recognise the need to further explore these linkages at the bilateral, sub-regional and regional level. All the above may lead to international recognition and spur foreign direct investment.

CHAPTER 3

MONEY LAUNDERING AND ANTI- TERRORISM FINANCING REGULATIONS IN SOUTHERN AFRICA

This Chapter basically looks at the following;

3.1.0 Background

3.2.0 Current Legislation for Anti ML and TF in Southern Africa

3.3.0 Recommended Basic Regulations for ML and TF

3.4.0 Developing Regional Standards and Cooperation Regulations

3.1.0 BACKGROUND

Marshall Mc Lulan's prediction that the world is going to become a global village has finally come true. This has impacted on a lot of aspects in life including law enforcement. Transnational organized crime has become more sophisticated as criminals too have access to enhanced travel and communication through which they hide from detection and prosecution. Transnational crimes like money laundering and terrorism financing go beyond boundaries and hence pose a global threat. Criminals take advantage of national boundaries in order to conceal their crimes. By doing so they are better placed to evade law enforcement agencies. They are positioned to take advantage of the differences between legal systems, clash of bureaucracies, the protection of the sovereign, and many times, the complete incapability of world nations to work together to overcome their differences.²⁶ Criminal money may flow rapidly through new centers, providing an illusion of success and short term boost to national savings. They may even flow away

²⁶ K.H.M Mweemba, 13th October 2006, *Paper Presented to Trainee Magistrates at National Institute of Public Administration* ; p.1

rapidly as conditions change, attracted by another centre, or merely moving to complicate detection. Therefore, law enforcement agencies through out the world must unite if they are to succeed in combating this common threat.

International cooperation and standard setting is needed more and more at all stages such as financial intelligence, investigative, and prosecution stages of ML and TF. The financial intelligence units have to exchange information with their foreign counterparts in order to properly analyse suspicious activities and other financial irregularities in an expeditious manner.

ML and TF perpetrators are always looking for safe havens with lax, ineffective or corrupt regimes. Southern Africa is mostly comprised of less developed countries. These countries have high levels of poverty and hence corruption as well. For instance, Zambia was recently announced by Transparency International as the ninth most corrupt nation in the world for two years in a row.²⁷ International cooperation and standard setting in Southern Africa will help in preventing, detecting and prosecuting corruption and also ML and TF cases. At the most basic level, it is important that the legal and constitutional definitions of ML and TF adopted by different countries are compatible. This will ensure that a crime committed in one jurisdiction will be recognized as such in another. Mutual legal assistance treaties (MLATS) covering asset tracing, freezing and confiscation, the production of evidence and gathering of witnesses are extremely valuable tools in pursuing investigations across national borders. Experience has shown that an effective or successful ML and TF strategy has to be preceded by political will, effective

²⁷ www.ZNBC.com

legislation, well regulated financial sector, a supportive enforcement structure, management of displacement factors and informal sectors, and effective means of providing international cooperation. Such should be the quest of southern African countries if they are to succeed against ML and TF.

3.2.0 CURRENT LEGISLATION FOR ANTI-ML AND TF IN SOUTHERN AFRICA

Most Southern African countries are still in the process of implementing comprehensive anti-money laundering and terrorism financing laws. This is hindering regional cooperation. Nevertheless, the on going process of law making can be seized and used to promulgate regional standards. Mr. Ernesto Lopez, Financial Sector Expert, International Monetary Fund (IMF), Washington, noted that a common problem in Southern Africa is the lack of financial and material resources to fight money laundering, particularly on the part of law enforcement agencies and the judiciary. Another problem is that measures on extradition and mutual legal assistance have not yet been enhanced. Most countries in the region have not joined the international Egmont Group of Financial Intelligence Units. This group helps financial units in various parts of the world to promulgate customer diligence measures against ML, TF and other related offences. Lack of membership to this group has compromised financial customer diligence concerning ML and TF. Following are the difficulties faced by various sectors of the region.

3.2.1 PROSECUTION AND JUDICIARY

There is a need for political sensitization of policy makers in the region on Money Laundering and Terrorism Funding issues. Some SADC Member States have not ratified international conventions particularly the Palermo Convention. Members of the prosecution and the judiciary require training on new legal practices emanating from being party to international instruments. The DRC has demonstrated strong political will by launching an effective crusade against corruption. The Government has considered but not yet incorporated the provisions of the United Nations Convention against Transnational Organised Crime into domestic legislation. Furthermore, the DRC had only two officers trained in anti -money laundering strategies as of 2003.²⁸ Poor border control is a specific weakness, which has continued to subject the DRC, like other countries in the Region, to the threat of transnational organised crime. Namibia has ratified the Protocol on Combating Illicit Drug Trafficking in the SADC sub-region (the SADC Protocol). However, it has not signed or ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the UN Convention). Namibia has not yet promulgated or adopted domestic legislation dealing with money laundering specifically. Other countries like Zambia, Tanzania, Zimbabwe and Malawi have not domesticated the conventions in order to make them binding law.

Countries also need capacity building in the drafting of legislation against money laundering and anti-terrorism funding. Some countries do not have specific laws or Acts

²⁸ Conference Report on SADC/ESAAMLG/UNODC/ISS *Regional Conference on Anti-Money Laundering Strategies and Counter Measures with Particular Regard to Drug Control* Willow Park Conference Centre Benoni, South Africa 21-23 October 2003

of parliament dealing with ML or more especially TF. Zambia enacted the Anti-Money Laundering Act in 2001 but the Act still needs revision in certain areas. There is a need to advocate for the enhancement of mutual legal assistance in criminal matters, and extradition, and for the improvement of law enforcement cooperation among SADC Member States in general. There is absence of a regional prosecutors' forum, much like the Southern African Regional Police Chiefs Coordination Organisation, where prosecutors can meet and discuss issues affecting their cross border cooperation.

3.2.2 LAW ENFORCEMENT AND MONITORING

Most countries in the region faced three particular challenges with fighting money laundering:

- i. The slow development and promulgation of legislation in SADC Member States that do not have FIUs as yet, with which law enforcement agencies can liaise in order to obtain relevant information on suspicious financial transactions and activities;
- ii. The problem of resource constraints, both human and financial;
- iii. The general lack of experience on the part of law enforcement to deal with money laundering cases.

That Member States lack available experts and regional organisations, such as SADC, do not keep a register of the relevant resource persons. In both the financial and non financial sectors, there is need to reiterate the need for relevant legislation, and assistance for drafting this legislation. SADC should augment needs assessments on legislation, appropriate structures required in member sates, and their compliance with international requirements to combat money laundering and terrorism funding (to supplement

ESAAMLG). There is need for broad sensitisation for policy makers who are ignorant about ML and TF. A survey in Lusaka, Zambia revealed that some policemen do not understand what ML and TF entail. The requirement for more research in the areas concerned and Supervision would be required in the area of financial reporting. The central banks of the region are proactive in spearheading the supervision of other financial bodies but are not very effective due to insufficient laws. The following institutions need monitoring and control legislation;

Banks

Commercial and merchant banks are licensed foreign currency dealers. The Government has pegged foreign currency exchange rates at unrealistically low levels in Zimbabwe. Transactions are being carried out at the banks at rates that are at least three times more than the official rate, in contravention of the law²⁹. A lot of laundering occurs in Zimbabwe and other countries for which foreign currency shortages continue to provide the backdrop and pretext. Proper obligations and monitoring should be imbedded in the laws of the region.

Estate agents

Experience the world over has demonstrated that money launderers often purchase immovable property. This is the case in the region. Consequently, in most jurisdictions, estate agents who are at the centre of property transfer issues are obligated to be accountable institutions.

Insurance companies

²⁹ Bothwell Fundira. 2004. Legislative and Institutional shortcomings and needs of Financial Institutions and the Business sector in Zimbabwe; p..4

Insurance companies play a significant role in money laundering. The simplest scenario is one in which a criminal purchases an annuity with an insurance company and surrenders the policy for encashment soon thereafter. When a cheque is received from the insurance company it appears to represent untainted money.

Casinos and gambling houses

Gamblers use cash to purchase casino chips of considerable value. After a few bets, they cash in the chips and are paid out in 'clean' cash. This gives apparent legitimacy to the source of the money. The legislation on casinos and gambling establishments should be aimed at ensuring that the practice of gambling is carried out equitably which it is not at the moment.

Travel agents

Travel agents have been used to clean 'dirty' money. A client buys tickets to travel abroad, which then enables him to obtain foreign currency. The tickets are cancelled and a refund received in whole or in part. Once foreign currency is obtained, it can be taken out of the country and banked in external accounts in contravention of the law. There is no specific legislation that deals with travel agents in most countries of the region.

The Stock Exchange

Clients purchase shares on the bourse and are paid by cheque by stockbrokers when they eventually sell the shares. A cheque from a stockbroker gives legitimacy to 'dirty' money. ML and TF laws in the region do not place much obligation on individuals to record, report and keep auditable systems in place.

3.2.3 GENERAL ANALYSIS OF REGULATIONS IN SOUTHERN AFRICA

The analysis revealed that the majority of personnel in accountable institutions are not aware of how money laundering occurs. To expect them to monitor and report such cases is to expect too much. The analysis also showed that South Africa is ahead of most of the other countries in the region having ratified most conventions and enacted most of the laws. However, many of these measures are new and have not yet been fully put into effect, and all sectors will need to continue increasing attention and training on anti-money laundering issues. Moreover, although the overall framework should be effective in the longer term, the results achieved to date are limited, and all government agencies will need to co-ordinate their efforts to ensure that the new legislative and regulatory regime that is being put into place is effectively implemented. Importantly, South Africa, like the other countries, also needs to expeditiously develop a comprehensive framework to combat the financing of terrorism. South Africa needs to issue guidelines to assist in the identification of suspicious transactions and activities.

The survey has revealed the Democratic Republic of Congo as the worst country in the fight against ML and TF. There exists an informal banking system known as *hawala* and its subsequent aspects, leading to difficulty for law enforcement agencies to monitor the system. Conflict diamonds are often used in lieu of currency in arms deals, money laundering, and other criminal activities such as terrorism financing; they are easily concealed and transported and virtually untraceable to their original source. The United Nations (U.N) General Assembly defines conflict diamonds as “rough diamonds used by rebel movements to finance their military activities, including attempts to undermine or

overthrow legitimate governments”³⁰ An analysis of the intricate connection between crime and terror in the DRC resulted in showing that a failing state is unable to contribute to the global war on terror financing. This does not distinguish it from other countries with the same characteristics. With that kind of crisis in its hand, the DRC is simply unable to fight terror financing in a meaningful way even in the short-term and long-term counter-terror financing objectives. It cannot police its borders, provide viable political or economic alternatives to sway criminal groups, or even gather meaningful intelligence. If left in such a miserable condition, the DRC will at least offer shelter to extremist elements that can operate unchallenged and undetected. Action and political will to reconstruct the state is needed now, or the DRC will remain a danger for many years to come.

All in all, the following can be highlighted to be the main factors impinging on the fight against ML and TF;

- *Resistance to anti-money laundering measures*
- *Lack of attention to the informal sector*
- *Inordinate delays in police investigations and in court cases*
- *Inter-sectoral conflict and lack of co-ordination*
- *Corruption in legislative, judicial and enforcement activities*
- *Lack of specialised prosecutorial skills*
- *Lack of investigative skills and resources*
- *Lack of information on sources of foreign investments*

³⁰from United Nations (U.N), U.N General Assembly Resolution 55/56, At internet: <http://ods-ddsny.un.org/doc/UNDOC/GEN/N00/562/75/PDF/N0056275.pdf?OpenElement>, 29 January 2001.

- *Lack of force of administrative directives such as circulars issued by the central banks*
- *Lack of harmonisation between domestic and international legal instruments*
- *Lack of domestication of internal legal instruments*
- *Lack of political will*
- *Inadequate resources*

3.3.0 RECOMMENDED BASIC REGULATIONS FOR ML AND TF PREVENTION

The FATF as an international standard setter of anti ML and TF has formulated different kinds of recommendations. The recommendations are forty plus nine special recommendations. Southern African countries can benefit and save costs by analyzing and implementing the FATF recommendations. Implementing the recommendations will ensure that there is uniformity in the laws of the countries. This will in turn make regional cooperation easier.

As a starting point, Southern African countries need to ratify and domesticate (if necessary) the main international instruments which include the Vienna Convention and Palermo Convention. Thereafter, mutual legal assistance treaties can be entered into with the help of the Eastern and Southern Anti-Money Laundering Group (ESAAMLG). The countries should consider;

- developing a better understanding of the nature, extent and impact of money laundering and terrorist financing in the region;

- expanding regional awareness of money laundering and terrorist financing issues and the role played by all concerned bodies.
- identifying and agreeing on comprehensive anti-money laundering and terrorist financing measures appropriate to the region;
- oversee and facilitate the implementation of anti-money laundering and terrorist financing measures in all member jurisdictions especially countries recovering from war;
- assess the level of implementation by each member of a comprehensive anti-money laundering and terrorist financing regime;
- facilitate the implementation of the FATF Special Recommendations on Terrorist Financing and the relevant United Nations instruments; and
- facilitate and coordinate the provision of technical assistance and training to assist jurisdictions to implement anti-money laundering and anti-terrorist financing measures.

Below are some proposed regulations for certain areas.

3.3.1 PREDICATE OFFENCES

According to the FATF recommendations 1 and 2, ML needs to be criminalised on the basis of the UN conventions and applied to all individuals and legal persons, determining as appropriate which serious crimes should be covered in addition to drugs. Measures should be put in place to confiscate the proceeds of crime. The law should include crimes such as the following as predicate offences of money laundering; corruption, bribery, tax evasion, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, fraud, counterfeiting currency, murder, grievous bodily injury, sexual

exploitation of humans, participation in organized crime and racketeering.³¹ The extent to which a country does this has implications for that country's ability to cooperate internationally and exchange information with other countries' authorities. If effective cooperation is to take place, uniform standards have to be set. Conduct which constituted an offence in one country should be deemed to be so in another country. This is known as dual criminality and it will make mutual legal assistance easier and more viable.

3.3.2 STATE OF MIND AND CORPORATE LIABILITY

According to the Vienna Convention, the perpetrator's state of mind, his or her intent or purpose of committing the money laundering offence means knowing that the proceeds are the product of a money laundering offence.³² Countries should set a common standard of negligent money laundering while the perpetrator should have known that the property was obtained using proceeds of a criminal act. Actual knowledge about the illicit origin of property or mere suspicion about that illicit origin should constitute the requisite state of mind for convictions. 'As the state of mind of a person is as much a fact as the state of his digestion..... it is as much a fact as anything else'³³ this has to be proved from the overt actions and circumstances of the suspect's case.

Money laundering often takes place through corporate entities. The concept of corporate criminal liability, however, varies among different countries. Common law countries subject corporate entities to criminal liability. Southern Africa is mostly made up of

³¹ Supra note 7; p55

³² Article 3(b)(i)

³³ as Bowen LJ stated in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, [1881-5] All ER Rep 856 at 861

common law countries. Therefore, a standard of criminal liability of corporations ought to be set in the region as recommended by the FATF.³⁴ The UN model legislation does not provide for criminal liability of corporations but it does provide for the application of other sanctions in Article 4.2.3.

3.3.3 FINANCIAL INSTITUTIONS

There is also need to formulate laws that will regulate financial institutions. The central banks in the region should be tasked to ensure that other financial bodies are adhering to the regional standards of customer diligence. Financial institutions should be required or permitted to provide competent national authorities with information about the identity of their customers, account activity and other financial transactions.³⁵ This is called the ‘Know Your Customer’ approach or KYC. It is therefore imperative that banking secrecy laws are received and necessary amendments are made to ensure that disclosure of financial institutions’ records can be made available to competent authorities. In financial and non-financial business sectors, directors should be protected against breach of confidentiality if they report their suspicions in good faith.³⁶ This will ensure that if financial institutions suspect that funds stem from a criminal activity, they should be required to report their suspicions promptly to the competent authorities. This is known as ‘Tipping off’ and it prevents ML and TF funds from entering the system. Appropriate law enforcement mechanisms should be put in place to process, investigate and prosecute

³⁴ Rec. 2

³⁵ Recommendation 13 and 14 of FATF

³⁶ Ibid

suspected reports of money laundering and a financial intelligence unit (FIU) should be established as the national receiving centre for information on money ML and TF.³⁷

With bodies like ESAAMLAG as a base, Southern African countries must enter into MLATS to ensure cooperation and mutual legal assistance in ML and TF investigations, prosecution and extradition of cases. Countries should consider implementing feasible measures to detect or monitor the physical cross border transportation of cash and bearer negotiable instruments. According to recommendation 19, they should also impose a requirement on financial institutions to report all transactions above a certain amount. In the United States of America, for instance, transactions over \$10,000 are supposed to be reported to the relevant authorities.

3.3.4 E-COMMERCE AND INTERNET BANKING

New technology from the west is coming into Southern Africa almost as quickly as the countries in the west start using it. E-commerce and Internet banking are two new kinds of services being offered by some financial institutions. The European Electronic Money Directive has defined electronic money as;

prepaid monetary value stored on an electronic device, which is issued by an entity and accepted as a means of payment by other parties. It is intended to act as an electronic surrogate for coins and bank notes and is generally used for transactions of a certain value.

E-money systems can be attractive to money launderers and terrorism financiers because they are not easily traceable and they offer instantaneous transfer (mobility). There is also

³⁷ Ibid Recommendation 26-32

no need for face to face contact with the transferee and service provider thereby posing extreme difficulty in identifying the person operating the account. Account based products are transparent to the issuer and may therefore be monitored for particular patterns and behavior. Legislation to ensure supervision and customer diligence by the issuer of such services is consequently needed.

3.3.5 NON-FINANCIAL INSTITUTIONS

Designated non-financial businesses and professions should also be subject to regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti ML and TF measures. Casinos should be licensed and closely monitored to ensure customer diligence as well as estate agents, insurance companies, travel agents and banks. Countries should also make sure that there is monitoring of lawyers' accounts by FIUs to make sure that they are not being abused. In doing so, they have to warn themselves of the lawyer-client confidentiality that subsists. While professional firms and financial institutions owe a duty of confidentiality to their clients, the maxim that "there shall be no confidence in iniquity" should apply. ML and TF legislation is not intended to turn financial institutions, professional businesses and their employees into detectives. They should not be expected to go out looking for signs of criminal activity but neither should they be allowed to play a dormant role.

3.4.0 DEVELOPING REGIONAL STANDARDS AND COOPERATION REGULATIONS

Southern African Countries should rapidly, constructively and effectively provide the widest possible range of mutual assistance in relation to ML and TF investigations, prosecutions and related proceedings.³⁸ They should also provide the widest range of international cooperation to their foreign counterparts. Cooperation between the financial and professional sector and law enforcement needs to be reciprocal. Financial institutions and professional firms are acutely sensitive to any damage to their reputation and they will want the minimum publicity about any money laundering investigations in which they get involved. If the various jurisdictions have effective dual criminality, tracing criminals will be smoothly facilitated and law enforcement agencies and other authorities will tend to cooperate as there will be limited chances of embarrassment due to wrongful accusations.

According to the FATF standards, the following general principles should be implemented by countries in order to ensure that effective gateways for the exchange of information and the provision of international cooperation exists at each stage of a money laundering or terrorist financing investigation:

- When an authority in country A has information officially requested by an authority in country B, the requested country-A authority should be in a position to provide the information to country B promptly.

³⁸ Ibid recommendation 36-40

- When an authority in country A has information it knows would be useful for an authority in country B, the country-A authority should be able to provide the information spontaneously and promptly to the country- B authority.
- When an authority in country A is requested by a country B authority to obtain information or a document, or to conduct an investigation or an inquiry, or to perform a particular action useful in the context of an analysis, investigation, or prosecution of ML or TF, the requested country A authority should be in a position to perform the requested action (natural if this action is permitted by rules regulating the performance of its duties at the domestic level.³⁹

In all the above, the principle of standard setting of dual criminality and reciprocity should be subsisting in order to have effective cooperation. The central banks should play a proactive and effective role.

³⁹ Opcit, at recommendations; 36 and 40

CHAPTER 4

RECOMMENDATIONS AND CONCLUSIONS

This Chapter will look at the following;

4.1 Guides in Regional Cooperation and Standard Setting

4.2 Recommendations

4.3 Conclusion

4.1 GUIDES IN REGIONAL COOPERATION AND SANDARD SETTING

The FATF has developed core programmes of activity which include self assessment of progress in implementing the 40 FATF recommendations (and any other regionally agreed recommendations), mutual evaluation of national programmes and the monitoring of developments in the field of money laundering and terrorism financing. Southern African countries need to enter into these self evaluation procedures. In the commonwealth countries which include most Southern African Countries, finance ministers have mandated two rounds of self evaluation and law ministers have one round. Southern African countries can jump unto the band wagon and take advantage of the process in order to strengthen the anti ML and TF system.

The tabulated results of self assessment surveys when distributed to members assist other countries to understand the laws of fellow member countries and, accordingly, provide a basic tool which can be used when seeking international cooperation and standard setting. In addition, the FATF recommends that mutual evaluation procedures be conducted by

multi disciplinary teams drawn from other member countries which look at the financial, legal and law enforcement concepts of a country's anti-ML and TF efforts. These methods are important because the knowledge that one's peers are going to examine, at your invitation, your statute books, banking and financial regulations and law enforcement methods has an effect of pushing governments to take anti- ML and TF seriously. They tend to implement all the measures that they can. The prospect of having the report discussed in a plenary meeting also has a focusing effect. Mutual evaluation also gives the examined country the opportunity to examine the effectiveness of national laws, regulations and operating procedures and provides a wider perspective in the national and international effect of anti-ML and TF efforts. Additionally, countries in Southern Africa can also join with the FATF in monitoring new ML and TF developments. This will ensure that effective counter measures of an international caliber are adopted.

Furthermore, current regional cooperation trend has shown a move towards feedback on suspicious transaction reports. This involves providing appropriate and timely feedback to financial and other institutions which report suspicious transactions. Recommendation 15 of the FATF 40 Recommendations states that; if financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities. Several forms of general feedback are currently provided for at both national and international levels. The type of feedback varies according to the obligations of secrecy or the number of reports being received by the financial units. Southern African countries can therefore ease this process by agreeing on

a general mode of working. The following types of feedback are used by most countries worldwide;

- (a) Statistics on the number of disclosures, with appropriate breakdowns, and on the results of the disclosures. This may include the results achieved on the reports such as whether prosecution occurred and what the outcome of the case was. Geographical locations from which cases are emanating from should be included. This may help in knowing which locations need special attention.
- (b) information on current techniques, methods and trends (sometimes called typologies). The FATF conducts continuous studies of new trends of ML and TF. Their information may be useful in the quest of finding out what new laws and strategies should be implemented to counter the scourges.
- (c) Sanitised cases of actual money laundering cases must be prepared and circulated. These are cases which have all specific identifying features removed. This type of information is regarded by financial sector representatives as even more valuable than information on trends.⁴⁰⁴⁰ These cases are very important to all stakeholder institutions in the fight against ML and TF because they provide detailed examples of actual ML and TF and the results of such cases, thus increasing the awareness of frontline staff.

Whatever the administrative structure of the government agencies involved in collecting intelligence or investigating and prosecuting criminality, it is essential that whichever agency is responsible for providing feedback receives the information and results upon which the feedback is based. This will enable the agency that provided the feedback

⁴⁰⁴⁰ *Combating Money Laundering and terrorism Financing: A Model of Best Practice for the Financial sector, Professions and Other Designated Businesses*; 2nd Edition; Published by the Commonwealth Secretariat; p.184

assess itself as to how accurate the information it gave was and what improvements it can make in future. Further cooperative exchange of information and ideas will enable the concerned institutions to work effectively and with greater uniformity.

4.2 RECOMMENDATIONS

- The traditional association of money laundering with banks and financial institutions ought to be changed as money laundering is a broad concept. A comprehensive and effective anti-money laundering framework is needed in order to significantly reduce the profitable aspects of the scourge.
- There is also need to establish legally recognized institutions to investigate and enforce the law if convictions are to be recognized, obeyed and respected while serving their useful purpose of deterrence.
- Deliberate policies aimed at educating officers in the concerned institutions are urgently needed as they are not familiar with the new anti ML and TF laws. In Zambia, some lawyers have complained that their clients have been slapped with the charges of ML by the police without proper clarification as to what predicate offence lead to ML.
- Southern African Countries should ensure that their competent authorities provide the widest possible range of international cooperation to their foreign counterparts. Exchange of information should be permitted without unduly restrictive conditions such as refusing a request for assistance on the sole ground that the request is also considered to involve fiscal matters or financial institution secrecy or confidentiality.

- Countries should ensure control and safeguards to ensure that information exchanged by competent authorities during investigations is kept private. This will encourage institutions which fear getting their name tainted in case of undue publication to freely cooperate.
- Countries in the region should pull their resources together in order to establish an institution that will train manpower in the best practice for fighting ML and TF. This will increase the available skills which are currently lacking in prosecution and investigation.
- Countries must harmonise domestic and international Legal instruments that they have ratified as soon as possible. Many countries have ratified conventions but they have not domesticated them.
- Countries must establish due diligence in their investment bodies to ensure investors account for their source of funding and intended operations. There are a lot of Non Governmental Organisations and Foreign Investments coming into the region some of which may be a means of financing TF or hiding ML proceeds.
- In fighting against terrorism, constitutional protections of speech, privacy and other freedoms should not be adversely eroded by national security considerations. Erosion of such rights is causing a crisis in the USA and Southern Africa can learn from that country. These freedoms are fundamental and are a source of the people's power.
- Poverty should be fought against which will in turn reduce corruption. Anti-corruption laws must also be strengthened in order to reduce corruption and

thereby increasing the confidence and accountability of institutions involved in ML and TF.

- Countries need to acknowledge the interrelationship between ML and TF and take steps in order to combat the scourges as such.
- The Notion that terrorism is a threat to some countries and not all should be changed as there have been attacks in southern Africa as highlighted earlier in the paper.

4.3 CONCLUSION

All Southern African countries have taken steps in fighting TF and ML but all of them have not yet attained the minimum standards set by FATF. Money laundering, catalyzed by the global economy, is derailing development in many countries. Its effects are aggravated by the fact that it does not easily lend itself to statistical analysis as observed by the IMF. While money laundering can occur in any country, it has significant security, economic and social consequences for developing countries as shown in the paper. Criminal money in large amounts undermines the social, economic and political fabric of society and consequently affects the day to day life and environment of every citizen⁴¹. A relatively-crime free society with a sound and effective criminal justice system provides a healthier and safer environment in which to live and work.

The International Monitoring Fund managing director, Michael Candessus has estimate the amount of ML at 2-5 percent of the World's Gross domestic Product- almost \$600

⁴¹ Economic Paper 70. 2005. *Combating Money Laundering and Terrorism Financing; A model for best practice* ; Commonwealth p.12

billion even at the lowest end of the scale.⁴² The United States of America authorities have made an approximate estimate of the total cost of planning and execution of the 11th September, 2001 attacks on that country at \$200,000.⁴³ Rwanda experienced the equivalent of three 11th September, 2001 attacks every day for 100 days, all in a country whose population was one thirty-sixth that of the United States.⁴⁴ Funding could have most likely arisen from money laundering, collection of membership dues and or subscriptions to the terrorist organizations in any country around the world. There is a strong link between ML and TF which needs to be recognised if the fight against the blights is to succeed. The primary purpose of terrorism is to 'intimidate a population or to compel a government or an international organization to do or to abstain from doing an act'.⁴⁵ This is contrary to most of the other criminal offences where financial gain is generally the ultimate objective.

Terrorists need finance in order to succeed with their plans. Therefore they turn to quick ways of financing their destructive motives. The many illegal ways that terrorists turn to include corruption, bribery, tax evasion, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, fraud, and counterfeiting currency. Afterwards they conceal their ill gotten gains in order to hide from detection, this process is known as money laundering. As earlier stated in the paper, regardless of the crime,

⁴² P.6 new book

⁴³ *Combating Money Laundering and terrorism Financing; A Model of Best Practice for the Financial sector, Professions and Other Designated Businesses*; 2nd Edition; Published by the Commonwealth Secretariat in 2006; p.6

⁴⁴ *Co-Chairs' report Conference on Combating Money Laundering and Terrorism Financing*; 17-18 DECEMBER 2002; p26

⁴⁵ Opcit; p.13

money launderers and terrorism financiers are similar in that they resort to placement, layering and integration in the process of turning illicit proceeds into apparently legal monies or goods⁴⁶.

Terrorism financing has the capability for massive espionage and clandestine operations within the Southern African region and the rest of the world. As Marcus Cicero mentioned when speaking to Caesar;

‘An enemy at the gates is less formidable, for he is known and carries his banner openly against the city. But the traitor (terrorist) moves among those within the gates freely, his sly whispers rustling through the alleys are heard within the halls of government itself. He rots the soul of the nation, he works secretly and unknown to undermine the pillars of the city.’

Terrorism financing is geared towards secrecy and so Southern Africa and the whole world have to be alert to any signs that show its episode. This will save lives as the scourge will be nipped in its infant stage.

Illicit drug users and abusers are also main players in exploiting the boulevard of ML in order to conceal proceeds from illicit trafficking in narcotic drugs and psychotropic substances. The World Health Assembly stated that in the world, there are 185 million illicit drug users, 2 billion alcohol users, 1.3 billion smokers and that for every dollar

⁴⁶ Supra note 4; p.I-7

invested in drug treatment, 7 dollars are saved in health and social cost⁴⁷. Effective action against illicit drug use will help reduce money laundering by a substantial degree.

If the scourges of ML and TF are not taken as some of the serious issues of national development, the dream-cast in basic necessities for all will be pursued but never attained. Launderers will get richer while the economies of LDCs as those in southern Africa will collapse. Moreover, the zeal and efforts of the genuine and legitimate workers will be frustrated by destruction and unfair competition with rich launderers. Terrorism is the anti- thesis of democracy which is a quest of the majority of individuals and nations today. It spares no one, both the rich and the poor die; therefore stopping its financing is imperative. International terrorist groups prey on weak States such as those in Southern Africa for sanctuary. Their recruitment is aided by grumble nurtured by poverty, foreign occupation and the absence of human rights and democracy; by religious and other intolerance; and by civil violence. In recent years, terrorists have helped to finance their activities and moved large sums of money by gaining access to such valuable commodities as drugs in countries beleaguered by civil war. They hide their tracks through the process of money laundering. ML and TF are economic crimes in nature. Therefore Southern Africa must cut off funds going to finance terrorism and make sure that money laundering does not pay. As Tony Blair pointed out;

'seizing criminal assets deprives criminals of their financial life blood. The challenge for law enforcement will become even greater as new technologies hide the money trail more effectively. We must ensure that law enforcement meets the challenges.'

⁴⁷ World health Organisation Statistics in The Drug Enforcement of Zambia Newspaper; August 2006 Volume No. 1; p.5

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