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DIRECTORATE OF RESEARCH AND GRADUATE STUDIES

SCHOOL OF LAW

**THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR COMBATING
MONEY LAUNDERING IN ZAMBIA**

BY

CLEMENT ANDELEKI

**A dissertation submitted to the University of Zambia in fulfilment of the
requirements for the award of a degree of Master of Laws**

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LUSAKA

2015

DECLARATION

I, CLEMENT ANDELEKI, Student No. 530504678, do solemnly declare that this dissertation is the best of my original and bonafide work and that to the best of my knowledge no similar piece of work has previously been produced and presented to the University of Zambia or any other Institution for the award of a degree of **Master of Laws**. The works referred to in this dissertation have been duly acknowledged.

Signature_____

Date_____

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CERTIFICATE OF APPROVAL

This dissertation authored by CLEMENT ANDELEKI and entitled **THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR COMBATING MONEY LAUNDERING IN ZAMBIA** has been approved as fulfilling the requirements for the award of the degree of **Master of Laws** by the University of Zambia

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ABSTRACT

The study discusses the legislative and institutional framework for combating money laundering in Zambia. After examining the historical origins and evolution of the problem of money laundering, the study proceeds to review the various measures that the Zambian Government has put in place since 1980 to combat money laundering. In so doing, the study examines in detail the roles played by the law enforcement agencies in Zambia, amongst them, the Anti Money Laundering Investigation Unit, the Drug Enforcement Commission and the Financial Intelligence Centre. The study also brings into perspective the roles played by the international community in the fight against money laundering and counter financing of terrorism.

At the centre of the study is the question whether or not Zambia has adequate legislative and institutional framework for combating money laundering, especially in the light of technological sophistications that has taken place since 1980s.

Relying on the qualitative method of data collection, the study engaged the seven institutions mandated to combat money laundering in Zambia. Structured interviews and participant observation was adopted as a method of data collection. This method of data collection implied having to be attached to the institutions mandated to combat money laundering in Zambia for most of the duration of study. The study also among others relied on desk research and review of leading judicial precedents on money laundering in Zambia

The research established that Zambia has adequate legislative and institutional framework for combating money laundering. The study however noted that despite this state of affair, there are legal provisions that tend to undermine the autonomy of these institutions. The lack of protected tenure of office for officers serving in the Anti Money Laundering Investigations Unit, the Drug Enforcement Commission, the Zambia Police Service, the Bank of Zambia and the Financial Intelligence Centre were among the bottle necks noted. Further it was observed that there is lack of coordinated interface amongst the seven law enforcement agencies.

The research notably recommends *inter alia* that the Anti Money Laundering Investigations Unit be made a fully fledged institution enjoying its own autonomy and independence away from the Drug Enforcement Commission as envisaged by the Prohibition and Prevention of Money Laundering Act. It is further recommended that the Office of the Auditor General of Zambia be granted prosecution powers like is the case in Lusophone countries. This is vital in an attempt to curtail abuse and embezzlement of public funds.

To my late father, Jailosi ANDELEKI

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TABLE OF CONTENTS

Title	i
Declaration	ii
Copyright	
Certificate of Approval	iii
Abstract	iv
Dedication	v
Acknowledgement	vi
Table of Contents	vii
Glossary	xii
 Chapter One: Introduction	
1.1 Introduction	
1	
1.2 Background of the Research	
1	
1.3 Statement of the Problem	
2	
1.4 Objectives of the Study	
3	
1.4.1 General Objectives of the Study	
3	
1.4.2 Specific Objectives	
3	

	1.4.3 Research Questions	
4		
	1.5 Rationale of the Study	
4		
	1.6 Methodology of the Study	
5		
	1.7 Literature Review	
5		
	1.8 Limitation of the Study	
9		
	1.9 Summary	
9		

vii

**Chapter Two: The concept of Money Laundering in Zambia
and at International level**

11		
	2.1 Introduction	
11		
	2.2 The historical evolution of the problem of money laundering	11
	2.3 The Problem of Money Laundering at International level	12
	2.4 Zambia's response to the problem of money laundering and drug trafficking	16
	2.5 The Concept of money laundering – A General overview	20
	2.6 The Basic Offences of money laundering in Zambia	23

25	2.7 The essential elements of the crime of money laundering	
	2.8 The process by which money is laundered generally	26
	2.9 The standard and burden of proof in money laundering cases	28
	2.10 Some techniques used as vehicles for money laundering	34
	2.11 The rationale of combating money laundering	36
37	2.12 Summary	

**Chapter Three: The Institutional and Legislative framework for
combating money laundering in Zambia**

39	3.1 Introduction	
39	3.2 The Prohibition and Prevention of Money Laundering Act, 2001	40
	3.2.1 The Anti Money Laundering Investigations Unit (AMLIU)	41
	3.2.2 Statutory functions of the Anti Money Laundering Investigations Unit	44
	3.2.3 Other powers of the Anti Money Laundering Investigations Unit	46
	3.2.4 The powers of investigation, search and arrest	46
51	3.3 Challenges faced by the Anti Money Laundering Investigations Unit	
54	3.4 The Anti Money Laundering Authority	
55	3.4.1 The Statutory functions of the Anti Money Laundering Authority	

3.5	The Financial Intelligence Centre’s role in combating money laundering	
55		
	3.5.1 The history of the Financial Intelligence Centre of Zambia	
56		
	3.5.2 The Statutory functions of the Financial Intelligence Centre of Zambia	56
	3.5.3 Operations of the Financial Intelligence Centre of Zambia	
57		
	3.5.4 The functions of the Board of the Financial Intelligence Centre of Zambia	
58		
	3.5.5 Measures intended to combat money laundering under the Act	
58		
	3.5.6 Internal measures to be adhered to by reporting agencies in preventing money laundering	
59		
	3.5.7 Offences that may be committed by Reporting Agencies under the Act	
60		
3.6	The Drug Enforcement Commission of Zambia	
61		
	3.6.1 The Statutory functions of the Drug Enforcement Commission	62
	3.6.2 Offences under the Narcotic Drugs and Psychotropic Substances Act	62
	3.6.3 The powers of the officers of the Drug Enforcement Commission	64

3.7 The office of the Auditor General of Zambia	66
3.7.1 The statutory role of the office of the Auditor General of Zambia	67
3.7.2 Some of the sanctions that may be imposed on erring public officers	69
3.7.3 The challenges facing the office of the Auditor General of Zambia	
70	
3.7.4 The successes recorded by the office of the Auditor General of Zambia	71
3.8 The Anti Corruption Commission of Zambia	72
3.8.1 The statutory powers of the Anti Corruption Commission of Zambia	73
3.8.2 The territorial Jurisdiction of the Anti Corruption Commission of Zambia	74
3.9 Summary	76
Chapter Four: The Role of Financial Institutions in Combating Money Laundering	78
4.1 Introduction	78
4.2 The Bank of Zambia, Anti Money Laundering Directive of 2004	79
4.2.1 The scope of the Bank of Zambia Anti Money Laundering Directives of 2004	80
4.2.2 The Customer Due Diligence and other obligations	80
4.2.3 Record Keeping as an obligation on Regulated Institutions	85
4.2.4 Reporting of Suspicious Activities and Transactions	85
4.2.5 The role of Anti Money Laundering Reporting Officers in combating money laundering	88
4.2.6 Requirement of Regulated Institutions to co-operation with Law Enforcement Agencies	89

4.2.7 The obligation of the Board and the Anti money Laundering Principal Officers of Regulated Institutions	90
4.2.8 Staff Training and other obligations of regulated institutions	91
4.2.9 The role of External Auditors in combating Money Laundering	91
4.3 Summary	92
Chapter Five: The International best Practices for combating Money laundering	
93	
5.1 Introduction	
93	
5.2 The Eastern and Southern Africa Anti Money Laundering Group (ESAAMLG)	95
5.2.1 The objectives of the ESAAMLG	95
x	
5.2.2 The Organisation structure of the ESAAMLG	
97	
5.2.3 The Challenges faced by the ESAAMLG	98
5.3 The Financial Action Task Force (FATF)	99
5.3.1 The Objectives of the FATF	101
5.3.2 The key features of the FATF Recommendations against money Laundering	102
5.3.3 Challenges faced by FATF member States and International Organisations	105
5.4 The Basel Committee on effective Banking Supervision	106
5.4.1 The objectives of the Basel Committee on effective Banking Supervision	107

5.5 The economic impact of money laundering at international level	108
5.6 Summary	
109	
Chapter Six: Findings, Conclusion and Recommendations	
110	
6.1 Introduction	110
6.2 Findings	111
6.3 Conclusion	114
6.4 Recommendations	115
Bibliography	118

GLOSSARY

ACC- Anti Corruption Commission

AMLIU- Anti Money Laundering Investigations Unit

AMLA- Anti Money Laundering Authority

BOZ- Bank of Zambia

BUPSML- Bank Use Promotion and Suppression of Money Laundering

CDD- Customer Due Diligence

DEC- Drug Enforcement Commission

DPP- Director of Public Prosecution

EFT- Electronic Funds Transfer

ESAAMLG- Eastern and Southern Africa Anti Money Laundering Group

FATF- Financial Action Task Force

FIC- Financial Intelligence Centre

FIU- Financial Intelligence Unit

KYC- Know Your Customer

IMF- International Monetary Fund

ML/TF- Money Laundering and Terrorist Financing

MOH- Ministry of Health

MoU- Memorandum of Understanding

PEP- Politically Exposed Person

SADC- Southern Africa Development Community

SITET- Special Investigations Team on Economy and Trade

StAR Initiative- Stolen Assets Recovery Initiative

UN- United Nations

UNCAC- United Nations Convention Against Corruption

UNODC- United Nations Office on Drug and Crime

ZRA- Zambia Revenue Authority

TABLE OF LEGISLATION

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Anti Corruption Commission Act No. 3 of 2012

The Anti Corruption Commission Act No. 38 of 2010

The Corrupt Practices Act No. 14 of 1980

The Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia

The Forfeiture of Proceeds of Crime Act, No. 19 of 2010

The Prohibition and Prevention of Money Laundering Act No. 14 of 2001

The Financial Intelligence Centre Act No. 46 of 2011

The Extradition Act, Chapter 161 of the Laws of Zambia

The Public Audit Act, Chapter 378 of the Laws of Zambia

The Public Finance Act, No. 15 of 2004

The Mutual Legal Assistance in Criminal Matters Act, No. 19 of 1993

INTERNATIONAL CONVENTIONS

1. Basel Committee on Banking on Banking Supervision: Core Principles for Effective Banking Supervision, 1974.
2. Basel Principles on the Prevention of Criminal use of the Banking System for the Purpose of Money Laundering (December, 1988).
3. Council of Europe: Convention on Laundering, Search, Seizure (Strasbourg, 08th November, 1990).
4. ESAAMLG- Eastern and Southern Africa Ant Money Laundering Group
5. FATF- Financial Action Task Force on Money Laundering. The Forty Recommendations, 1996.
6. STAR Initiative- Stolen Asset Recovery Initiative, 2007
7. United Nations Convention against Trans- National Organised Crime (Palermo Convention),
8. United Nations Model Money Laundering and Proceeds of Crime Bill (2000).
9. United Nations Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime, 1999.

CHAPTER ONE: INTRODUCTION

1.1 Introduction

The purpose of this dissertation is to evaluate the efficacy of the legislative and Institutional framework for combating money laundering in Zambia. In doing so, the study seeks to establish why the problem of money laundering seems to escalate in Zambia like in many other countries even amid consented efforts to eradicate the vice. The advent of advanced technology in the world seems to have brought with it new threats and requirements for comprehensive legislative and institutional reforms. The aim of this study therefore is to investigate the problem of money laundering in Zambia *vis- a- vis* the adequacy of the legislative and institutional framework designed to combat this vice. Though the problem of money laundering may seem to be entirely new, it is in fact a phenomenon with a longer history that goes back to the early 1980s in Zambia. In Chapter One, the dissertation presents the background of the research and the statement of the problem for investigations. Further, the general objective of the research and the specific research questions together with the rationale of the study are also presented. This is followed by sections on methodology and the literature review. The final part of the Chapter draws a summary and conclusion.

1.2 BACKGROUND OF THE RESEARCH

This study arises from the several challenges experienced by states at local and at international levels in the fight against money laundering. At international level, the research examines the extent of the problem of money laundering based on the reports highlighted in the United Nations Annual Global Report on money laundering¹ and counter financing of terrorism. This Report estimates that a total of approximately 3.6% of the global domestic product (GDP) translated to US\$ 1.6 trillion is laundered annually world over particularly in least developed countries. At national level, the study has also been motivated by the increased cases of money laundering activities involving public funds as reported in the Auditor General's Annual reports which reveals high levels of mis- appropriation and general embezzlement of public funds. On that basis, the study has been motivated to examine and interrogate the extent of the problem of money laundering in Zambia with particular focus on the legislative and institutional frameworks. The study therefore interrogates both the national

¹The United Nations Annual Global Report on Money laundering and counter of Terrorism Financing, Technical Report, 2010, UNO, KSL- 34- 13 on www.uno.org

and international dimensions for combating of money laundering. This research in short mirrors through the legislative and institutional capacity of Zambia to combat the problem of money laundering in the advent of high technological advancements in the area of commerce, trade and industry. In doing so, the study examines and takes into consideration the international best practices for money laundering. This research also takes cognizance of some of the writings by some researchers in this area of study and in the same vein calls for more research in the area of money laundering. The conviction of several prominent political leaders in Zambia since 2001 and the high levels of mis-appropriation of public funds as revealed by the Auditor General's reports annually, attest to the need to continue examining Zambia's legislative and institutional framework for combating money laundering in order to safe guard the much needed public resources. As regards the problem of money laundering at international level, the study observes that it has just been slightly over a decade now since the first formal and consented international action to combat money laundering was taken. This came about following the 11th September, 2001 bombing in the United States of America commonly referred to as the 9/11 terrorist attack. This study observes that this terrorist attack brought to the fall the need to effectively combat money laundering which is linked to financing of terrorism. The 9/11 terrorist attack arose as a wakeup call to several countries throughout the world to realise the need for consented international and regional coordination to put a stop to money laundering and counter financing of terrorism. Countries, since the advent of 9/11 realised the need to effectively combat money laundering to its core whenever and wherever it may arise. The crime of money laundering is a new phenomenon and presents new threats to the international community in the twenty- first century. The augmentation of international trade, the expansion of the global financial system, increased international travel and the general surge in the internationalisation of organised crime is seen as having supported the problem of money laundering and financing of terrorism

1.3 STATEMENT OF THE PROBLEM

Money laundering manifests itself in various forms particularly by funds acquired through criminal or illicit activities. Such activities include drug trafficking; illegal arms deals; illegal smuggling of precious stones; and such related environmental crimes, cyber crimes; fraud; and armed robberies. The problem of money laundering poses one of the greatest financial

risks particularly to least developed countries such as Zambia.² Most particularly, money laundering destabilises the economic, social, political and cultural framework of the country. Notably, in Zambia, the increased revelation of embezzlement of public funds as revealed in the Auditor General's reports annually demonstrates the gravity of the problem relating to this crime and its predicate offences. To further demonstrate the extent of the problem of money laundering in Zambia, there are also a number of convictions of prominent public figures by the courts of law. These have included public officers in the Ministry of Finance holding positions of Cabinet Minister, Permanent Secretary and Secretary to the treasury among such other levels.³ Many other cases of money laundering which are discussed in this study all demonstrate the extent of the problem of money laundering in Zambia.

In spite of available laws to address the problem of money laundering in the country, the scourge of money laundering is unyielding desired results. What is not known are the reasons why the problem of money laundering seems to escalate even amid serious consented interventions at national and international levels. This dissertation therefore investigates the problem of money laundering and addresses the reasons for the scourge.

1.4 OBJECTIVES OF THE STUDY

1.4.1 GENERAL OBJECTIVE

The general objective of this study is to evaluate the efficacy of the legislative and institutional framework for combating money laundering in Zambia. In doing so, the study will discuss the concept of money laundering in Zambia and at international levels. Additionally, the study interrogates the international best practices against money laundering and examines how Zambia can draw valuable lessons in the fight against the vice.

1.4.2 SPECIFIC OBJECTIVES

- a) To examine the legislative framework against money laundering in Zambia
- b) To examine the institutional framework for combating money laundering in Zambia

² The United Nations Global Annual Report on money laundering and financing of terrorism of 2010 which suggests that approximately US\$ 1.6 trillion translating to 3.6 percent of the Gross Domestic Product of the global economy is laundered through transnational organised crime particularly in emerging economies.

³ Subordinate Court at Lusaka, tried under cause number SSP/13/ 2004 where prominent public officers were arraigned, tried and convicted for money laundering, see: *The People v Katele Kalumba and 4 others*.

- c) To examine some of the international best practices against money laundering where the Zambia can draw lessons.
- d) To critically discuss Zambia's compliance levels with International conventions and best practices against money laundering and its predicate offences

1.4.3 RESEARCH QUESTIONS

The study seeks to provide specific answers to the following questions:

- a) Does Zambia have an effective legislative framework for combating money laundering and its predicate offences?
- b) Does Zambia have an effective Institutional framework for combating money laundering and its predicate offences?
- c) Has Zambia managed to comply with international conventions and best practices against money laundering and why is it necessary for countries to adhere to International best practices on money laundering?
- d) What lessons can Zambia draw from the International community on the fight against money laundering?

1.5 RATIONALE OF THE STUDY

The purpose of the study is to examine Zambia's institutional and legislative framework for combating money laundering amid the advancements of technology. This is on the basis that the problem of money laundering has posed a serious challenge to many countries. This has been further complicated by the advancement of technology in commerce, trade and industry such as the banking sector of the global economy. This has given room to money laundering syndicates across the globe. This study therefore is aimed at providing a valuable contribution in form of knowledge to Government, society, the private and public sectors of the economy. This knowledge is intended to help in eradicating the problem of money laundering both at national and international levels. The study also aims at contributing knowledge intended to enhance understanding required for addressing the difficult and complex subject of money laundering. The findings of this study can also be the basis for legislative and institutional reforms in Zambia and at international levels. The banking sector in particular can play a pivotal role in curbing the problem of money laundering through the findings of the study.

1.6 METHODOLOGY OF THE STUDY

The methodology used for data collection in this study was the qualitative research method which involved participant observation from the selected sample which was purposely identified to encompass the seven (7) law enforcement agencies in Zambia. In coming up with the findings, the study used semi-structured interviews, observations and focussed discussions with the law enforcement agencies namely; the Anti-Money Laundering Investigations Unit, the office of the Auditor General of Zambia and the Anti Corruption Commission. The other institutions surveyed included the Drug Enforcement Commission, the Financial Intelligence Centre, the Bank of Zambia and the Zambia Police Service. The study also adopted a desk research method which examined empirical data from selected academic publications, legislation and judicial decisions on money laundering. The selected sample of the desk research was purposive and analysed various other writings on the subject under investigation. The above methods were preferred during this study as opposed to random sampling and other methods of data collection owing to the specialised nature of this research. The study in short targeted the institutions mandated to enforce anti- money laundering legislation in Zambia. The researcher was also fortified by his personal knowledge and vast experience in the practice of criminal law as a public prosecutor and criminal investigator in the forensic sciences department of the Zambia Police Service.

1.7 LITERATURE REVIEW

The present study has taken into consideration various writings on money laundering in Zambia and at International levels. Amongst such writings, the study examined the dissertation of Mbaya Malama.⁴ Malama has made valuable contribution on the global challenges posed by money laundering. However, Malama does not explain how responsive the Zambian legislation has been in an attempt to overcome the scourge of money laundering. Malama, in particular does not explain the challenges facing least developed countries in combating the problem of money laundering. It is clear that the research mostly focussed on the problem of money laundering in developed economies and does not relate the problem to emerging economies such as Zambia. This knowledge gap has prompted this research for the purpose of evaluating the anti-money laundering systems in Zambia.

⁴ Mbaya Malama, 2004, The effects of Globalisation on money laundering, Bachelor of Laws Dissertation, University of Zambia

Another writer, Okogbule,⁵ discusses the problem of money laundering in Nigeria and Zambia. Okogbule has raised prominent issues, among others, the mode by which money is laundered or perpetuated. He concludes that money laundering is a truly global phenomenon which requires concerted efforts and unilateral action by states all over the world for the battle against money laundering to be won. Okogbule's study does not evaluate the institutional and legislative framework for combating money laundering in Zambia which is the purpose of this study.

In the same vein, the United Nations Annual Report on Laundering and Forfeiture of Proceeds of Crime⁶ discusses the urgency of money laundering world over. It is estimated that over 80% of all laundering schemes had an international dimension and classifies money laundering as a trans-national organised crime and hence urges state parties to co-operate and join efforts for the purpose of mutual legal assistance, search, seizure and forfeiture of proceeds of crime.⁷ This Report however does not highlight the challenges faced by least developed Countries in combating money laundering. Further, the Report does not provide a framework of action to assist least developed countries in combating this vice.

This research has also reviewed the writings of Kenneth Kaoma Mwenda,⁸ the first of its kind examining the problem of money laundering in Zambia. It brings out a lot of information on the legislative and institutional framework against money laundering. This knowledge gap relates to the latest developments after the publication of this valuable writing such as the creation of the Financial Intelligence Centre in Zambia and the re-alignment of the functions of the Anti-Money Laundering Investigations Unit. Further, the creation of the National Prosecutions Authority of Zambia, the enactment of the Forfeiture of Proceeds of Crime Act and the repeal of the Anti Corruption Commission Act⁹ are among some novel developments in the sphere of money laundering regulation in Zambia not factored by Kenneth Kaoma. Mwenda's writing but which will be considered in this research.

⁵ S.N. Okogbule, Regulation of Money Laundering in Africa, The Nigerian and Zambian Approaches, (London: Cambridge Press, 2006) 14-16.

⁶ The United Nations Annual Report on Money laundering and Forfeiture of Proceeds of Crime Report, Technical Report, 2012, UNO, KSL- 12- 16 on www.uno.org

⁷ The United Nations Annual Report on Money laundering and Forfeiture of Proceeds of Crime Report, Technical Report, 2012, UNO, KSL- 22 on www.uno.org

⁸ Kenneth Kaoma Mwenda, Anti Money Laundering Law and Practice: Lessons from Zambia (Lusaka: Unzapress, 2005) 14

⁹ Act No. 12 of 2010 (repealed) and replaced by the Anti Corruption Commission Act No. 3 of 2012

The present study also reviewed the writings of Justin Siphon Chitengi.¹⁰ This research concludes that Chitengi has made valuable contribution in discussing the historical evolution of the problem of money laundering in the 1970s. Chitengi has highlighted some ways in which money laundering syndicates are perpetuated particularly in developed countries. Chitengi has however not addressed the problem of money laundering in Zambia and its adverse effects. Chitengi, in his study does not discuss the problem of money laundering affecting emerging and least developed countries like Zambia. The knowledge gap in these writings coupled with the scanty writings on the problem posed by money laundering and financing of terrorism has inspired this research so as to bring out the unknown aspects of the problem thereby adding or making a contribution to this new dimension of knowledge.

This study has also examined the work of Calvin Lee Pacleb.¹¹ Pacleb discusses the problem of white collar crime and in particular examines the role of corruption in international money laundering. Pacleb discusses how corruption is associated with the problem of money laundering. Pacleb has extensively discussed the problem of corruption and how it becomes a twin offence to money laundering. Pacleb concludes that corruption is one of the major crimes predicate to money laundering. This research has perused through this work and the conclusion drawn is that Pacleb's the works does not provide solutions on how least developed countries like Zambia can effectively combat the scourge of money laundering. This study therefore remains justified in that it intends to close the knowledge gap by providing answers as to how least developed countries may effectively combat the problem of money laundering.

This research owner has also examined the dissertation of Anold Kaluba.¹² Kaluba discusses the problem of white collar crime in general. A perusal of this works shows that the concentration was on cyber crime. Kaluba has addressed his mind to the problem of money laundering in general and merely discusses the process by which money is laundering. Kaluba gives a theoretical assumption on the problem of money laundering in general. However, Kaluba does not review the institutional and legislative framework for combating money laundering in Zambia. Kaluba, does not also provide or address in his study the

¹⁰Justin Siphon Chitengi , 2011, Combating Money Laundering and Terrorism Financing, LL.M Thesis, University of Cape Town

¹¹ Calvin Lee Pacleb, B.S, 2003, International Money Laundering Perspective: A comprehensive review and general theory of Corruption, Master of Arts in Economics, Thesis, University of Texas

¹²Anold Kaluba., 2012. The Emergence of white collar crime in Zambia: An assessment of the effects and the efficacy of the legal regime in addressing the scourge, LL.B Dissertation, University of Zambia

challenges facing least developed countries such as Zambia in countering money laundering syndicates and its related offences. This vacuum in the knowledge gap justifies the reasons to discuss the institutional and legislative framework for combating money laundering in Zambia.

There has also been consideration on the writings of Ernest Mwansa,¹³ and during this study it was evident that the work shows that there was more concern with the constitutional mandate of the Executive branch of Government. The work discusses the constitutional and legal structures of the Public Accounts Committee and the office of the Auditor General of Zambia in the fight against abuse of public funds. This work is a highly valuable contribution in the fight against abuse of public funds in Zambia. Mwansa advances ways in which the office of the Auditor General of Zambia and the Public Accounts Committee can effectively and efficiently combat abuse of public funds. While this contribution is highly appreciated it does not go on to show whether Zambia's uniformity legislative and institutional framework is adequate in the fight against abuse of public funds. Mwansa does not explain the link between abuse of public funds to the problem of money laundering in Zambia. The present study therefore remains justified in filling in the knowledge gap.

The present study took into consideration the writings of Phil Morgan Kancheya.¹⁴ Kancheya in his study among others discusses the problem of money laundering in unregulated institutions of the economy. Kancheya explains the challenges of regulating the informal sector dealing with foreign exchange. The black dollar and counterfeiting of notes in the streets of cities like Lusaka and Livingstone was amongst the unregulated markets of the economy highlighted. However, the present study observes that Kancheya does not address the efficacy of Zambia's legislative and institutional framework for combating money laundering. The present study therefore still remains justified to fill in the knowledge gap. During the present study, consideration was drawn to the works of Brandon James Reddington.¹⁵ The study by Reddington, which is a valuable contribution to the source of knowledge on money laundering delves in the problem of money laundering as it relates to financing of terrorism. The study brings out ways in which countries can effectively counter

¹³ Ernest C. Mwansa, 2014, Assessment of the effectiveness of Parliamentary oversight of the Executive through the Public Accounts Committee in Zambia, LL.M Thesis, University of Zambia

¹⁴ Phil Morgan Kancheya, 2010, Money laundering in Zambia, Challenges of money laundering in unregulated sectors of Zambia, LL.B Dissertation, University of Zambia

¹⁵ Brandon James Reddington, 2011, Assessment the true effectiveness of the Anti Money Laundering and Counter of Financing of Terrorism, Master of Arts in Security Studies, Thesis, Georgetown University

financing of terrorism through money laundering regulation. This is very important to this study as money laundering acts as a catalyst or fuel for financing terrorism activities at international level. The study makes knowledge contribution on terror networks and how they are able to finance their illicit activities through money laundering. The study does not however address the connection between terrorism and money laundering neither does it address the institutional framework against money laundering in Zambia.

Another writer, Mao Sikaindo,¹⁶ discusses the problem of drug trafficking as it relates to money laundering. Sikaindo makes valuable pointers to the undisputable link between the problems of drug trafficking to that of money laundering. Siakaindo however does not examine the efficacy of Zambia's legislative and institutional framework for combating money laundering. The present study is persuaded by to such knowledge and ingenuity by various writers on the subject. The present study aimed at examining the institutional and legislative framework for combating money laundering in Zambia is and remains justifiable as it is intended to fill in the knowledge gap identified above.

1.8 LIMITATION OF THE STUDY

The study is limited to the information that the researcher was availed in the sampled area of the research as free access to all necessary data was not given due to the security nature or situational location of the institutions surveyed. The sample size was reduced to target the institutional heads and heads of departments in the selected institutions under survey.

1.9 SUMMARY

In conclusion, this dissertation has provided the general overview of the research. It has specifically dealt with a number of components analogue to the Research proposal as regards the structure. However additionally and most importantly, the study attempted to lay the discourse of the problem of money laundering and its historical origins. The advent of advanced technology in the world has no doubt brought with it new threats requiring comprehensive legislative and institutional reforms. Zambia like many other countries has made serious strides in an attempt to enhance the legislative and institutional framework for combating money laundering. As has already been alluded, the problem of money laundering

¹⁶ Mao Sikaindo, 2005, Social Economic and Political impact of Drug Trafficking and Money Laundering, LL.B Dissertation, University of Zambia

is a new phenomenon and adversely affects the economic, social, political and cultural dimensions of society. The problem of money laundering is known to have heightened at the stage of the terrorist attack popularly referred to as the 9/11 terrorist attack. This therefore confirms that money laundering is an offence that exist side by side other predicate offences such as drug trafficking, terrorism financing, corruption and cyber crime to mention but some offences. Money laundering today presents new threats to the national and international community. Its complexity in detection, prevention and prosecution remains one of the most challenging owing to the advancement in technology and the systematic nature of organised crime.

The 9/11 terror attack coupled with the threat posed by the terrorist networks who rely on proceeds of crime to finance their illicit activities can evidently not be worn by a single country. There is thus need to deprive criminals of proceeds of their crime in order to safe guard world order, peace and tranquillity. The financial institutions and law enforcement agencies world over must raise their bar if the fight against money laundering is to be won. Consequently, states must also do their part by ensuring enactment of effective public policies reflecting international best practices against money laundering.

The following Chapter discusses the concept of money laundering based on the Zambian and international dimension.

CHAPTER TWO: THE CONCEPT OF MONEY LAUNDERING: THE ZAMBIAN AND INTERNATIONAL PERSPECTIVE

2.1 INTRODUCTION

The purpose of this chapter is to discuss the concept of money laundering based on the Zambian and International perspective and practice. The research will focus on the historical evolution of the problem of money laundering in Zambia. Thereafter, the study discusses the concept of money laundering in general and highlights what constitutes this offence. The study also explains the money laundering processes. The discussion outlines the basic offences of money laundering and essential elements of this offence. The study further explains some notable techniques used as vehicles for money laundering syndicates. The study concludes by examining the rationale for combating money laundering and explains why countries such as Zambia must take effective measures to eradicate this vice. This discussion is vital to this research in that it underscores what constitutes the offence of money laundering in Zambia and at international level. The study explains the concept of money laundering in general so as to appreciate the challenges faced by states in the fight against this vice.

2.2 THE HISTORICAL EVOLUTION OF THE PROBLEM OF MONEY LAUNDERING IN ZAMBIA

The historical evolution of the crime of money laundering in Zambia is traced to the problem of drug trafficking.¹⁷ The first Zambian drug trafficking curtail was first detected in 1980 on the Zambian Airways boeing plane 'DC 10'. The Airhostesses were flying from Lusaka to Heathrow, London and whereupon they were found in possession of illicit drugs in the drug trafficking scandal that was later nicknamed the 'drug boom'.¹⁸ The implicated drug traffickers who were employees of the Zambian Airways in their capacities were subsequently arrested. Further investigations in this case revealed that the suspects had become so wealthy that they owned luxurious houses in Zambia and abroad.¹⁹ In addition,

¹⁷ Newton Sibanda, *Zambian Authorities Crackdown on Drug Trafficking Problem*, (London: Palgrave,2001) 5-6

¹⁸ The drug boom was the first largest drug trafficking cartel ever to be discovered thereby bringing to the fall the levels of illicit trafficking of drug in Zambia

¹⁹ Newton Sibanda, *Authorities crackdown on Drug trafficking problem*, (London: Palgrave, 2001) 7. These suspects were merely made to pay admission of guilt fines as there was at that time no adequate legislative and institutional framework to combat drug trafficking

investigations also revealed that the accused persons had also incorporated companies and owned luxurious cars that were believed to have been exchanged with drugs in South Africa, Botswana and Namibia.²⁰

Furthermore, the accused persons were also found to have owned several bank accounts with high account balances characterised by suspicious electronic transfers of funds from one account to another within short periods of time and smurfed deposits.²¹ At that time, Zambia did not have adequate legislative framework to combat money laundering as it was a new phenomenon. Besides that, there was no institutional framework by which to address and combat drug trafficking and money laundering. Consequently, the Zambian Government had to devise ways of responding to the new challenges of money laundering and drug trafficking.

This information is significant to this study in that it lays the foundation of the problem of money laundering in Zambia. The information helps to set out the pace for further discussion on the legislative and institutional framework against money laundering in Zambia. The information also help us to understand the legislative and institutional framework for combating money laundering based on where we are coming from, where are and where we are heading to in terms of legislation on money laundering. With this information at hand, the study is set for further discussion and engagement on the subject matter.

2.3 THE PROBLEM OF MONEY LAUNDERING AT INTERNATIONAL LEVEL

There are a number of writers that have discussed the concept of money laundering and its historical evolution at International level.²² The study now discusses the problem of money laundering at international level and its historical origins.

The pioneer of writing on money laundering and its effects is Parlour²³ which text book adopted the international approach to the concept of money laundering. The wrings have been persuasive to many prominent financial and non financial institutions, including the

²⁰ Newton Sibanda, *Zambian Authorities Crackdown on Drug Trafficking Problem*, (London: Palgrave, June, 2001) 8

²¹ Justice Mathews Chaila Commission, *Report on Drug trafficking Inquiry in Zambia*, (Lusaka, Government Printers, 1985) 23-26

²² For example, S.N.Okogbule, *Regulation of money laundering in Africa, The Nigerian and Zambian approaches*,(London: Cambridge University Press, 2006), 26-31

²³ Rodrick Parlour, *International Guide on Money Laundering: Law and Practice* (London: Butterworths,1995) 27

International Monetary Fund (IMF) and the World Bank²⁴ as a guiding manual on Money Laundering Regulation. Parlour, discusses the problem of money laundering and its historical origins at international level, by particularly focusing on the origins of the word ‘money laundering.’ Parlour explains that money laundering originates from the mafia ownership of Laundromats in the United States of America²⁵.

Parlour further explains that Laundromats are automated self service laundry machines where clothes are washed and dried.²⁶ These machines were designed in such a way that one inserts money into the machine for it to provide the service that one seeks and thereafter goes off automatically upon the expiration of time. This is a legitimate business that was chosen by these mafias to disguise their illicitly acquired funds. Parlour contends that these Mafioso chose this business because it was a cash business and this gave them undoubted advantage as it was hard for the authorities to detect the illicit proceeds.

Parlour, also explains that these gangsters that were operating in the United States of America were earning huge sums of money from drug trafficking, extortion, gambling, prostitution and bootleg liquor, ‘an illegally distilled whisky’ among other such illicit activities. In an attempt to regulate these illicit activities, the Government passed legislation²⁷ requiring all persons to show a legitimate source of their monies. In response and in order to legitimise their illicit proceeds, these gangsters devised ways to clean their funds through purchasing outwardly legitimate businesses and to mix their illicit earnings with the legitimate resources.²⁸

Parlour, further explains that Laundromats were chosen by these gangsters because they were cash businesses and this was undoubted advantage in disguising laundered proceeds. One of the renowned money launderers that has ever been known in history was *Al Capone* who purchased Laundromats as a way of concealing proceeds of crime by mixing legitimately acquired funds with illicit proceeds, but was however prosecuted and convicted in October, 1931 for tax evasion.²⁹ The convict herein was sent to Prison for a crime associated to money

²⁴World Bank Report, The Challenges of Combating Money Laundering and Financing of Terrorism, Technical Report, Commonwealth, 2012, WB-34-12, 9

²⁵ Laundromats are electronic and automated machines used to do laundry by inserting of money in the machine to allow such machine to do laundry for a specific period which is automated. This business was operated by mafia or criminal gangs as a way of disguising their illicitly acquired funds

²⁶ Rodrick Parlour, International Guide on Money Laundering: Law and Practice (London: Butterworths, 1995) 23

²⁷ Financial Crimes Enforcement Network Act, 1970

²⁸ Rodrick Parlour, International Guide on Money Laundering: Law and Practice (London: Butterworths, 1995) 17

²⁹ Rodrick Parlour, International Guide on Money Laundering: Law and Practice (London: Butterworths, 1995) 25

laundering through activities that generated his illicit income as there was no law yet devised against this crime. The circumstances of this case were based on information that *Al Capone* was found in possession of funds reasonably suspected to be proceeds of crime. Owing also to the difficulty on the part of the prosecution proving that such proceeds were realised from criminal activity, he was charged, prosecuted and convicted for tax evasion. However, according to Fisher,³⁰ he explains that it is from this tale that the term “money laundering” originated from. Fisher states that:

Money Laundering is called what it is because that perfectly described what takes place, that is to say illegal or ‘dirty’ money is put through the circle of transactions, or washed so that it comes out at the other end as legal, or ‘clean’ money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate income.

This definition is very important to this study in that it describes money laundering and outlines exactly what happens during the crime of money laundering and its predicate offences such as drug trafficking, fraud, cyber crime and illegal trade in precious stones among other similar such offences. The definition therefore established the crime of money laundering and the process by which laundering of money takes place. The definition sets ground for further discussion on the process of money as discussed in Chapter two. The study partially agrees with the definition of money laundering by Fisher. It is not completely right the perception by Fisher as that definition tends to limit money laundering to the use of financial institutions as a mode of cleaning the dirty money. This study considers that money laundering can and does take place without necessarily having to use the financial system to launder funds. The study recognises that illegally obtained funds can still be laundered by for example, purchasing of luxurious houses and other properties and even forming a front or offshore company. It will later in this Chapter be evident that there are other ways in which illegally obtained funds may be laundered without the need of using a financial institution. What is correct is the position that money laundering is the use of illegally acquired proceeds as though the same had been genuinely acquired when in fact not.

³⁰ J. Fisher, *Money Laundering Law and Practice*, (Oxford: Oxford University Press, 2001) 42-43

On the other hand, Burrell³¹ explains that Meyer Lansky, another renowned money launderer, who was also involved in a series of money laundering syndicates, deposited his illicit earnings into the Swiss Bank. These funds, however, were discovered and restricted by the Government. Burrell explains that it is from this episode where money laundering would seem to have started through the use of financial institutions to launder illicitly acquired funds.

In another view, Blunden,³² describes money laundering in the following terms:

Money laundering is an expression which is one of the fairly recent origins and that the original sighting was in newspaper reporting the Watergate scandal in the United States in 1973. The expression of money laundering first appeared in a Judicial or legal context in 1982 in America in the case of *United States v. Fulmore*³³ and since then the term has been widely accepted and is in popular usage throughout the world.

The study agrees with this definition and to the assessment that word money laundering started acquiring prominence in the Watergate scandal in the United States of America in 1982 and the case of Fulmore was the first of such kind of crime to be brought before the courts of law.

Furthermore, Temple³⁴ gives another perspective of the background of money laundering. Temple states that money laundering as a crime only attracted interest in the 1980s, essentially within a drug trafficking context. It was from an increased awareness of the huge profits generated from this criminal activity and concern at the massive drug abuse problem in western society which created the impetus for governments to act against drug trafficking by enacting legislation that would deprive drug traffickers of their illicit gains.

Therefore from the above definitions of money laundering, this study draws a position that money laundering has been in existence for decades now within the drug trafficking context mostly. Today however money laundering has become so complex a crime that it involves all forms of illegally acquired funds such as cyber crime, illegal smuggling of precious stones, piracy, tax evasion to mention but some offenses akin to money laundering. The offence can become so gruesome in certain instances in that the perpetrators of crime can even kill just to derive the proceeds of crime. This is common in armed robberies and environmental crimes

³¹ P. Burrell, Preventing Tax Evasion through money laundering legislation, *Journal of Money Laundering Control*, No. 3 Volume 1, (2000) 10

³²S. Blunden, *The Money Launderers: How they do it and how to catch them at it*, (London: Cambridge press. 2001) 21-23

³³ (1982) 551 F. Sup 314

P. Temple, *Essential Elements of Prevention of Money Laundering* (London: Securities institute, 1998) 18

such as poaching of protected game. Money laundering therefore as a crime is more complex than what may generally be envisaged by a common man.

2.4 ZAMBIAN RESPONSE TO THE PROBLEM OF MONEY LAUNDERING AND DRUG TRAFFICKING

In response to the ‘*drug boom*’³⁵ syndicate, the Zambian Government, in conjunction with the British Government tasked their law enforcement agencies to jointly investigate the source of these illegal drugs that were being trafficked to London’s Heathrow International Airport by the Airhostesses of the Zambia Airways.³⁶ The disposal of the illicit proceeds of the crime resulted into the arrest of some of these Zambia Airways employees. This took place at London’s Heathrow International airport particularly at the Penta Hotel which was being occupied by the airline employees when in London.³⁷

In view of these arrests resulting from drug trafficking, the then President of the Republic of Zambia, constituted a Commission of Inquiry which was called the ‘Justice Matthews Chaila Commission’ with the terms of reference *inter alia* to establishing the extent of the problem of drug trafficking and money laundering in Zambia.³⁸ The Chaila Report, 1985, inquired into this matter and recommended in its Report that there were a number of persons of Zambian and foreign origin who were engaging themselves in drug trafficking and money laundering including some dignitaries who were serving in government then. As a follow up to the Chaila recommendations of 1985, the then President of the Republic of Zambia appointed an *ad hoc* body to effectively and efficiently combat the money laundering and drug trafficking problems. This law enforcement agency was known as the Special Investigations Team on Economy and Trade (SITET).³⁹

In the same vein, in 1985, the President, in an attempt to eradicate the problem of drug trafficking, ordered Security Forces to mount an operation to ‘Clean Up’ Lusaka through random surveys and searches of suspected perpetrators of drug trafficking particularly at the

³⁵ Drug boom was the nick name given to the first and largest drug scandal to be discovered linking Zambians to drug trafficking

³⁶ Jane Sithole, Times of Zambia newspaper of October 28th, 1981, Drug deal burst, on page 1

³⁷ Raphael Mungole, Commissioner, Drug Enforcement Commission of Zambia, Seminary Paper presented at the Fourth Drug Enforcement Commanders and Senior Officers Conference in Siavonga on 19th February, 2001 (unpublished) on page 5

³⁸ Staff Reporter, Times of Zambia newspaper of 29th October, 1981, KK acts to stop Drug trafficking, at page 1

³⁹ Raphael Mungole, Commissioner, Drug Enforcement Commission of Zambia, Seminary Paper presented at the Fourth Drug Enforcement Commanders and Senior Officers Conference in Siavonga on 19th February, 2001 (unpublished) on page 12. SITET was an adhoc body constituted in 1981 as a special agency to combat drug trafficking and violations of the Foreign Exchange Control Act and other forms of economic subbotage.

International Airport at Lusaka and all other residential areas. This operation was commonly known as the operation 'Juju' which operation resulted into the arrest of sixty eight (68) people who were detained at Lusaka Remand Prison.⁴⁰ Among the people that were detained included high profile personalities such as those who were serving as Ministers in government.⁴¹

The achievements of the operation 'juju' coupled with the recommendations in the Justice Chaila Commission Report of 1985 gave the Zambian Government the necessary impetus to set in motion a series of measures to overcome the scourge of drug trafficking and money laundering in Zambia.⁴² On that basis, the Zambian Government took stringent measures to combat drug trafficking and money laundering.

The historical evolution of the problem of drug trafficking and money laundering is also highlighted by Phelisters Mwansa,⁴³ who is also former Assistant Commissioner of the Drug Enforcement Commission of Zambia. Mwansa, explains that the control of and regulation of the use of dangerous drugs in Zambia can be traced back to 1923 when the British colonial government enacted what was called the *Opium and Habit Forming Drugs Regulation Ordinance*. The piece of legislation was followed up by a number of other statutes and statutory instruments. The Dangerous Drugs Act of 1967 was the first piece of legislation in this area after the Zambia's independence in 1964. Mwansa in her writings contends that this law against drug trafficking and money laundering was first passed under the portfolio of the Ministry of Health. Four years later after the legislation's enactment, it became apparent that the law was inadequate in addressing the problem of drug trafficking.⁴⁴

The initiative made by the Zambian Government to appoint the Justice Matthews Chaila Commission and the subsequent constitution of the Special Investigations Team on Economy and Trade can be credited as being the preliminary milestone for legislative and Institutional reforms in the fight against drug trafficking and money laundering in Zambia. This effort is

⁴⁰ Newton Sibanda, African news on Peace, Justice and Reconciliation in Africa, Zambian Authorities crackdown on drug trafficking,(Lusaka, Printpark,1981) 9

⁴¹Phelisters Mwansa, The problem of Drug Trafficking in Zambia since 1923, Seminar Lectures for the Drug Enforcement Commission, Lusaka, 2001 (Unpublished) 3

⁴²Phelisters Mwansa, The problem of Drug Trafficking in Zambia since 1923, Seminar Lectures for the Drug Enforcement Commission, Lusaka, 2001 (Unpublished) 5

⁴³ Phelisters Mwansa, The problem of money laundering in Zambia since 1923, Seminar Lectures for the Drug Enforcement Commission, 2001 (Unpublished) 3

⁴⁴ Phelisters Mwansa, The problem of money laundering in Zambia since 1923, Seminar Lectures for the Drug Enforcement Commission, 2001 (Unpublished) 10

inspirational as being the historical cornerstone in the advances against eradication of money laundering syndicates in Zambia.

Raphael Mungole⁴⁵ also explains that the period from 1980 saw an unprecedented upsurge in drug-related cases, particularly trafficking in *methaqualone*, commonly known as *mandrax*. This saw most West African and Asian criminals swarm the Country for purposes of the illicit trade. As a result of this state of affairs coupled with the subsequent involvement of prominent Zambians in the crime, this inevitably gave rise to public outcry. The recommendations and debates among legislators followed, culminating in the appointment of the Country's most famous illicit drugs trade Inquiry called the Justice Matthews Chaila Commission of Inquiry. The subsequent arrest of 68 suspects involved in drug trafficking and money laundering through operation '*Juju*' was clear testimony of the government's determination to 'nip the scourge in its bud.' However, Zambians and foreign nationals alike continued to reap enormous profits from the illicit trade due to the absence of a specialised government office and legislation to stop the scourge.

The Chaila Report found enormous evidence of money laundering and illegal currency exchanges.⁴⁶ Some detainees paid fines under the now defunct Special Investigations Team on Economy and Trade. This was so because there was no law to deal with cases of *mandrax* and money laundering in Zambia. This inadequacy of the law, compounded by an increasing drug addiction among many young people in particular, compelled the Zambian Government to create a statutory body called the Drug Enforcement Commission to regulate the problem. The Drug Enforcement Commission (DEC) became the Institution mandated to efficiently and effectively combat money laundering and drug trafficking in Zambia and came into existence as a legal entity in 1989. This Institution as such became a specialised anti-drug trafficking wing formed to investigate all drug and drug related offences, prosecute offenders, as well as educate the public on the dangers of drug abuse.

This study has observed that since its establishment, the Drug Enforcement Commission has been made efforts to significantly address the problem of drug trafficking through drug supply and demand reduction strategies. The former strategy entails interdiction efforts, while the latter involves preventive education, counselling, and rehabilitation interventions. During

⁴⁵ Raphael Mungole, Drug Enforcement of Zambia, Seminary Paper presented at the Fourth Drug Enforcement Commanders and Senior Officers Conference held in Siavonga on 19th February, 2001 (unpublished) 8

⁴⁶ Justice Matthews Chaila Commission Report on Drug Trafficking Inquiry in Zambia (Lusaka, Longman,1985) 23-26

this study, it was learnt that Zambia, the once considered a major transit country for illegal drugs, has significantly managed to scale down the rate of drug trafficking.⁴⁷

The other analysis on the evolution of the problem of money laundering and drug trafficking in Zambia is authored by Commissioner Raphael Mungole.⁴⁸ Mungole has discussed the evolution of the problem of money laundering and drug trafficking. Mungole also explains that after noticing the increase in the trends of drug trafficking and also following the drug boom scandal coupled with the revelations of the Chaila Report of 1985, the Zambian Government created a statutory body called the Drug Enforcement Commission⁴⁹ with a specific mandate to combat drug trafficking and money laundering. The creation of the Drug Enforcement Commission in 1989 was achieved through legislation⁵⁰ that saw the repealing of the Dangerous Drugs (Amendment) Act of 1985 which led to the enactment of the Narcotic Drugs and Psychotropic substances Act.⁵¹ The Drug Enforcement Commission became operational with effect from the 1st January, 1990 through statutory Instrument No. 180 of 1989. The Narcotic Drugs and Psychotropic substances Act was enacted on 1st November, 1993 to strengthen the mandate of the Drug Enforcement Commission by repealing the Dangerous Drugs (Amendment) Act. The new Act in effect increased the penalty on conviction for drug trafficking from 15 years to 25 years imprisonment with hard labour thereby showing evidence of a strengthened mandate to the Drug Enforcement Commission. It was hoped by Government that this measure will act both as a deterrent and retributory measure against perpetrators of the drug trafficking and money laundering crimes.

The mandate of the Drug Enforcement Commission was further strengthened and streamlined by the enactment of the Prohibition and Prevention of money laundering Act⁵² and other Acts which include the Forfeiture of Proceeds of Crime Act⁵³ and the Mutual Legal Assistance in Criminal Matters Act⁵⁴. The other legislation that was enacted to strengthen the functions of the Drug Enforcement Commission was the Extradition Act⁵⁵. The strengthening of the Drug

⁴⁷ Newton Sibanda, African news on Peace, Justice and Reconciliation in Africa, Zambian Authorities crackdown on drug trafficking, (Lusaka, Printpark, 1981) 12

⁴⁸ Raphael Mungole, Drug Enforcement of Zambia, Seminary Paper presented at the Fourth Drug Enforcement Commanders and Senior Officers Conference held in Siavonga on 19th February, 2001 (unpublished) 6

⁴⁹ By Act No. 7 of 1989 and Statutory Instrument No. 87 of 1989.

⁵⁰ Statutory Instrument No. 87 of 1989

⁵¹ Chapter 96 of the Laws of Zambia

⁵² Act No. 14 of 2001

⁵³ Act No. 19 of 2010

⁵⁴ Act No. 19 of 1993

⁵⁵ Chapter 161 of the Laws of Zambia

Enforcement Commission through the enactment of the Acts mentioned above meant that the legislation created other Institutions such as the Anti Money Laundering Investigations Unit to specifically tackle the problem of money laundering and its predicate offences. These pieces of legislation also guaranteed unilateral actions by other States in the fight against money laundering while rendering assistance to freeze assets suspected to be proceeds of crime.

The strengthening of the Drug Enforcement Commission through enactment of supporting legislation such as the Forfeiture of Proceeds of crime Act⁵⁶ was demonstrated in the case of *The People v Ross Ernest Moore and Hassel Shamaline*.⁵⁷ In this case the Supreme Court of Zambia ordered the forfeiture of 121 kilograms of gold that was acquired illegally from within Zambia. The Court further ordered the sale of the gold and the revenue directed to government national treasury. The study on that basis considers that the Drug Enforcement Commission was strengthened through enactment of the forfeiture of Proceeds of Crime Act.

It is thus evident from the above actions by the Zambian Government that there was political will to combat money laundering and drug trafficking. The creation of a Permanent Agency of Government called the Drug Enforcement Commission with a specific mandate of combating money laundering and drug trafficking may be taken to further demonstrate the abundance of political will to deal with the problem.

2.5 THE CONCEPT OF MONEY LAUNDERING - A GENERAL OVERVIEW

In this part of the study, this research considers the gist of the problem of money laundering. In doing so the study explains the meaning of the offence of money laundering as envisaged by the various pieces of legislation and other writers. The study also explains the various roles played by the law enforcement agencies in Zambia. The definition of money laundering takes various forms. The difficulty of the offence of money laundering is that it does not occur independently of other offences such as drug trafficking. There has been as a result of the advanced global technology, this offence has further been complicated in detection and prosecution of offenders. The introduction of telephone banking for example entails that one could transfer funds from one account to another within a short space of time. These developments have not been corresponding with the law reforms particularly in emerging economies and least developed countries. This study has also established evidence that the

⁵⁶ Act No. 19 of 2010

⁵⁷ SCZ Judgment No.1 of 2010

legislative and institutional framework for combating money laundering in Zambia is not all encompassing owing to the challenges of interface amongst the law enforcement agencies and conflict of laws. For example, money laundering is a crime created by section 2 of the Prohibition and Prevention of Money Laundering Act⁵⁸ in and the same offence is also created for by section 22 of the Narcotic Drugs and Psychotropic Substances Act.⁵⁹ By implication this means that an accused person in money laundering can either be arrested by the Anti Money Laundering Investigations Unit and or the Drug Enforcement Commission. It is this challenge in institutional and legislative framework that results in the challenge discussed above. Additionally, the two pieces of legislation create different sanctions against money laundering resulting in a total legal contradiction. This is not the only interface challenge in the legislative framework against money laundering. The role of the Zambia Police Service and the Anti Corruption Commission of Zambia in cases of offences predicate to money laundering such as abuse of office, fraud, uttering and forgery and similar such offences override each other thereby resulting in the legislative and Institutional framework against money laundering not being comprehensive.

In order to appreciate the problem of money laundering, it suffices to begin by defining what constitutes money laundering. Money laundering has been defined differently in many aspects both at national and international levels. In Zambia, money laundering is described by Section 2 of the Prohibition and Prevention of Money Laundering Act⁶⁰ which defines money laundering as an activity which involves the following attributes:

- a) Engaging directly or indirectly, in a business transaction that involves property acquired with proceeds of crime;
- b) Receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realised directly or indirectly from illegal activity; or
- c) The retention or acquisition of property knowing that the property is derived or realised, directly or indirectly from illegal activity.

The Prohibition and Prevention of Money Laundering Act defines what is meant by 'Proceeds of Crime and Illegal activities.' Section 2 of the Prohibition and Prevention of Money Laundering Act, thus defines 'Proceeds of Crime' to mean any property, benefit or

⁵⁸ Act No.14 of 2001

⁵⁹ Chapter 96 of the Laws of Zambia

⁶⁰ Act No.14 of 2001

advantage, within or outside Zambia realised or derived, directly or indirectly from illegal activity. While ‘illegal activity’ means “any activity whenever or wherever carried out which under written law in the Republic of Zambia amounts to a crime”.

This research observes that the definition of money laundering as espoused by the Prohibition and Prevention of Money Laundering Act is very progressive owing to the wide and all encompassing position. This definition has taken note of all forms by which money may be laundered. It is the considered view of this study that all possible loopholes are fully taken care by the definition.

On the other hand, Section 22 of the Narcotic Drugs and Psychotropic Substances Act⁶¹ creates an offence of money laundering when it declares that:

Any person who does any act or omits to do any act with an actual or constructive intention to conceal the fact that the whole or part of any property was directly or indirectly acquired as a result of a crime committed under the Act or an act which, if it had happened in Zambia, would have constituted a crime under this Act shall be guilty of an offence and shall be liable upon conviction to imprisonment for a period not exceeding ten (10) years.

Generally, money laundering may be defined as a process of disguising illicit proceeds of ill-gotten funds mostly through the use of financial institutions to legitimise the ill-gotten funds. It is for this reason that financial institutions being targets of money laundering activities must work out mechanisms to prevent and combat money laundering in whatever form it manifests itself. Put differently, money laundering may be defined as all acts or omissions in the process to conceal or disguise the true nature, source, origin of the money with an intention of misleading members of the general public to believing that the proceeds of crime were genuinely acquired when in fact not.

In another perspective, the Bank of Zambia, Anti Money laundering Directives, 2004 has defined money laundering as the process of making illegally gained proceeds that is, (“dirty”) money appear (“clean”) or legal.

J. Fisher,⁶² describes money laundering in the following words:

⁶¹ Chapter 96 of the Laws of Zambia

⁶² J. Fisher, Money Laundering Law and Practice, (Oxford: Oxford University Press, 2001) 42-43

Money laundering is called what it is because that perfectly described what takes place, that is to say illegal or 'dirty' money is put through the circle of transactions, or washed so that it comes out at the other end as legal, or 'clean' money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate income.

This study has established that the crime of money laundering as a criminal offence does not exist on its own, but is associated to other crimes such as drug trafficking, fraud and cyber crime. Money laundering is also akin to other twin offences such as armed robberies, piracy and illicit trade in precious stones like emeralds and diamonds. It is usually committed side by side with some other offences commonly known in this field of study as predicate offences. The other most common offences predicate to money laundering also include illicit disposal of proceeds of drug trafficking, tax evasion, illegal trade in fire arms, ivory and the illicit trade in products of endangered species simply called environmental crimes. The other offences predicate to money laundering includes embezzlement of public funds and counterfeiting.

However, it is vital at this point to discuss the basic elements that constitute the crime of money laundering. It is these basic elements that the prosecution must prove in a case of money laundering if they are to succeed in prosecuting perpetrators of this crime.

2.6 THE BASIC OFFENCES OF MONEY LAUNDERING IN ZAMBIA

From the definition of money laundering in Zambia, it would appear that there are five (5) basic offences that may be committed under the Prohibition and Prevention of Money Laundering Act,⁶³ namely:

i) Assisting another to retain the benefit of a crime

Assistance occurs where a person is involved in an arrangement with another person, and he/she knows or suspects that the other person is, or has been involved in, or has benefitted from drug trafficking or criminal conduct and that arrangement helps the other person to retain or control the proceeds directly or indirectly or enables the other person to use the proceeds or to invest them for his benefit.

⁶³Section 2 of the Act No. 14 of 2001

It is a requirement of the law that a person who suspects that the other person is involved in money laundering reports such other person to the Anti Money Laundering Investigations Unit for further action. If such person fails and is arrested, prosecuted and convicted he or she shall be liable to a fine not exceeding one hundred and thirty-nine thousand penalty units or to imprisonment for a term not exceeding five years, or to both.⁶⁴

ii) Acquiring, possession and use of criminal proceeds

The offence of acquisition is an offence that arises from the use or possession of property which the accused person knows or has reasonable grounds to suspect that such proceeds are proceeds of drug trafficking or criminal conduct and have acquired such property at less than the full value of the property.⁶⁵

The purpose of this offence is to prevent criminal proceeds from being passed on by criminals to be used and enjoyed by third parties. Here the reference is to “property”, rather than “funds” or “investment” and that property include money. The penalty for commission of an offence under this section is the same as for assisting another to retain the benefit of the crime.

iii) Concealing or transforming Proceeds to avoid Prosecution or a Confiscation Order

In this offence, removing or transferring of proceeds of crime directly or indirectly which may be as a result of drug trafficking or criminal conduct for the purpose of avoiding or helping someone else to avoid prosecution constitutes an offence. The offence is committed by a person who assists in the offence if he knows or has reasonable grounds to suspect the nature and source of the property as one derived from illicit activity.⁶⁶

The contexts by which the words concealing or disguising of any property are used include the act of concealing or disguising that property’s source, nature, location, disposition, movement and ownership. This offence attracts similar penalty as aiding, counselling or abetting discussed above.⁶⁷

⁶⁴Section 9 of the Act No. 14 of 2001

⁶⁵ Section 2 of the Act No. 14 of 2001

⁶⁶ Section 8 of Act No. 14 of 2001

⁶⁷Section 9 of Act No. 14 of 2001

iv) **Failure to disclose knowledge or suspicion of money laundering**

This offence only relates to drug trafficking and does not apply to proceeds of crime in general. A person is guilty of this offence if he learns in the course of employment, trade or profession that a particular person is engaged in drug trafficking, but fails to report the crime to law enforcement agencies.⁶⁸

v) **Tipping Off**

Section 11 of the Prohibition and Prevention of Money Laundering Act, 2001 creates an offence against any person who engages in divulging information to unauthorised persons. The aim of constituting this offence is to guarantee the integrity of an investigation and it is committed when information or any other matter occurs which have the potential to prejudice the investigations. This offence generally arises when the person in the investigations team discloses to the suspect who is the subject matter of an investigation or by anyone who knows the suspect who has prior knowledge that an investigation into money laundering has begun or is about to begin or that the Anti Money Laundering Investigations Unit has been informed about the suspicious transaction activities or a disclosure has been made to another employee under internal reporting procedures.

The law prescribes a penalty to any person who without lawful authority divulges information to an unauthorised person. The offence attracts a fine not exceeding one hundred and thirty-nine thousand penalty units or to imprisonment for a term not exceeding five years or both.⁶⁹

2.7 THE ESSENTIAL ELEMENTS OF THE CRIME OF MONEY LAUNDERING

In order to successfully prosecute the crime of money laundering, it is important on the part of the prosecution to prove the elements of the crime as have been set out in the definitions of money laundering above.

The study observes that the element of *mens rea* of an accused person in the offence of money laundering include both the “intention” to disguise or conceal the illicit funds and the knowledge on the part of the launderer whether such knowledge is actual or implied that such

⁶⁸ Section 11 of Act No. 14 of 2001

⁶⁹ Section 11 of Act No. 14 of 2001

funds are ill gotten. On the other hand, the study considers that the element of *actus reus* in the offence of money laundering is satisfied by the actual act of concealing, disguising or transforming illicitly acquired funds or an act of introducing such funds into the legitimate financial sector. In addition, the usage, acquisition and possession of illegally acquired funds or property constitutes sufficient *actus reus*. Actus reus is also satisfied by the act of disguising the true source, origin, nature, use and ownership of such funds or property.

This research established that the crime of money laundering involves the act of receiving, possession, concealing, disguising, disposing of or bringing into Zambia, any property derived directly or indirectly from an illegal activity. The evidence gathered during the study shows that the offence of money laundering includes the retention of proceeds of crime and the use of such proceeds knowing that the same has been derived from criminal activities. This definition in itself creates five different offences under the Act which can be prosecuted in respect to money laundering outlined above.

2.8 THE PROCESS BY WHICH MONEY IS LAUNDERED GENERALLY

According to Kenneth Kaoma Mwenda⁷⁰ money is generally laundered in three stages as follows:

2.8.1 Placement: This is the first stage in the money laundering process which involves the introduction of proceeds of crime into the economy with a view of disassociating such proceeds with the crime. This stage involves the actual disposal of the ill-gotten cash into the legitimate financial system as though such proceeds have been genuinely acquired. This may involve the act of depositing the ill-gotten funds or currency exchange structuring of large deposits by security broker, conversion into cheques, gold and bearer securities as a way of disassociating the funds from the crime.

2.8.2 Layering: At this stage, the intention of the offender is to disguise or conceal the ownership of the funds. This may be achieved by creating complex layers of the transaction in order to obscure the audit trail. The aim of the offender at this

⁷⁰ Kenneth Kaoma Mwenda, *Anti Money Laundering Law and Practice: Lessons from Zambia*, (Lusaka: UNZApress, 2005) 8

stage is also to ensure that detection of the ill-gotten funds is made difficult. The launderer may at this stage perform acts that are intended to distance the money from its criminal source and this may, for example, involve movement of money from different accounts. The offender may involve electronic bank transfer to different countries where other bank accounts are being maintained such as offshore countries or tax haven countries.

2.8.3 Integration: This is the last stage in the process of money laundering and involves the laundering process being drawn towards the utilisation of laundered funds as if such funds are legitimately earned when in fact not. In this process, the offender creates in the minds of society that the wealth in issue is legitimately earned. The process may involve establishing shell banks and anonymous companies, purchase of heavy vehicles and luxurious houses.

While this is the common process in which money is laundered technically, it must be understood that this is not the only process that money laundering takes. Mwenda,⁷¹ contends that the three stage interpretation of money laundering is superficial and has its roots in a time when money laundering was a crime that was often committed only in relation to proceeds of drug trafficking. By virtue of the fact that all drugs were sold on the streets for cash, this generated large volumes of cash. It is this cash mountain which gave rise to the above stated analysis. This view, though helpful, does not explain it all. The perpetration of money laundering in modern times is much more complicated than the three stage framework above.

The associated offences to money laundering such as financial frauds and cyber crime do show that money laundering does not always involve depositing large sums of money into the financial system for purpose of placement. Money laundering can and does occur within the funds which are already in the financial systems itself. This confirms that the process of money laundering is more complex than envisaged by the technical stages of money laundering discussed above.

The three stages of money laundering outlined above are relevant as they describe the process by which money is laundered usually through the financial system.⁷² While the three stage assumption remains the most prominent way in which money is laundered, it is a narrow

⁷¹Kenneth Mwenda, *Anti Money Laundering Law and Practice: Lessons from Zambia*, (Lusaka: UNZApress, 2005) 13

spectrum of how this crime is committed as offenders have advanced to launder funds even without the necessity of having to place the money through a financial system so as to achieve the three tier system advanced above. This assumption of the three tier system is merely a general position by which money is laundered. With the evolution of technology, offender have also in an attempt to conceal or distance the illegally acquired funds have changed the tactics and are still able to launder funds without the need to use a financial institution. These methods are discussed later in this Chapter.

2.9 THE STANDARD AND BURDEN OF PROOF IN MONEY LAUNDERING CASES

The practice of the law of money laundering and the criminalisation of this vice require certain standards of proof. The study now turns to this aspect and doing so, in the context of the enforcement of the Forfeiture of Proceeds of Crime Act⁷³.

It is trite law in many common law jurisdictions that the burden of proof in criminal law cases, including offences of money laundering, lies on the prosecution. This principle was set out in the celebrated case of *Woolmington v Director of Public Prosecutions*⁷⁴ where the court in referring to who bears the legal burden of proof in criminal matters and stated that the burden of proof except to fewer cases which are of extreme nature lies on the prosecution. It was in the course of the case that the House of Lords established a now popular phrase that “he who alleges must prove” as a principle of criminal law practice. The rare circumstances where the legal burden shifts to the accused person is where such accused person raises the defence of disease of mind, permanent or otherwise as was stated in the case of *R v M’Naughten*.⁷⁵

In Zambia, like many common law jurisdictions, the burden of proof in criminal matters lies on the prosecution to prove beyond all reasonable doubt that the accused person is guilty of the offence as charged. This principle has however posed a serious legal challenge in cases of money laundering, particularly in relation to the Forfeiture of Proceeds of Crime Act. The High Court for Zambia judgment in the case of *Austin Chisangu Liato v The People*⁷⁶ is

⁷³ Act No. 19 of 2010

⁷⁴ (1935) Appeal Cases 462

⁷⁵ (1843) N.S 847

⁷⁶ HPA/ 40/ 2012

illustrative of the above point. This judgment by the High Court for Zambia that sat as a Divisional court expressed the challenge with regard to the burden and standard of proof in money laundering cases. This in return demonstrates the efficacy of the Forfeiture of Proceeds of Crime Act and has demonstrated most clearly that the burden of proof in criminal matters lies upon the prosecution. In order to underscore the point with regard to the High Court judgment in the Austin Liato case, it is important that the facts of this case be restated.

At the High Court stage, Austin Chisangu Liato (hereinafter called 'the appellant'), was a former Minister of Labour in the Government of the Republic of Zambia. He was arraigned, tried and convicted by the Subordinate Court of the first class on one count of possession of property suspected of being proceeds of crime contrary to Section 71(1) of the Proceeds of Crime Act No. 19 of 2010. The particulars of offence alleged that the appellant, on the 24th November, 2011, at Lusaka, in the Lusaka District, of the Lusaka Province of the Republic of Zambia, did possess and conceal money at his farm no. L/Mpamba /44 Mwembeshi the sum of K2, 100,100,000.00. The said proceeds were reasonably suspected to be proceeds of crime.

The prosecution's evidence was that the money in issue was reasonably suspected to be proceeds of crime as envisaged by section 71(1) of the Forfeiture of Proceeds of Crime Act. Accordingly, the prosecution led evidence in the Subordinate Court at Lusaka whereof they contended that the money in issue was stored in circumstances that raised reasonable suspicion that the same could be reasonably suspected to be proceeds of crime contrary to section 71(2) of the Forfeiture of Proceeds of Crime Act. The evidence led by the prosecution however did not point as to which illegal source the money could have been derived. After trial in the Subordinate Court, the appellant was convicted as charged and consequently sentenced to 2 years imprisonment with hard labour on the basis that the accused person, had failed to discharge the onus placed upon him by subsection 2 of Section 71 of the Forfeiture of Proceeds of Crime Act which required the appellant to satisfy the Court that he had not derived or realised the said property from unlawful activity. The Subordinate Court also found that subsection 3 of Section 71 of the Act did not require the prosecution to prove a predicate offence to establish a *prima facie* case of the crime and for the burden of proof to shift to the accused person. The Subordinate Court found the appellant guilty and sentenced him accordingly to 24 months imprisonment with hard labour and had both the proceeds of the crime to the value of K 2,100,100,000.00 and his Mwembeshi Farm forfeited to the State.

The convict, being dissatisfied with both the conviction and sentence, lodged an appeal to the High Court against the findings of the lower court. This case has thus set a landmark test to examine the efficacy of the Forfeiture of Proceeds of Crime Act in combating money laundering. The appeal before the High Court in this matter brought to test who the question as to who bears the burden of proof and what is the standard of proof in money laundering cases. The gist of this matter bordered on when property may reasonably be suspected to be proceeds of crime and who bears the burden of proof thereof.

It was argued by the learned Counsel for the appellant that the appellant had the right to keep the money in issue in the manner that he did considering that there is currently no law in Zambia prohibiting possession of money and keeping such proceeds in one's home to whatever value. It was further contended by learned Counsel for the appellant worked for the Government of the Republic of Zambia in various senior portfolios and that he legitimately earned the funds as there was no evidence on record suggesting the accused had engaged in criminal activities which would raise reasonable suspicion that such money may have been earned through illicit activities.

The Prosecution, on the other hand, contended that being found in possession of large sums of money concealed in a highly secured and fortified place raised reasonable suspicion which satisfies the law as envisaged by the legislature in section 71(1) of the Forfeiture of Proceeds of Crime Act⁷⁷ and that it is incumbent upon the accused person to prove that such proceeds were genuinely earned. The learned Counsel for the appellant however vehemently argued that it is the duty of the prosecution was to prove that such proceeds are proceeds of crime by linking the proceeds or property to criminal activity and that if the prosecution fails to discharge this burden, the appellant deserved to be acquitted. In other words Counsel for the appellant suggested that to the guilty verdict against the appellant could only be pronounced if evidence of a predicate offence was established linking the proceeds of crime to the illicit acquisition of the funds.

These arguments by the learned Counsel for the appellant in the High Court for Zambia culminated in the acquittal of the appellant for the offence of being in possession of property suspected of being proceeds of crime. The High Court held a position that the burden of proof in all criminal matters including money laundering cases lie upon the prosecution to prove

⁷⁷ Act No, 19 of 2010

that the said proceeds were reasonably suspected to be proceeds of crime by linking the proceeds to illegal activities to justify the suspicion. The position adopted by the High Court in acquitting the appellant was that of ordinary criminal law which one wonders whether that is also the appropriate position of money laundering cases.

Discomposured by the High Court judgment, the Director of Public Prosecutions on behalf of the people took up the cudgels and sought to assail that judgment by appealing to the Supreme Court for Zambia. The Director of Public Prosecutions raised four grounds of appeal as follows:

1. "The High Court erred in law when it held that to prove reasonable suspicion under section 71(1) of the Forfeiture of Proceeds of Crime Act, the prosecution had to show the link between the source of the money or the accused to possible criminal conduct.
2. The Court erred in law when it held that under section 71(2) the prosecution needed to prove that the accused had knowledge that the source of the money was as a result of criminal conduct.
3. The Court erred in law when it held that the prosecution's burden of proof under section 71(1) was not discharged as the prosecution failed to adduce evidence upon which an inference could be drawn that money could reasonably be suspected to be proceeds of crime.
4. The court erred in law when it construed section 71 of the Forfeiture of Proceeds of Crime Act in a manner that would render it impossible to give effect to the intention of the legislature taking into account the preamble to the said Act."

The grounds of appeal in Supreme Court like in the High Court raised significant points of law on the construction of section 71 of the Forfeiture of Proceeds of Crime Act. This no doubt brought the efficacy of this important legislation in money laundering cases to test. The appeal to the Supreme Court raises a point of paramount importance in that it poses for consideration the broad question whether section 71 of the Forfeiture of Proceeds of Crime, does prescribe a different standard of proof from the general criminal law standard, and whether the onus of proof and the evidentiary burden of proof ought to be understood differently under that section, from the general criminal law position.

The Supreme Court in its judgment held that reasonable suspicion as used in section 71(1) of the forfeiture of Proceeds of Crime Act is mere conjecture or surmise, shy of

actual proof that a state of affair exists. It is enough that such suspicion be based on articulable facts. The onus that lies before the prosecution is merely that of proving that they are in possession of reasonable suspicion. What remains thereafter is the role of the accused to disprove the allegation by the prosecution.

The High Court judgment was founded on the general criminal law position which the Supreme Court agrees with that the prosecution need to prove the case beyond all reasonable doubt. The High Court held a view that section 71 (2) of the Forfeiture of Proceeds of Crime Act suggest some reversal of the general position of who bears the burden of proof in criminal matters.

The Supreme Court in reversing the High Court judgment stated agreed with the position taken by the subordinate court of the first class that pronounced the verdict of guilty. The Supreme Court held a view that section 71(1) does not impose any duty on the prosecution to prove any predicate offence. The court was of the view that mere suspicion that the property is reasonably suspected to be proceeds of crime is enough to shift the burden to the accused person to justify the legality of such property to avert the suspicion.

This study therefore agrees with the position of the Supreme Court on the case of Austin Liato. Imposition a legal burden on the Prosecution to link proceeds of crime to a predicate offence would amount to declaring the provision f section 71 of the Forfeiture of Crimes Act redundant. Legally speaking, the standard of proof placed on the prosecution to prove their case beyond reasonable double is hard to attain because it is not an easy matter to prove by the prosecution. This is so because it requires the prosecution to find evidence of where such proceeds were illicitly acquired from by the accused person. This being an impossible burden to discharge, it is submitted that in money laundering cases, the burden of proof must lie on the accused person to prove that such earnings were legitimately acquired as opposed to the law as it stands now. It is only the accused who can explain the sources of his or her wealth once reasonable suspicion about the sources has been raised by law enforcement officers.

The system of shifting the burden of proof in money laundering cases from the prosecution to the accused person has worked well in Papua New Guinea. The Government there enacted

the Inter-Group Fighting Act in 1977 which legislation shifts the burden of proof from the prosecution to the accused person in money laundering cases. In Section 10(3), this Act states as follows:

‘A person charged of the offence of money laundering or its associated crimes is guilty of that offence unless he proves to the satisfaction of the Court, that he did not take part in the actual offence’.

On the other hand, the Constitution of Papua New Guinea in Article 37(4) provides for a presumption of innocence in the following words:

A person charged with an offence;

- a) Shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge.

It is therefore further submitted that such a provision can be imported into the Zambian laws as a strong measure and deterrent against money laundering. The second proposal for law reform is the need to enhance the fight against money laundering would be to lower the stand of proof in money laundering cases. It is being submitted that the standard of proof in money laundering cases be reduced from proof beyond all reasonable doubts to a level of civil law standard of proof which is based on the balance of probabilities.

Such a measure would remove the onerous and strenuous task on the prosecution, to prove beyond all reasonable doubt that the accused indeed committed the offence as alleged, especially given that the law enforcement and criminal investigation officers in Zambia are understaffed and have limited resources at their disposal. There is thus urgent need for the law on money laundering to be amended to take into consideration these submissions as the failure to amend the law will continue to create a flaw in the prevention and combating of money laundering. The case of Austin Liato, has demonstrated, from the findings by the High Court, that remedial action is necessary on the law on money laundering in Zambia.⁷⁸ As the law stands, no one is under compulsion to take his or her earnings to the Bank. The study shows that people are at liberty to keep their money in the manner they consider safe and beneficial. The study also ascertained that keeping money in one’s house does not necessary,

⁷⁸ The High Court decision acquitting Austin Chisangu Liato was appealed to the Supreme Court of Zambia which has since reversed the acquittal and upheld the conviction and sentence as imposed by the Subordinate Court. At the time of this decision by the Supreme Court, this study had already been concluded. The study therefore could not delve into the Supreme Court judgment upholding the conviction and sentence respectively.

on its own, bring about a reasonable suspicion later alone prove that the earnings were illegally acquired.

The need to amend the law is aimed at providing for a deterrent measure against persons engaged in illicit activities whose proceeds they are unable to account for. The shifting of the burden of proof in money laundering cases from the prosecution to the accused person will go a long way in the prevention and combating of money laundering. It is obvious that such an amendment may attract criticism from human rights and constitutional law specialists who may feel that the amendment takes away the presumption of innocence, but, such amendment would fall in the realm of the definition of money laundering as set out by the United Nations Vienna Convention Against Illicit Traffic in Drugs and Psychotropic Substances, 1988. It is suggested that the Constitution should contain a derogation on the presumption of innocence of accused persons by granting exceptions to this rule for the benefit of combating money laundering and its associated offences as was attempted in Papua New Guinea.

Apart from criminal liability, the Anti Money Laundering law also deals with civil liabilities. The civil aspect of money laundering involves the seizure and forfeiture of proceeds of crime to the state and is regulated by the Forfeiture of Proceeds of Crime Act which law has already been discussed. It must be understood that it is common law practice that restitution be applied whenever there has been a successful prosecution of a money laundering case.

This restitution doctrine merely entails the recovery of the proceeds of crime through civil procedure and may include seizure of vessel used in perpetrating the crime of money laundering such as drug trafficking and tax evasion⁷⁹.

2.10 SOME OF THE TECHNIQUES USED AS VEHICLES FOR MONEY LAUNDERING

Chitengi⁸⁰ has explained the techniques that are used to launder funds from suspecting individuals and financial institutions. Chitengi refers to placement, layering and integration as the common ways by which funds are laundered. To do this, and in order to disguise the true

⁷⁹ Justin Sipho Chitengi, 2011, Combating Money Laundering and Terrorism Financing, LL.M Thesis, University of Cape Town

⁸⁰ Justin Sipho Chitengi, 2011, Combating Money Laundering and Terrorism Financing, LL.M Thesis, University of Cape Town

source of the illicit funds, money launderers use complex typologies or mechanics of money laundering which include:

- 1) **Retail Business:** These businesses may be used as mere fronts where most of the sales disclosed are fictitious. Owners of such fronts may convert their illegally obtained income into legitimate income by showing sales through the retail business and paying the requisite taxes as applicable. The same technique as is applicable to retail sale, also applies *mutatis mutandis* to wholesale businesses.⁸¹
- 2) **Charity Shows:** Money laundering is also perpetrated by way of organising charity and entertainment shows which constitutes an effective method of laundering illicitly acquired funds. The key in laundering money using this mode lies in the fraudulent sale of tickets. The extent to which fraudulent tickets can be sold is similar to the extent to which money can be laundered.
- 3) **Lottery Tickets:** A lottery may be viewed as a type of gambling game in which people buy numbered tickets. Several numbers are then chosen, and the people who have those numbers on their tickets win a prize. In a lottery, winning happens and depends entirely on luck or chance.

The lottery constitutes big business in several countries. Launderers acquire lottery tickets from genuine winners by paying them the lottery prize with their illegitimately acquired proceeds. The encashment of these tickets leads to the legitimization of their illicitly acquired proceeds. A similar technique of legitimising illegal proceeds is given effect by purchasing winning tickets of race courses.

- 4) **Casinos:** A casino is a building or room where people play gambling games such as roulette. Money laundering is given effect in casinos by way of the launderer taking their proceeds to the casino and buying large numbers of casino chips with which they did little or practically no gambling. At the end of the

⁸¹ Kenneth Kaoma Mwenda, *Anti Money Laundering Law and Practice: Lessons from Zambia*, (Lusaka: UNZApress, 2005) 24

day, the launderer conveniently cashes the casino chips passing them off as genuine winnings.

- 5) **Property:** The purchase of property at random prices constitute an effective way of laundering money. The purchase of low value property at highly inflated prices is one such technique. The level to which the price is inflated is the extent to which money is laundered.
- 6) **Securities Market:** The capitalisation of the markets is one of the primary ways to mobilise funds for economic growth. The markets so capitalised are also known as the stock exchanges. The stock market characteristics and features are that as long as the prices of shares moves up or down, the participants in this market make or lose money. In the security market, the profits can easily be reconditioned on paper while laundering the illegal proceeds. This is usually the case when launderers want to attract unsuspecting members of the public to subscribe to their prospectus on a securities or stock exchange to believe the organisation is genuine and doing fine when infact not.
- 7) **Insurance Sector:** Insurance Companies offer life insurance policies or other forms of general insurance, including health and property insurance. Laundering of money is given effect by investing in very expensive insurance policies and after paying few premiums, applying for premature encashment of policies at a discounted rate. This also occurs through falsified claims and deliberate damage to the insured property in order to benefit from the insured sum. The payment of the premature policies received by the insurer is passed on as legitimate money.

2.11 THE RATIONALE OF COMBATING MONEY LAUNDERING

It is now public policy both at national and at international levels for State parties to combat money laundering in order to achieve economic development. Kenneth Mwenda⁸² contends that money laundering as a policy objective must be combated by States in that it tends to undermine legitimate private sector initiatives by extending finance and credit to front companies that are used by launderers, thereby making it difficult for other companies to

⁸² Justin Sipho Chitengi , 2011, Combating Money Laundering and Terrorism Financing, LL.M Thesis, University of Cape Town

compete with those front companies on a fair and level playing field. In addition, money laundering may lead to a government's loss of control over economic policy as proceeds of crime in the economy have a tendency of continuing to dwarf the government's national budget.

Above all, money laundering affects currencies and interest rates since launderers tend to reinvest their funds where their schemes are less likely to be detected by law enforcement agencies. Notably also, money laundering leads to economic distortion and instability since launderers are often not interested in profit generation from their proceeds, but rather concealing their identity and protecting the proceeds of crime.

Furthermore, money laundering can lead to loss of government revenue particularly where tax evasion is rampant in the country. This may lead to risks in privatisation of genuine companies since money launderers often have financial power to out-bid legitimate investors as was seen in the investment in Meridian BIAO Bank in Zambia which was a shell bank used as a vehicle to launder funds.⁸³ The Meridian BIAO Bank was incorporated in Zambia in 1995 under the Companies Act⁸⁴ and grew from height to height and by 1997, the bank had become one of the most reputable banks to be associated with in Zambia before it went into voluntary liquidation owing depositors in excess of over K3 billion. It was unknown to the authorities that this Bank was incorporated as a shell bank with no physical presence anywhere in the world. The Bank made super profits from many reputable Companies and individuals and externalised the proceeds of their investment before suddenly winding up business in Zambia. This left several Companies and individual depositors stranded forcing some Companies to close as their working capital was externalised by shareholders of Meridian BIAO Bank to safe havens.

2.12 SUMMARY

The Chapter has explained that the problem of money laundering needs to be aggressively combated owing to the adverse effect that it causes particularly that it exposes the recipient country to reputation risk resulting in the erosion of investor confidence in that country's financial market. Furthermore research has shown that money laundering can also lead to a legal risk to banks in cases where the banks are subjected to all sorts of suits resulting from

⁸³ Kenneth Kaoma Mwenda, *Banking and Micro- Finance Regulation* (Lusaka : Unzapress, 1997) 14-15

⁸⁴Chapter 388 of the Laws of Zambia

the bank's failure to observe the Know Your Customer standards or failure to practice 'due diligence' in customer evaluation and acceptance.

Money laundering has the potential of compromising corporate governance structure of banks, especially in the case of small banks. This is more particularly with regard to their approach to deposit mobilisation and customer selection. Other than that, the study has shown that money laundering has capacity to provide fuel for terrorists activities while draining its 'milk' which can come from such predicate offences as drug trafficking, poaching of endangered animals, tax evasion, illegal arms dealing, illegal dealing in precious stones, corrupt practices by public officials, ghost worker pay- roll, armed robberies, fraud and piracy at sea.

All these considerations of the effects and consequences of money laundering explain why countries should do all that is in their power to fight money laundering locally and internationally.

In Chapter Three, the paper discusses the Institutional and Legislative framework for combating money laundering in Zambia, with particularly focus on the role of the Financial Intelligence Centre and the Anti- Money Laundering Investigations Unit among such other Institutions.

CHAPTER THREE: THE INSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR COMBATING MONEY LAUNDERING IN ZAMBIA

3.1 INTRODUCTION

This Chapter examines Zambia's Institutional and Legislative framework for combating money laundering thereby examining the efficacy of the law in the prevention and detection of money laundering in Zambia. In order to streamline this discussion, this chapter will specifically delve into the operations of the Anti Money Laundering Investigations Unit and the Anti Money Laundering Authority. These are the Institutions mandated to enforce the Prohibition and Prevention of Money Laundering Act, 2001, a piece of legislation which is one of the cornerstones regulating money laundering in Zambia. This chapter will further discuss the role of the Financial Intelligence Centre in combating money laundering. This authority is mandated to enforce the Financial Intelligence Centre Act.⁸⁵ In discussing the Financial Intelligence Centre, the paper will begin by considering the brief history of this Institution and thereafter assess the effectiveness of this institution in the framework against money laundering in Zambia. Furthermore, the chapter will examine the role of the Drug Enforcement Commission (DEC) in the fight against money laundering and associated offences under the Narcotic Drugs and Psychotropic Substances Act.⁸⁶ Also considered will be the role of the Auditor General of the Republic of Zambia in combating financial crimes related to money laundering and ensuring fiscal discipline in the Public Service through the enforcement of the Public Audit Act⁸⁷ and the Public Finance Act⁸⁸ respectively. Finally, this chapter will expound the role of the Anti Corruption Commission in the fight against corruption. This is on the basis that corruption is an offence associated with or predicate to money laundering. Corruption is generally considered to be a twin offence with money laundering and this paper will specifically make reference to the enforcement of the Anti-Corruption Commission Act.⁸⁹

⁸⁵ Act No. 46 of 2010

⁸⁶ Chapter 96 of the Laws of Zambia

⁸⁷ Chapter 378 of the Laws of Zambia

⁸⁸ Act No. 15 of 2004

⁸⁹ Act No. 3 of 2012

3.2 THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT, 2001

Prior to the enactment of the Prohibition and Prevention of Money Laundering Act, the Narcotic Drugs and Psychotropic Substances Act of 1993 was the only Act that dealt with the criminalization of money laundering in Zambia. In particular section 22 of this latter Act made it an offence for any person to engage in money laundering activities.

It suffices to state that the said section of the Narcotic Drugs and Psychotropic Substances Act was too narrow in scope as it defined money laundering in relation to the offence of drug trafficking. This perspective is not a true reflection of the offence of money laundering as this crime extends beyond drug trafficking inclination. In an effort to effectively combat money laundering, it became necessary to enact the Prohibition and Prevention of Money Laundering Act, 2001, to address money laundering from the broader perspective. The enactment of the Prohibition and Prevention of Money Laundering Act, 2001, brought with it the Anti Money Laundering Investigations Unit⁹⁰ and the Anti Money Laundering Authority.⁹¹ The latter took over the mandate of enforcing money laundering laws from the Drug Enforcement Commission. Section 31 of the Prohibition and Prevention of Money Laundering Act reinforces section 22 of the Narcotic Drugs and Psychotropic substances Act, 1993 which still creates the offence of money laundering. The two sections referred to above in the two Acts reinforce each other in the fight against Money Laundering. It allows that the two Institutions to exercise power against perpetrators of money laundering.

Besides that, the enactment of the Prohibition and Prevention of Money Laundering Act, 2001, was further reinforced by the passing of the Bank of Zambia, Anti- money laundering Directives, 2004 to provide for the criminalization of money laundering. The Directives of the Bank of Zambia set out guidelines to be adhered to by financial institutions for purposes of prevention and detection of money laundering activities. The Directives of the Bank of Zambia which are further discussed in Chapter four also set out procedures to be adhered to by financial institutions in reporting suspicious transactions to the Anti Money Laundering Investigations Unit. The Prohibition and Prevention of Money Laundering Act, 2001

⁹⁰Section 5

⁹¹Section 3

provides a framework for combating money laundering in Zambia.⁹² This Act also makes provision for the legislative framework against money laundering and the constitution of the Anti-Money Laundering Authority and the Anti Money Laundering Investigations Unit.⁹³ The Act also makes provision for the disclosure of information to supervisory authorities by regulated Institutions on suspicious transactions of money laundering activities, the forfeiture of property from persons convicted of money laundering activities, international co-operation in investigations, prosecution and legal process of prohibition and prevention of money laundering, and any matters connected with or incidental to the foregoing.⁹⁴

The Prohibition and Prevention of Money Laundering Act, 2001 makes provision that property can be restricted, seized or forfeited on suspicion of money laundering which property may include “money and all other property, real or personal, movable or immovable property, including choses in action and other tangible or incorporeal property wherever situated and includes any interest in such property.”⁹⁵ For purposes of this chapter, I will restrict my discussion to the two institutions mandated to regulate money laundering under this Act, which are the Anti Money Laundering Investigations Unit (AMLIU) and the Anti Money Laundering Authority.

3.2.1 THE ANTI MONEY LAUNDERING INVESTIGATIONS UNIT (AMLIU)

The Anti Money Laundering Investigations Unit (hereinafter referred to as the Unit) is headed by the Commissioner who is also the Commissioner of the Drug Enforcement Commission. The Unit comprises the Commissioner and such other officers as may be appointed by the Commissioner.⁹⁶ However, the Drug Enforcement Commission is itself a department in the Ministry of Home Affairs⁹⁷ by virtue of the Narcotic Drugs and Psychotropic Substances Act, 1993 which repealed the Dangerous Drugs (Forfeiture of Property) Act, 1989. Section 4 of the Narcotic Drugs and Psychotropic Substances Act, 1993 provides as follows:

⁹² Long title of the Act

⁹³ Long title of the Act

⁹⁴ Long title of the Act

⁹⁵ Section 2

⁹⁶ Section 15

⁹⁷ Section 4

- (i) The Drug Enforcement Commission established under the Dangerous Drugs (Forfeiture of property) (Special Organisations) (Drug Enforcement Commission) Regulations, 1989, is hereby continued as if established under the Act.
- (ii) The Commission shall be a department in the Ministry responsible for Home Affairs and shall be under the control and supervision of the Minister responsible for Home Affairs.

It is therefore implied from the provisions above that the Anti Money Laundering Investigations Unit is also under the Ministry of Home Affairs. The Unit is responsible for the implementation of policy objectives of the regulatory and institutional framework for combating money laundering. The constitution of the Financial Intelligence Centre in Zambia in the year 2010 should be interpreted as altering the money laundering enforcement machinery in such a way as to leave investigations with the Unit while prosecution powers were handed over to the National Prosecution Authority of Zambia.⁹⁸

However, there is an obvious overlap on the collaboration between the Drug Enforcement Commission and the Anti Money Laundering Investigations Unit. During the study conducted at the Anti Money Laundering Investigations Unit it became apparent that the two institutions are both headed by one Commissioner who belongs to a department under the Ministry of Home Affairs and that both Agencies are under the Ministry of Home Affairs.⁹⁹ It would appear that from the law there is no provision under the Prohibition and Prevention of Money Laundering Act, 2001 or under any other law which suggests that the Unit be under the supervision of the Minister of Home Affairs. In view of the significant role of this Agency in the fight against economic crimes, it is suggested that the Unit should operate in an autonomous manner with the Commissioner of the Anti Money Laundering Unit enjoying protected tenure of office. As at now, research has shown that the said Commissioner who has dual roles serves at the pleasure of the appointing authority. This means that he or she can be dismissed at any time, for any reason or no reason at all. It is thus proposed that in this regard, the Unit be headed by a different Commissioner in order to avoid overlap and stretching the Commissioner of the Drug Enforcement Commission.

⁹⁸ Section 5 of Act No. 34 of 2010

⁹⁹ Section 2 of Act No. 14 of 2001

This study has shown that the lumping of Institutions has other negative consequences. This research has established that as a consequence of this institutional arrangement, the Anti Money Laundering Investigations Unit is not directly funded. The Unit only receives funding from the treasury through the Drug Enforcement Commission. This has brought challenges in the operations of the Unit. The arrangement of funding can be blamed on having no provisions in the Prohibition and Prevention of Money Laundering Act to support the autonomy of this Agency that would then entitle it to receive direct funding from the Treasury. The funding problem also compromises the quality of the institutional and regulatory framework for combating money laundering in Zambia.

Considering the importance of this Agency of Government, it is suggested that this Institution be allowed to operate as a fully fledged law enforcement agency. There is also thus need also to amend the Prohibition and Prevention of Money Laundering Act to make provision for this Agency to be funded directly from the national treasury. It is contended that owing to the Unit's institutional framework of operating as a department of the Drug Enforcement Commission, it has not been able to demonstrate independence and autonomy in its operations. The independence and autonomy of this Unit is most desirable as it would help provide a measure of protection against misuse or abuse of financial disclosures. It is unusual for an institution that is created under an Act of Parliament to be allowed to operate under the supervision of another institution created under another Act of Parliament. This state of affairs compromises the efficacy of such an important agency owing to challenges of accountability and bureaucracy.

It is thus envisaged by this author that separating the Unit from the Drug Enforcement Commission will strengthen the former's mandate which in turn will strengthen the regulatory and institutional framework for combating money laundering in Zambia. Finally, there is need to stipulate the qualifications for a Commissioner for the Anti Money Laundering Investigations Unit and to clearly state who is eligible for appointment by the President to such an important office. The basis of this is that Money Laundering is a specialised field that envisages qualified persons to superintend over its affairs. Any failure to do so, allows the appointing authority to appoint any person to be the Commissioner of the Unit. This may be undesirable considering the significant role of this institution. What may work well in this field is a qualified Commissioner enjoying a protected tenure of office.

3.2.2 STATUTORY FUNCTIONS OF THE ANTI-MONEY LAUNDERING INVESTIGATIONS UNIT

The functions of the Anti Money Laundering Investigations Unit are provided by the Prohibition and Prevention of Money Laundering Act¹⁰⁰ and as amended by the Prohibition and Prevention of Money Laundering (Amendment) Act.¹⁰¹ These functions include:

- i. To collect, evaluate, process and investigate financial information including that from, regulated Institutions and Supervisory Authorities, relating to financial and other business transactions suspected to be part of money laundering, for purposes of preventing and suppressing money laundering offences;
- ii. The Anti- Money Laundering Investigations Unit has power to prosecute persons or institutions engaged in money laundering activities;¹⁰²
- iii. To liaise with other law enforcement agencies in the conduct of investigations and prosecutions of money laundering offences;¹⁰³
- iv. To supervise the reporting requirements and other administrative obligations imposed on regulated institutions and supervisory authorities under the Act.
- v. To assist in developing of programmes for use by regulated institutions and supervisory authorities in the implementation of the Prohibition and Prevention of Money Laundering Act, 2001;
- vi. To cooperate with law enforcement agencies and institutions in other jurisdictions responsible in investigations and prosecution of money laundering offences; and
- vii. To conduct training of officers in regulated institutions on how to detect money laundering and report suspicious transactions.

The implication of these statutory functions of the Anti Money Laundering Investigations Unit can be summed up in the following ways. While the Anti -Money Laundering Investigations Unit still performs some of the roles outlined above, the Prohibition and Prevention of Money Laundering (Amendment) Act, No 44 of 2010 has transferred some of these mandates to the Financial Intelligence Centre.

¹⁰⁰Section 6(1)

¹⁰¹Act No. 44 of 2010

¹⁰² Section 6(1)(f) of Act No.14 of 2001

¹⁰³ Section 6 (1)(c)

The most notable of the functions transferred from the Unit to the Centre include the role to collect, evaluate and process financial information including that from, regulated institutions and supervisory authorities. This is in relation to financial and other business transactions suspected to be part of money laundering, for purposes of preventing and suppressing money laundering offences.¹⁰⁴ It is envisaged by the Act¹⁰⁵ that once the Centre is fully operational, the Unit shall leave this responsibility to the Centre. However, the Financial Intelligence Centre will coordinate efforts with the Anti Money Laundering Investigations Unit, though dissemination of the disclosure of suspicious transaction reports will be the responsibility of the latter.

The Anti Money Laundering Investigations Unit has power to prosecute persons or institutions engaged in money laundering activities.¹⁰⁶ In doing so, the Anti Money Laundering Investigations Unit will liaise with other law enforcement agencies where necessary in the conduct of investigations and prosecutions of money laundering offences.¹⁰⁷ The Unit will also retain power to supervise the reporting requirements and other administrative obligations imposed on regulated institutions and supervisory authorities under the Act. In addition, the Unit will assist in developing programmes for use by regulated institutions and supervisory authorities in the implementation of the Prohibition and Prevention of Money Laundering Act, 2001. The study has revealed that the role of developing training programmes for use by regulated Institutions has always been the preserve of the Anti money Laundering Investigations Unit until the enactment of the Prohibition and Prevention of Money Laundering (Amendment) Act, 2010. The Amendment Act confers on the Financial Intelligence Centre, which is not yet operational due to administrative and logistical challenges, the role of developing training programmes for use by regulated Institutions. As such, this role is still being executed by the Anti Money Laundering Investigations Unit.

The Unit is required by law to cooperate with law enforcement agencies and institutions in other jurisdictions responsible for investigations and prosecution of money laundering offences. This is necessitated by the fact that money laundering is a trans- national crime,

¹⁰⁴Section 5

¹⁰⁵Section 5

¹⁰⁶ Section 6(1)(f) of Act No.14 of 2001

¹⁰⁷ Section 6(1)(c) of Act No.14 of 2001

hence the need for the Anti Money Laundering Investigations Unit to cooperate with other law enforcement agencies in other jurisdictions outside Zambia. This will help in the sharing of vital information and render to each other mutual legal assistance through investigation and prosecution of offenders. Through this mutual cooperation, the benefits are many and include extradition of persons charged with money laundering offences, exchange of information and technologies, confiscation and freezing of assets suspected to have been acquired through illegal activities.

Although this may be the case, the Anti Money Laundering Investigations Unit may also be said to investigate complaints of money laundering made by individuals as whistle blowers involving suspicious transactions. The mandate of this institution may also involve joint investigations with other law enforcement agencies whether in Zambia or outside where the offence of money laundering may have been committed or where the crime is coined with other offences such as forgery, fraud and corruption.¹⁰⁸ This was clarified recently by the chief investigations officer of the Anti money Laundering Investigations Unit during this research conducted in Lusaka.

3.2.3 OTHER POWERS OF THE ANTI MONEY LAUNDERING INVESTIGATIONS UNIT (AMLIU)

The Prohibition and Prevention of money laundering Act 2001 confers upon officers of the Anti money laundering investigations unit others powers in dealing with money laundering cases and these powers include:

- a) **The Power of seizure of property:** The Act¹⁰⁹ authorises and confers power on an officer of the anti money laundering investigations unit to seize property which he or she has reasonable grounds to believe was derived or acquired from money laundering activities.¹¹⁰ The phrase “reasonable ground” to believe was interpreted in the case of the United States of America v Arvizu¹¹¹ by the Supreme Court of the United States. The Court held that this is a situation where an authorised officer cannot turn a blind eye if he has reasonable ground to believe that the property in issue was either derived or acquired from money laundering activities.

¹⁰⁸ This is provided for by their mission statement of the Drug Enforcement Commission

¹⁰⁹ Section 15 of Act No.14 of 2001

¹¹⁰ Section 13 of Act No. 14 of 2001

¹¹¹ 534(US) 266 of 2002

The power to release seized property The Prohibition and Prevention of Money Laundering Act requires that the officer effecting the release does record in writing, specifying in detail the circumstances of and the reasons for, the release.¹¹² The Act also provides that when the property is so released the officer who effected the seizure or the state or any person acting on behalf of the state, will not be liable to any civil proceedings by any person unless it is proved that the seizure and release were not done in good faith.¹¹³ But what is good faith?¹¹⁴ The concept of good faith may have different meanings but according to international jurisprudence, the term good faith may be understood as complying with some standards of decency and honesty. The words “good faith” was also defined by Keily¹¹⁵ to mean any acts of fairness, fair conduct, and reasonable standards of fair dealing, decency and ethical sense of standards of fair dealing in a community.

Although this may be the case, this provision is considered to be unjust in that if not carefully checked may be abused through arbitrary exercise of power. It is submitted that any law bordering on fundamental human rights and freedoms, such as the right to property must have some safeguard on the fundamental rights of suspects. The effect of this provision is that it confers immunity to Anti Money Laundering Investigation officers to be at liberty to seize private citizen’s property for unprescribed duration without recourse to any relief by the affected party whose right to property had been violated through the seizure. It is suggested that a safeguard be provided in the law to limit the duration within which property can be held or seized for purposes of investigations. This study observed that depriving private citizen of their property is a violation of the fundamental human rights.

- c) **The power of forfeiture of property:** As a general rule, any property which has been seized under the Prohibition and Prevention of Money Laundering Act 2001 and which is in the possession or under the control of a person convicted of a

¹¹² Section 16(2)(b)

¹¹³ section 16(2)(a)

¹¹⁴ Vallejo v Wheeler (1998) ER 1012

¹¹⁴ Allen v Flood (1898) AC 1 at 46

¹¹⁵ T. Keily, Good faith on the Vienna convention on contracts for the international sale of goods, journal and arbitration, Volume 3, No 1 (1999) 15

money laundering offence and which property is derived or acquired from proceeds of that crime, is liable to forfeiture by a court of law.¹¹⁶

However, where a person convicted of a money laundering crime dies before or after the order of forfeiture by court has been made, the order will have effects against the estate of the deceased.¹¹⁷ But where property is seized and no prosecution for any offence under any written law is instituted with regard to the property including where no claim in writing is made by any person and where no proceedings are commenced within six months from the date of seizure, the Commissioner of the Anti-Money Laundering Investigations Unit can apply to a court of law, upon the expiration of the six months period, for an order of forfeiture of the property.¹¹⁸ This occurs even if the suspect has not been convicted which is totally contrary to the fundamental human rights particularly the right to property.

It is important to stress at this point that the court will not make an order of forfeiture unless the Commissioner of the Anti Money Laundering Investigations Unit meets two statutory conditions: firstly that the Commissioner has given notice published in the Gazette, and in one daily newspaper which enjoys national circulation that the seized property is liable to vest in the state if it is not claimed within three months;¹¹⁹ and secondly three months after giving this notice the property remains unclaimed.¹²⁰ However, where a claim in writing is made by a person that is lawfully entitled to the property, indicating that the property is not liable to forfeiture under the Prohibition and Prevention of Money Laundering Act of 2001, the Commissioner of the Anti money Laundering Investigations Unit may order release of the property to the claimant if he or she is satisfied that there is no dispute regarding the ownership of the property and that it is not liable to forfeiture.¹²¹ In contrast, where a claim is made against property seized under the Prohibition and Prevention of Money Laundering Act 2001, and the Commissioner finds that there is a dispute over the ownership of the property, or that there is insufficient evidence to determine the ownership of the property, or that the Commissioner is unable to ascertain whether the property is liable to forfeiture or not, the

¹¹⁶ Section 17(1)

¹¹⁷Section 17(2)

¹¹⁸ Section 18(1)

¹¹⁹ Section 18(2)

¹²⁰ Section 19(2)

¹²¹ Section 18(3)

Commissioner will refer the claim to the High Court.¹²² It must be understood here that the Subordinate courts have no jurisdiction over such matters.¹²³

In trying to establish whether any property belongs to, or is in the possession or under the control of any person, that is a 'claimant', the High Court can upon an application by the Commissioner, make any one or two types of orders.¹²⁴ These orders can either run concurrently or be sequential. The High court can in making such an order. One order would require that any documents relevant to:

- i. The identification, the location or the quantification of the property; or
- ii. The identification or the location of any documents necessary for the transfer of the property of the claimant is delivered to the Commissioner.¹²⁵

The other order would direct a regulated institution¹²⁶ to produce to the Commissioner all information obtained by that institution about any business transaction conducted by or for the claimant with the institution before or after the date of the order as the Court may Direct.¹²⁷ However, where the Commissioner is satisfied that an individual or a person is failing to comply with, or is delaying or otherwise obstructing the court order, an authorised officer can enter the premises of that person, search the premises and remove any material document or other things therein for the purpose of executing the court order.¹²⁸ So where property is forfeited under the Prohibition and Prevention of Money Laundering Act, 2001, such property shall vest in the State.¹²⁹ It is thus important at this point to stress that it shall constitute an offence for any person to tamper with seized property and if found guilty of this offence, such person shall be liable on conviction to a fine or a term of imprisonment¹³⁰.

3.2.4 The powers of investigation search and arrest

The officers of the Anti Money Laundering Investigations Unit (AMLIU) are empowered by the Prohibition and Prevention of Money Laundering Act, 2001 to carry out investigations,

¹²² Section 18(4)

¹²³ Section 18

¹²⁴ Section 19(1)(a) 46

¹²⁵ Section 19

¹²⁶ Section 2

¹²⁷ Section 19(1)(b)

¹²⁸ Section 19(2)

¹²⁹ Section 20

¹³⁰ Section 20

search and arrest perpetrators of the crime of money laundering.¹³¹ However, as a general rule, every offence under the Prohibition and Prevention of Money Laundering Act 2001 is a cognizable offence for purposes of the Criminal Procedure Code.¹³² Thus, where a person arrested under the said Act is serving a sentence of imprisonment or is in lawful custody, that person should upon an order by a magistrate be brought before that magistrate at such a place as would be specified in the order for the purpose of investigation into the matter in respect of which the person is liable to be arrested under the Prohibition and Prevention of Money Laundering Act 2001.¹³³ Also, whenever an authorised officer has reasons to believe that there is reasonable cause to suspect that in or on any premises there is concealed or deposited any property liable to seizure or forfeiture under the Prohibition and Prevention of Money Laundering Act 2001 or to which an offence under that Act is reasonably suspected to have been committed or any book or document directly or indirectly relating to, or connected with any dealing or intended dealing whether in Zambia or outside, in respect of any property liable to seizure or forfeiture under the Act, or which would if carried out be an offence under the said Act; the authorised officer can with a warrant issued by a court of competent jurisdiction do any one of the following;

The officer can enter the premises and search for, seize and detain any such property, book or document. In addition, such officer can also search any person who is suspected or connected with the custody of such property subject of an investigation in order to facilitate the investigations. The Anti Money Laundering Investigations Unit is also empowered to arrest any person who is in or on the premises in whose possession any property liable for seizure or forfeiture under the Prohibition and Prevention of Money Laundering Act, 2001, is found or whom the officer reasonably believes to have concealed or deposited the property. Such officer may also break, open, examine and search any premises, article, container or receptacle suspected or connected with the offence; or may stop, search and detain any conveyance suspected to be carrying property liable to seizure or forfeiture under the Act.¹³⁴ These are the wide powers given to officers of the anti money laundering investigations unit by the law in order to combat the problem money laundering and its predicate offence.

¹³¹ Sections 22 and 23 of Act No. 14 of 2001

¹³² Sections 22(1) and 28 of Act No. 14 of 2001

¹³³ Section 22(2)

¹³⁴ Section 23

3.3 CHALLENGES FACED BY THE ANTI- MONEY LAUNDERING INVESTIGATIONS UNIT

Research on the operations of the Anti -Money Laundering Investigations Unit has revealed a number of challenges. Whilst the important functions of this Agency are there for all to see in its daily operations, internally the Unit faces very serious challenges. The following are the challenges that this unit is facing in the effective implementation of the Prohibition and Prevention of Money Laundering Act, 2001.

a) Inadequate and erratic funding

During the study it was discovered that the Anti Money Laundering Investigations Unit is poorly funded from the Drug Enforcement Commission. Instead of the operational costs of ZMW 25 million required annually only about ZMK 450,000 is made available annually to the Unit making it extremely difficult to effectively and efficiently operate. The Unit requires to effectively monitor side by side the regulatory authority to ensure that financial institutions are in compliance with the Bank of Zambia Anti Money Laundering Directives of 2004. The Unit without adequate funding may not be able to meet their regulatory functions. It is thus proposed that Government moves fast in declaring the Unit to be a fully fledged agency of government considering the significant role that it plays in combating money laundering. The autonomy of the Unit will enable it to receive funding directly from the national treasury.

b) Lack of decentralisation in the operations

The Anti Money Laundering Investigations Unit it was learnt during this study that it is not decentralised. This means that they do not have physical presence in other places outside Lusaka. The study proposes the need to decentralise the operations of the Unit to allow for efficient operations. In the current form, it was learnt during the study that any person wishing to report a money laundering case outside Lusaka needs to travel to Lusaka to lodge such complaint. Considering the significance of the functions of this institution, it is suggested that it be decentralised to the provincial headquarters at least.

c) Lack of political will

The study noticed that political good will is required to effectively combat money laundering. Zambia has ratified a number of conventions against money laundering¹³⁵ but yet there has been little progress in domestic them. It was learnt during the study, for example, that Zambia does not have an institution particularly mandated to combating terrorism. This is despite the serious and ravaging effects of terrorism, a crime which is associated to money laundering and drug trafficking. This situation is undesirable in modern civilised states as the crime of money laundering requires effective policing just like other offences such as corruption, drug trafficking and frauds . These offences are all predicate or associated to money laundering but are managed by established fully fledged institutions namely the Anti Corruption Commission, Drug Enforcement Commission and the Zambia Police respectively.

d) Inadequate and obsolete equipment

It was learnt during the study that the Anti Money Laundering Investigations Unit does not have modern equipment for easy monitoring of banking compliance. The Unit depends more on the reporting formalities of regulated institutions which occurs once in a week. The reliance on reporting formalities without being able to verify the authenticity and credibility of such reports is not good in the fight against money laundering. The Unit is in need of an intranet calibration machine¹³⁶ which would help to improve the enforcement of the law and in the monitoring of compliance at local and at international levels. They Unit has never owned such a machine it was learnt during the study and that officers rely on personal mobile phones to receive communication from other law enforcement agencies abroad on matters of money laundering matters. The Unit also receives manual reports from financial institutions on suspicious transactions once every week. This was seen to be undesirable in the age of technology as the process of money laundering occurs within a short time. The transfer of fund electronically via mobile phones or other instantaneous communications can surely not wait for suspicious transaction reports. The use of electronic funds transfers from one account to another and the use of the world wide website to engage in trade globally has made it extremely hard to effectively combat money laundering. The need for modern advanced equipment in the fight against money laundering can therefore not be over emphasised. The

¹³⁵ These include the Eastern and Southern African Anti Money Laundering Group; the United Nations convention on the Suppression of financing of terrorism

¹³⁶ This equipment is what is used to connect all financial institutions to monitor electronic funds transfers and receives instantaneous communications from other law enforcement agencies world over on red alerts of suspicious transactions and wanted persons and those on the criminal watch

study therefore suggests urgent need to procure modern equipment to enable the Unit execute its mandate effectively to serve the country from being used as a transit point of laundered funds and counter financing of terrorism.

e) Lack of autonomy and independence

The study learnt that the Anti Money Laundering Investigations Unit operates at a department of the Drug Enforcement Commission. It is despite being created by its own statute¹³⁷ and required to operate independently operating merely a department. The Unit operates under the same Commissioner of the Drug Enforcement Commission despite the Act provides that the Unit shall have its own Commissioner as the Head. This state of affairs has robbed the Unit the autonomy and independence envisaged under the Act. The lack of autonomy arises from the aspect that the Drug Enforcement Commissioner serves under the Ministry of Home Affairs. The same Commissioner is appointed and serves at the pressure of the appointing authority unlike the Auditor General and the Director General of the Anti Corruption Commission. This it was learnt is undesirable if the independence and autonomy of the Unit was to be enhanced and guaranteed. The study considers the Unit to be a vital tool in combating money laundering and its predicate offences. Further that, autonomy and independence is vital in combating money laundering particularly if the suspects are politically exposed person.¹³⁸ This is the basis that the Unit can be freed from political or other external influences thereby promoting professionalism. The study observed that professionalism in the current state of affairs cannot be guaranteed as the officers of the Unit do not enjoy protected tenure of office.

It is our considered view that the Anti Money Laundering Investigations Unit is no doubt the back bone and key feature in the fight against Money laundering in Zambia. Its mandate under the Prohibition and Prevention of Money Laundering Act, 2001 establishes a clear vision intended to eradicate money laundering and its associated offences in Zambia. It was observed during the study that Act regulating money laundering in Zambia has progressive provisions but for the outlined challenges. It was learnt for example that the powers vested in the Unit include powers of investigation, search and arrest of perpetrators of money

¹³⁷ The Prohibition and Prevention of money laundering Act, No. 14 of 2001

¹³⁸ Politically Exposed Persons are person who wield instruments of power or persons who formerly held instruments of power in Government e.g. cabinet ministers, permanent secretaries, chief executive officers of parastatals to mention but some.

laundering. It became clear from this research that the Unit has enormous other powers under the Act to effectively combat money laundering and its predicate offences. However, it has some bottle-necks as already alluded to in its operations which require addressing. Once the observations made are addressed it is hoped that this would go long way in combating this white collar crime.

f) High staff turn over

The other challenge facing the Unit is the high staff turnover. It was learnt during the study that the Unit loses staff annually on an average of 3 to 5. The members of staff are highly trained and experienced in the field of money laundering investigation and prosecution. The major cause for the challenge of high staff turnover which was noted was the poor conditions of service. It was further observed that the Unit needs an a total number of 60 and currently has only 16 members of staff that are not enough to adequately respond to the demands of enforcing the anti money laundering legislation. The infrastructure occupied as office space at the Unit's headquarters was found to be in dilapidated state. The study observed that this was undesirable considering the significance of this institution in the fight against money laundering in Zambia. It is suggested that ways to enhance the staffing levels be exploited and conditions of service for the officers servicing the Unit be favourably considered to curtail the brain drain. The officers serving under the Unit are mostly targeted for employment by financial institutions in Zambia and abroad and engaged as anti money laundering compliance officers. This has been a challenge to the Unit in that financial institutions usually offer better conditions than the conditions offered to these officers by government.

3.4 THE ANTI MONEY LAUNDERING AUTHORITY

The Anti Money Laundering Authority (AMLA) is created under section 3 of the Prohibition and Prevention of Money Laundering Act, 2001, and consists of eight members. These are the Attorney General of the Republic of Zambia, as Chairperson, the Inspector General of the Zambia Police Service and the Commissioner of the Anti Money Laundering Investigations Unit. Others include the Director General of the Anti Corruption Commission, the Governor of the Bank of Zambia and the Commissioner General of the Zambia Revenue Authority.

There are two other members as may be appointed by the Minister¹³⁹ currently Messrs Sebastian Kopolande and Yussouf Dodia.

3.4.1 The Statutory functions of the Anti-Money Laundering Authority.

The Anti- Money Laundering Authority's statutory functions can be classified to be two fold pursuant to section 4 of Prohibition and Prevention of Money Laundering Act, 2001. Section 4 specifically states as follows:

The functions of the Anti- Money Laundering Authority shall be;

- a) To provide general or specific policy directives to the Commissioner and the Commissioner shall give effect to such directives; and
- b) To advise the Minister on measures required to prevent and detect money laundering in the Republic.

The implication of these provisions is that the Anti- Money Laundering Authority is responsible for policy formulation for purposes of efficiency in the prevention and suppression of money laundering in Zambia. The Authority acts as a Board for the Anti-Money Laundering Investigation Unit and as such it is the highest policy making organ in the fight against money laundering. In view of the foregoing provision, the Authority apart from giving policy guidelines to the Commissioner of the Anti- Money Laundering Investigation Unit, also renders timely guidelines and advice to the Minister on best practices that must be adhered to in order to prevent and suppress money laundering in Zambia. In view of this the Authority acts as a body specialised on policy matters regulating money laundering in Zambia.

3.5 THE FINANCIAL INTELLIGENCE CENTRE AND ITS ROLE IN COMBATING MONEY LAUNDERING IN ZAMBIA

The creation of the Financial Intelligence Centre was made possible through the enactment of the Financial Intelligence Centre Act.¹⁴⁰ This Act of Parliament arose from Zambia's interaction with the international Community on Money laundering particularly the Egmont Group of Financial Intelligence Units.¹⁴¹ The Egmont Group took its name, Egmont, from a

¹³⁹ Section 3(g)

¹⁴⁰ Act No. 46 of 2011

¹⁴¹ The Egmont Group was formed in 1995 in Brussels, Belgium as one of the largest international network against money laundering

palace in Brussels. The Egmont Group has a total of over 100 member Countries world over. The Egmont Group provides a forum for Financial Intelligence Units around the world to improve cooperation in the fight against money laundering. The purpose of the Financial Intelligence Centres at national levels is to improve co-operation in the fight against money laundering and to foster the implementation of domestic programmes against money laundering.

3.5.1 THE HISTORY OF THE FINANCIAL INTELLIGENCE CENTRE OF ZAMBIA

In 2009, the then President of the Republic of Zambia, Mr. Rupiah Bwezani Banda directed that the Financial Intelligence Centre should be established in Zambia, the result of which paved way for the constitution of a secretariat at the Bank of Zambia in May, 2010.

The mandate of the Secretariat of the Financial Intelligence Centre was to ensure that by March, 2011, the Financial Intelligence Centre was operational. The Secretariat's initial mandate was to prepare the technical and legal basis for the establishment of the Financial Intelligence Centre. The Act has since become law effective the 24th November, 2010 when the President assented to the bill. However, even if this is the state of affairs, research has shown that the Financial Intelligence Centre is not yet functional due to administrative and operational challenges. This state of affairs means that the Anti Money Laundering Investigations Unit still performs the functions of this Agency.

3.5.2 THE STATUTORY FUNCTIONS OF THE FINANCIAL INTELLIGENCE CENTRE OF ZAMBIA

The Financial Intelligence Centre Act¹⁴² and the Prohibition and Prevention of Money Laundering (Amendment) Act¹⁴³ provide the functions of the Financial Intelligence Centre. The Financial Intelligence Centre Act states that the Centre shall be the sole designated agency responsible for the receipt, requesting, analysing and dissemination of the disclosure of Suspicious Transaction Reports (STRs) including information from any foreign designated authority. In addition, the Centre is mandated to analyse and evaluate suspicious transaction

¹⁴² Act No. 46 of 2010

¹⁴³ Act No. 44 of 2010

reports and information so as to determine whether there is sufficient basis to transmit such reports for investigation by law enforcement agencies or a foreign designated authority.¹⁴⁴

Besides that, the Centre shall be responsible for disseminating information to law enforcement agencies, where there are reasonable grounds to suspect money laundering or financing of terrorism. Furthermore, the Centre is mandated under this Act to share information relating to suspicious transactions in accordance with the Act to any foreign designated authority, subject to such conditions as the Directors of the Centre may deem fit.¹⁴⁵ The Financial Intelligence Centre Act also empowers the Financial Intelligence Centre to provide information, advice and assistance to law enforcement agencies in the furtherance of an investigation. The centre is allowed to enter into any agreement or arrangement, in writing with a foreign designated authority which the Board considers necessary or desirable for the discharge or performance of its functions. It must be understood that the Board¹⁴⁶ is the highest policy making body of the Financial Intelligence Centre. The Act also empowers the Centre to conduct enquiries on behalf of foreign designated authorities and notify them of the outcome.

The Financial Intelligence Centre is also obliged under this Act to inform the public and reporting entities of their obligation and measures that have been or might be taken to detect, prevent and deter money laundering occurrences. The Centre is also allowed to access directly or indirectly, on a timely basis financial, administrative or law enforcement information, required for the better carrying out of its functions under the Act. Finally, the Centre is also mandated under the Act to perform any such other functions as are necessary to give effect to the Act.

3.5.3 OPERATIONS OF THE FINANCIAL INTELLIGENCE CENTRE OF ZAMBIA

The Financial Intelligence Centre Act¹⁴⁷ provides that in order to ensure transparency and accountability, the Centre shall operate under a Board. The Board of the Centre shall consist of part-time members including the Chairperson, Vice Chairperson and three other persons.

¹⁴⁴Section 5

¹⁴⁵Section 5

¹⁴⁶ The Board of the Financial Intelligence centre is appointed by the President of the Republic of Zambia on part time basis consisting 5 members with vast legal and corporate experience for a 3years term subject to renewal

¹⁴⁷ Section 7(1) and 7(2)

Such Board members shall be appointed by the President of the Republic of Zambia and one of the three members of the board should be the Director of the Centre who shall also be the Secretary to the Board.¹⁴⁸ This Act also provides that a person shall not be qualified for appointment to the Board unless such person has had not less than 10 years experience in a field connected with financial analysis, law, accounting, forensic auditing, financial investigations, law enforcement or any other field as the Minister of Finance may so determine.

3.5.4 THE FUNCTIONS OF THE BOARD OF THE FINANCIAL INTELLIGENCE CENTRE OF ZAMBIA

The Financial Intelligence Centre Act provides¹⁴⁹ for the functions of the Board which includes the carrying out of the functions of the Centre. The Board is mandated to issue policy directives to the reporting entities regarding their obligations and other measures that might be taken to detect, prevent and deter the commission of any offences connected to Money Laundering.

In addition to that, the Board is empowered under the Act to enter into and facilitate cooperation agreements with foreign designated authorities in combating money laundering. Other than that the Centre is allowed under the Act to perform such other functions as are necessary to give effect to the Act.

3.5.5 MEASURES INTENDED TO COMBAT MONEY LAUNDERING UNDER THE ACT

The Financial Intelligence Centre Act makes provision for the prevention of money laundering and other associated crimes by outlining measures of due diligence to be complied with by all reporting institutions¹⁵⁰ which measures include the prohibition of reporting entities from establishing or maintaining anonymous or any account in a fictitious name. In addition, the Act obliges reporting entities to identify its customers through the Know Your Customer (KYC) measures¹⁵¹. The study learnt that this measure is intended to prevent money laundering from persons who conceals their identity and true nature and source of funds.

¹⁴⁸ Section 7(4)

¹⁴⁹ Section 8 (1)

¹⁵⁰ Section 15

¹⁵¹ Section 15

The Financial Intelligence Centre Act also requires that reporting entities do identify their customers by names on reliable and independent source documents or information; particularly when such entities are opening accounts or establishing business relationship with a customer.¹⁵² The requirement also applies to a situation where a customer, who is neither an account holder nor enjoys an established business relationship with the financial institution, wishes to carry out a transaction.

The Act also requires reporting agencies to apply the rules of due diligence where a customer wishes to carry out a domestic or an international wire transfer of monetary amounts.¹⁵³ Similar process is required to apply where doubt exists about the veracity or adequacy of previously obtained customer identification information.¹⁵⁴ Further, the due diligence procedure must be applied by a reporting agency where there is suspicion of any serious offence involving the customer or the customer's account. Finally, the Act obliges reporting entities to develop and implement programmes for the prevention of money laundering and any other serious offences.¹⁵⁵

3.5.6 INTERNAL MEASURES TO BE ADHERED TO BY REPORTING AGENCIES IN PREVENTING MONEY LAUNDERING

The Financial Intelligence Centre Act sets out a number of internal programmes to be adhered to by reporting agencies in preventing money laundering in Zambia. Such measures include the maintenance of internal policies, procedures and controls by reporting agencies to fulfil the obligations of the Act.¹⁵⁶ Further, reporting agencies are obliged to ensure adherence to adequate screening procedures to prevent money laundering.¹⁵⁷

The Act also requires that reporting entities train its employees to make them aware of money laundering and any other serious offences.¹⁵⁸ In doing so, the training must enable employees of regulated Institutions to recognise transactions and actions that may be linked to money laundering. The Act also encourages reporting agencies to enact policies and procedures that help prevent the misuse of technological development such as electronic fund transfers for

¹⁵² Section 16

¹⁵³ Section 16

¹⁵⁴ Section 17

¹⁵⁵ Section 23

¹⁵⁶ Section 23

¹⁵⁷ Section 23(1)(c)

¹⁵⁸ Section 22(1)(d)

value.¹⁵⁹ The study observed that this is so for purposes of prevention of money laundering and related crimes. Furthermore, reporting agencies are encouraged to review and verify compliance with statutory provisions under the Act through independent audits conducted at regular intervals. Finally, the internal regulations include enactment of measures or mechanisms for the prevention of money laundering and any other serious crimes.

3.5.7 OFFENCES THAT MAY BE COMMITTED BY REPORTING AGENCIES UNDER THE ACT

The Financial Intelligence Centre Act criminalises a number of acts or omissions by reporting agencies. Firstly, section 31 of the Act provides that failure by a regulated institution to comply with the know your customer identification regulation attracts a penalty upon conviction of a fine not exceeding one million penalty units or imprisonment for a period not exceeding ten years or both. It is also an offence under the Act for a regulated institution to fail to maintain or provide access to records arising from the failure to maintain books and records and the destruction or removal of any records or books; or the failure to avail information in a timely manner in response to a lawful request for any books or records.¹⁶⁰ Any person who commits the above offences shall be liable on conviction to a period not exceeding two years or a fine not exceeding two hundred thousand penalty units.

Other offences provided for under the Act include the failure to fulfil the due diligence obligations or maintenance of internal controls arising from any failure to conduct due diligence procedures with respect to customers, accounts and transactions in compliance with the Act.¹⁶¹ Notably also, it shall be an offence for a reporting agency to fail to comply with the obligations for special monitoring set out under the Act which offence on conviction attracts imprisonment for a period not exceeding five years or a fine of four hundred and fifty thousand penalty units.¹⁶²

Above all, it shall be an offence for a reporting entity to fail to report suspicious transactions occurring in their institution.¹⁶³ Section 45, in particular states that it shall be an offence for any person to intentionally or negligently fail to submit a report to the Centre as required by

¹⁵⁹ Section 25

¹⁶⁰ Section 43

¹⁶¹ Section 45

¹⁶² Section 45

¹⁶³ Section 45

law. This provision states that any person found guilty of this offence shall on conviction be liable to imprisonment for a period not exceeding seven years or a fine not exceeding seven hundred thousand penalty units. The study observed that the Financial Intelligence Centre Act has conferred sufficient provisions to enable officers of the Centre to effectively discharge their duties. The only challenge is that the Centre has remained in a non-functional state to date. As a result of this situation, the Anti Money Laundering Investigations Unit has continued to receive Suspicious Transaction Reports, requesting and analysing financial information from regulated Institutions. In addition, the Anti Money Laundering Investigations Unit still continue to conduct investigation and prosecution of money laundering cases. This state of affairs is contrary to the international best practices against money laundering and to the Financial Intelligence Act, 2001. In view of the foregoing, the study observes that action should be taken so that the Centre begins to function as fully fledged institution as soon as possible. This is so as the board is already in place following its appointment by the Republican President in 2011. The study feels that there is no further justification for delaying the full operations of the Financial Intelligence Centre.

3.6 THE DRUG ENFORCEMENT COMMISSION OF ZAMBIA

The Drug Enforcement Commission (DEC) is yet another Institution mandated by law to combat money laundering resulting from drug trafficking. As was explained in Chapter two, money laundering as a crime in Zambia traces its origins to drug trafficking activities. It has also been explained that the Drug Enforcement Commission and the Anti-Money Laundering Investigations Unit share the same Commissioner and offices. Therefore the reality of the connection between money laundering and drug trafficking in Zambia cannot be better demonstrated.

3.6.1 THE STATUTORY FUNCTIONS OF THE DRUG ENFORCEMENT COMMISSION

The Drug Enforcement Commission as already stated in the preliminaries was established in 1989 with a special mandate to effectively control and prevent illegal production, trafficking and abuse of narcotic drugs and psychotropic substances¹⁶⁴. In addition, this institution was

¹⁶⁴ Act No. 87 of 1989

also mandated to combat money laundering¹⁶⁵. This was prior to the enactment of the Prohibition and Prevention of Money Laundering Act, 2001.

The functions of the Drug Enforcement Commission are provided for by the Narcotic Drugs and Psychotropic Substances Act.¹⁶⁶The Act states that the functions of the Commission include; collecting, collating and disseminating of information on narcotic drugs and psychotropic substances. Furthermore, the Commission is mandated by the Act to receive and investigate any complaint of alleged or suspected breach of the Act.¹⁶⁷

The Drug Enforcement Commission is mandated to provide rehabilitation services to drug addicts in order to contribute to the social economic development of the Country.¹⁶⁸ The Drug Enforcement Commission is also mandated to render advice to Government ministries and departments, public bodies, institutions, companies, statutory bodies and corporations means of preventing prohibited activities relating to narcotic drugs and psychotropic substances and suggest measures, procedures or methods of work compatible with proper performance of their duties to reduce prohibited activities.¹⁶⁹Furthermore, this institution is mandated to educate the public of the evils of abusing drugs and illegal trafficking in narcotic substances.¹⁷⁰

3.6.2 OFFENCES UNDER THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT

The Act creates a number of offences that are intended to prevent offenders from engaging in drug trafficking activities. The Act prohibits any person from engaging in trafficking of narcotic drugs and psychotropic substances and any person found guilty of this offence shall be liable upon conviction for a term not exceeding 25 years.¹⁷¹ It shall also be an offence under the Act for any person who, without lawful authority, imports or exports any narcotic drug or psychotropic substances and that any person found guilty of the offence shall be liable on conviction to a term not exceeding 20 years.¹⁷²

¹⁶⁵ Section 22 of the Act

¹⁶⁶ Section 5 of Chapter 96 of the Laws of Zambia

¹⁶⁷ Section 5

¹⁶⁸ Section 5(c)

¹⁶⁹ Section 5

¹⁷⁰ Section 5

¹⁷¹ Section 6

¹⁷² Section 7

It shall also constitute an offence under the Act for any person who, without lawful authority to be in possession or under his or her control any narcotic drugs and psychotropic substances and any person guilty of this shall on conviction be liable to a term not exceeding 15 years.¹⁷³

It shall also constitute an offence under the Act for any person without lawful authority to cultivate any plant which can be used or consumed as a narcotic drug or psychotropic substance, or from which a narcotic drug or psychotropic substance can be extracted.¹⁷⁴ Any person found guilty of this offence shall upon conviction to a fine of not less than five hundred penalty units or imprisonment for term not exceeding ten years or both.¹⁷⁵

Besides all, it shall constitute an offence under the Act for any person without lawful authority to take a narcotic drug or psychotropic substance by smoking, injecting into his or her body, sniffing, chewing, drinking or otherwise administering such drug or substance and any person who does these things shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding ten years.¹⁷⁶

Further, it shall amount to an offence for any person to attempt, abet, solicit, incite and compound or do any act preparatory to, or in furtherance of, the commission of any offence under the Act. Any person found guilty of such offence shall on conviction be liable to imprisonment for a term of not less than five years.¹⁷⁷

The Act has also criminalised the following offences in order to prohibit drug trafficking:¹⁷⁸

- i. Conspiracy to commit an offence under the Act;¹⁷⁹
- ii. Unlawful manufacture of narcotic drugs and psychotropic substances;¹⁸⁰
- iii. Inducing another through use of deceit, force or other means to use any narcotic drugs or psychotropic substance;¹⁸¹ and
- iv. Possession of instruments or utensils used in administering narcotic drugs or psychotropic substances without lawful authority.¹⁸²

¹⁷³ Section 8

¹⁷⁴ Section 9

¹⁷⁵ Section 9

¹⁷⁶ Section 10

¹⁷⁷ Section 11

¹⁷⁸ Section 12

¹⁷⁹ Section 13

¹⁸⁰ Section 13

¹⁸¹ Section 14

¹⁸² Section 15

The other offences that the Act provides for include the occupation or control of premises and the permitting of use of one's premises for administering narcotic drugs or psychotropic substances.¹⁸³ In addition, the Act also constitute an offence against any person who without lawful authority supplies to, or procures for, any person a narcotic drug or psychotropic substance or advertises for sale any such drug or substance.¹⁸⁴

Further, the Act creates an offence against any person who with intent to deceive, obtains a narcotic or psychotropic substance or prescription for narcotic drug or psychotropic substances from a medical practitioner without disclosing to the practitioner the particulars of every narcotic drug or psychotropic substance issued to him by a different practitioner in the past.¹⁸⁵ It shall also be an offence under the Act for any person to be in possession of any property of which he has actual or constructive knowledge that the whole or part of such property was acquired through the proceeds of drug trafficking.¹⁸⁶

3.6.3 THE POWERS OF THE OFFICERS OF THE DRUG ENFORCEMENT COMMISSION

The authorised officers have power under the Act, to conduct investigations, arrest, seize and detain any conveyance.¹⁸⁷ In doing so, the officers of the Drug Enforcement Commission are empowered to enter the premises and search for, seize and detain any such property, book or document.¹⁸⁸ In addition, they have power to search any person, who is in or on the premises, and detain that person and remove him or her to any place in order to facilitate the search.¹⁸⁹ Further they can arrest any person who is in or on the premises in whose possession any property liable to seizure or forfeiture under the Act is found, or whom the officer reasonably believes to have concealed or deposited the property.¹⁹⁰ They can also break open, examine and search any article, container or receptacle; and can stop, search and detain any conveyance.¹⁹¹

¹⁸³ Section 16

¹⁸⁴ Section 17

¹⁸⁵ Section 18

¹⁸⁶ Section 21(1)

¹⁸⁷ Section 23

¹⁸⁸ Section 24(1)

¹⁸⁹ Section 25

¹⁹⁰ Section 24(2)(a)

¹⁹¹ Section 25

The officers may if necessary, break open any outer or inner door, or window of any premises and forcibly enter the premises or any part of it.¹⁹² In doing so, the officers have power to forcibly remove any obstruction to the entry, search and seizure of any property that they believe constitute a crime.¹⁹³

The Act also empowers officers of the Drug Enforcement Commission for the purpose of record and identification to take measurements, photographs, finger prints, hand and foot prints of any person in lawful custody.¹⁹⁴ Such officers also have power to intercept, detain and open any postal article in the course of transmission by post and also to intercept any message transmitted or received by any telecommunication.¹⁹⁵

The officers are also empowered by the Act to use a firearm against any person in lawful custody charged with or convicted of an offence relating to narcotic drugs or psychotropic substances when such person is escaping or attempting to escape.¹⁹⁶

Furthermore, such officers are empowered to use firearms against any person who by force rescues or attempts to rescue any person in lawful custody.¹⁹⁷ Such officers may also use a firearm against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person or where the life of such officer in lawful execution of his functions is under threat.¹⁹⁸ However, where such officer uses a firearm under the provisions of this Act, he or she shall aspire as far as possible to use firearm to disable such person and not to kill.¹⁹⁹

The study in short observed that the Narcotic Drugs and Psychotropic Substances Act is one of the key statute and feature in the fight against money laundering. Some of the notable provisions of this Act as already stated above include section 6, which criminalises drug trafficking and prescribes imprisonment of 25 years against any person convicted thereof, with no option of a fine.

¹⁹² Section 24(1)(d)

¹⁹³Section 24

¹⁹⁴ Section 26

¹⁹⁵Sections 26 and 27

¹⁹⁶Section 28(1)

¹⁹⁷ Section 28(b) and (c)

¹⁹⁸ Section 28

¹⁹⁹ Section 28(3)

In view of the foregoing, the Narcotic Drugs and Psychotropic Substances Act contains progressive provisions that deter drug trafficking and money laundering activities in Zambia. The offence of Drug Trafficking is non bailable and any vessel that is the subject matter of the commission of any offence under the Act is amenable to forfeiture to the State upon conviction of the accused person. The Act also allows for forfeiture proceedings against the estate of a deceased person if such person dies after conviction. Additionally, it has also been demonstrated that property may also be liable to forfeiture where the owner of such property who is a subject matter of prosecution under the Act is untraceable.

It is also clear that the Drug Enforcement Commission has a mammoth task in combating drug trafficking in Zambia. It has been demonstrated that the Narcotic Drugs and Psychotropic Substances Act contains a number of offences under the Act intended to eradicate the vice of drug trafficking which is an offence associated to money laundering.

3.7 THE OFFICE OF THE AUDITOR GENERAL OF ZAMBIA

The office of the Auditor General in Zambia is the Supreme Audit Institution with the mandate to audit Government institutions to ensure that public funds are used for the intended purpose and expose abuses of public funds particularly by Politically Exposed Persons (PEPs).²⁰⁰ The Auditor General's office is created by the Constitution of Zambia.²⁰¹ In its functions, the Auditor General's Office enforces two Acts of Parliament which are the Public Audit Act²⁰² and the Public Finance Act.²⁰³ Its legal mandate is to audit accounts for parastatal organisations, statutory bodies, donor funded Institutions and any other Institutions in which public resources have been invested.²⁰⁴

The Auditor General's office as a public institution scrutinises the public sector to see to it that there has not been any wastage of tax payer's money and that Government deliver services in an equitable, efficient and effective manner for the benefit of all the citizens. The office also provides Parliament with independent information, guidance and assurance to help hold the Government agencies to account for the public funds that have been entrusted to them. The office of the Auditor General is a key strategic institution which is autonomous

²⁰⁰ This is in accordance with the website of the Auditor General office, www.auditorgeneral.gov.zm

²⁰¹ Article 121 of the Constitution of Zambia

²⁰² Chapter 378 of the Laws of Zambia

²⁰³ Act No. 15 of 2004

²⁰⁴ Section 44 of the Public Finance Act No. 15 of 2004

and carries on independent audits which help detect financial crime perpetrated by false accounting, fraud, embezzlement of public funds, forgery, and ghost worker payroll and similar such vices which rob the Treasury of huge sums of monies intended for the development of this country.

The Auditor General's Report 2008 for example has revealed that from the public funds appropriated by Parliament, K3, 918,288,485 of such funds were misappropriated by spending agencies in Zambia. In addition, the same Report shows that K1,388,790,328 of the public funds allocated by parliament was unaccounted for and K438,773,166 was under banked and a total of K25,789,847,602 was unretired as imprest. The Report also reveals that K345, 542,984 was paid for goods and services that were never delivered to Government, K10, 042, 083,206 amounted to wasteful expenditure by spending agencies and K125, 228,272.00 amounted to overpayment to contractors for goods and services.²⁰⁵

It is clear from the foregoing, that the Auditor General's reports are very helpful in the fight against financial crimes, but that these reports are never been taken seriously by the law enforcement Agencies in Zambia.²⁰⁶ This has rendered the work of the office of the Auditor General academic in many respects. It is suggested that the office of the Auditor General should be empowered to possess prosecution powers as in Lusophone jurisdictions of Angola, Mozambique and in Portugal. In these countries, offences of this nature, bordering on abuse of public funds are treated as capital offences.

3.7.1 THE STATUTORY ROLE OF THE OFFICE OF THE AUDITOR GENERAL OF ZAMBIA

The mandate of the Auditor General's office is provided for by the Public Audits Act and the Public Finance Act respectively.²⁰⁷ The functions of the Auditor General's office among others include:

- i) **To audit and report arbitrary use of public funds²⁰⁸**

²⁰⁵ Auditor General of Zambia, Audit Report, 2010 submitted to the Parliamentary Accounts Committee

²⁰⁶ These were the popular views observed by most senior officers interviewed during the study

²⁰⁷ Chapter 378 and Act No. 15 of 2004 respectively supported by explanation in Nexus Common wealth Network publication on the role of the office of the Auditor General of Zambia on http://www.commonwealthofnations.org/partner/office_of_the_auditor_general//

²⁰⁸ Section 3 of the Public Audit Act, Chapter 378 of the Laws of Zambia

The office of the Auditor General shall satisfy itself that the money expended has been applied for the purpose for which such funds were appropriated in accordance with the Appropriation Act or in compliance with the approved supplementary estimates or in line with the Excess Expenditure Appropriation Act²⁰⁹ or as the case may be and that the expenditure conforms to the authority that governs it.

ii) **To cite misapplication and misappropriation of public funds²¹⁰**

The office of the Auditor General is mandated to audit accounts relating to any expenditure charged by the Constitution of Zambia or any other law on the general revenue of the Republic and to submit a report there on to the President not later than twelve months after the end of each financial year and cite misappropriation of Public funds in whatever form it arises.

iii) **To co-ordinate with law enforcement officers and other oversight Institutions such as Parliament²¹¹**

The office of the Auditor General is mandated under the Public Audit Act to coordinate with law enforcement officers and other oversight institutions such as Parliament in an effort to restore public confidence in public funds expenditure.

iv) **To restore public confidence that the tax paid is being used for the intended purpose²¹²**

It is a duty of the office of the Auditor General to conduct regular audits as they deem fit, the accounts of every statutory corporation or public company, department, and private institution that receives Government grant, subsidy or subvention in any financial year in order to restore public confidence that the tax paid is being used for the intended purpose.

v) **To restore donor confidence²¹³**

The office of the Auditor General's core functions in the enforcement of fiscal policy in public funds are intended primarily to restore donor confidence that the funds donated by the

²⁰⁹ Act No. 6 of 2008

²¹⁰ Section 4 of the Public Audit Act, Chapter 378 of the Laws of Zambia

²¹¹ Section 5 of the Public Audit Act, Chapter 378 of the Laws of Zambia

²¹² Section 4 of the Public Audit Act, Chapter 378 of the Laws of Zambia

²¹³ Nexus Common wealth Network publication on the role of the office of the Auditor General of Zambia on http://www.commonwealthofnations.org/partner/office_of_the_auditor_general//

Donor community as Multi-lateral Co-operating partners have indeed been used for the designated purposes.

vi) **To device methods of ensuring accountability and compliance by public institutions, parastatals and statutory bodies**²¹⁴

The Auditor General's statutory role is to render advice and training to controlling officers and spending agencies in order to enhance compliance with the government financial regulations so as to avoid and reduce on audit queries. In addition, the Auditor General's office in their quest to enhance fiscal policy is mandated to devise methods of ensuring accountability and compliance by public institutions, parastatals and statutory bodies.

3.7.2 SANCTIONS THAT MAY BE IMPOSED ON ERRING PUBLIC OFFICERS

There are number of actions that may be taken by the executive branch of government following proof by an Audit Report that there has been misappropriation of public resources by a public officer. The following are some of the actions that may be taken against an erring public officer for abuse of public funds or the commission of an offence against government financial regulations:²¹⁵

- i. Recovery of misappropriated funds from an erring officer either through repayment of cash through payroll recoveries or other means.
- ii. Disciplinary action against such erring public officer which includes suspension, warning (verbal or written), demotion and separation of officer from service.
- iii. Prosecution of an erring public officer in a court of Law: This is the ideal action against any public officer who abuses public funds for personal gain. This is what happened in the case of the convicted former Permanent Secretary of the Ministry of Health, Dr. Kashiwa Bulaya. The brief facts are that Dr Kashiwa Bulaya

²¹⁴ Section 3(a) of the Public Audit Act, Chapter 378 of the Laws of Zambia and Nexus Common wealth Network Publication, 2010 on the role of the Auditor General's office in Zambia in ensuring transparency and accountability in public expenditure, pp.8-9

²¹⁵ Section 13 of the Public Audit Act, Chapter 378 of the Laws of Zambia

being the Permanent Secretary in the Ministry of Health was arrested and later convicted for abuse of office and corruptly awarding a contract to his own private company, Buttico A1 for the supply of herbal remedies to the Ministry of Health. The contract in issue deprived the Government of the Republic of Zambia expenditure in excess of K2, 000,000.00 or US\$400,000.00.

3.7.3 THE CHALLENGES FACING THE OFFICE OF THE AUDITOR GENERAL OF ZAMBIA

The study at the Auditor General's office revealed that this office, important as it is, is facing a number of challenges in the implementation of its statutory function. The following were some of the notable challenges indicated by the office:²¹⁶

- i) Lack of adequate political will: Government lacks adequate political will to support the Auditor General's office, as evidenced by poor funding to enhance the efficiency of the office despite numerous appeals.
- ii) Reports by the Auditor General's office are not acted upon despite spending huge sums of money to conduct such audits. Typical of this is that, public officers cited in the Report go without punishment and more often than not even get promoted to higher public office as was the case involving Michael Mabenga, who despite having been cited for financial misappropriation of Constituency Development Funds, the Government appointed him as Deputy Minister of Lands and Natural Resources, a very high public office of trust in Zambia. The Supreme Court of Zambia recommended the arrest of Michael Mabenga in its judgment for misappropriation of Constituency Development Fund.
- iii) Lack of cooperation by public officers when conducting audits resulting in prolonged audit in some departments than is ordinarily necessary.
- iv) Senior Government officials tend to have negative attitude towards the Auditor General's office, perceiving the Institution as aiming to frustrate Government business.

²¹⁶ This information was availed by the Deputy Auditor General during this study

- v) Inadequacy of advanced equipment to ensure easy monitoring of public spending in line ministries or institution.
- vi) Lack of sustainable training programmes for staff under the Auditor General's office and ancillary staff owing to the high cost of training.
- vii) Delay in concluding cases on financial crimes in courts of law, raising the need for a financial crimes court.
- viii) Lack of co-operation by public officers when conducting audits evidenced by poor record keeping and unretired imprest, unexplained expenditure and misappropriation of public funds.

3.7.4 THE SUCCESSES RECORDED BY THE OFFICE OF THE AUDITOR GENERAL OF ZAMBIA IN THE FIGHT AGAINST ABUSE OF PUBLIC FUNDS

The study, during the participant observation, learned that the office of the Auditor General of Zambia through its reports has been key in exposing abuses of public funds.²¹⁷ These reports have previously resulted the arrest of prominent public personalities and some are serving or have served various sentences in the Zambian Prisons. These include the former Permanent Secretary in the Ministry of health, Dr. Kashiwa Bulaya.²¹⁸ The Auditor General's Report of 2006 was exposed by the. Others serving various sentences include former Zambia Air Force Commander, Lieutenant General Sunday Kayumba, former Zambia Army Commander, Lieutenant General Geojago Musengule and former Zambia National Service Commander, Major General Wilford Funjika. These officers were as of date currently all convicted by the courts of law for corrupt practices although their cases are still being heard on appeal.

Two former Inspector General of Police, Mr Ephraim Mateyo and Mr Francis Kabonde have jointly been administered with "warn and caution" statements by the Anti Corruption Commission for paying for motor vehicles and traffic motor bikes from a South African company at inflated prices and for goods which were never been received.²¹⁹ At the Ministry

²¹⁷ This is contained in the Auditor General of Zambia's annual bulleting of 2007, entitled, the role of the Office of the Auditor General of Zambia in promoting transparency and accountability.

²¹⁸ Auditor General of Zambia's annual Bulleting of 2009 entitled, Show me the money.

²¹⁹ Zambia Daily Mail of 21st January, 2010

of Health, some members of staff are currently on trial charged with theft of K28, 000,000,000.00 or United States dollar equivalent US\$ 5,600,000.00.

The case of former Finance Minister Dr. Katele Kalumba, former Permanent Secretary in the Ministry of Finance, Stella Chibanda, former Secretary to the Treasury, Dr. Bede Mphande who were convicted further illustrate the extent of the scourge of abuse of public resources.²²⁰ The Second President, Dr. Frederick Chiluba was acquitted under unclear circumstances in 2010. Therefore, the study finds the office of the Auditor General to be a key Institution in the fight against financial crimes and Government should render the necessary support to this office to continue to execute its mandate effectively. This will help in the attainment of the Millennium Development Goals (MDGs) and the implementation of the Public Reform Strategy Paper (PRSP) which measure is intended to enhance transparency and accountability in the public sector.

The study observed that the office of the Auditor General of Zambia is key and strategic in the fight against embezzlement of public funds through misappropriation both in grant aided institutions and parastatal companies in Zambia. It has been demonstrated how the former Permanent Secretary in the Ministry of Health, Dr Kashiwa Bulaya laundered public funds through an arbitrary award of a tender to his own privately owned company, Buttico A1 Limited. Through this revelation and several other audit revelations, the Auditor General's office has demonstrated its relevance to combating financial crimes.

3.8 THE ANTI-CORRUPTION COMMISSION OF ZAMBIA

The Anti-Corruption Commission was created by the Anti-Corruption Commission Act²²¹ and is one of the Institutions mandated to combat corruption in Zambia. It should be understood from the outset that corruption like drug trafficking is a twin offence to money laundering and that these crimes are inseparable.²²² This Agency was established in 1980 under an Act of Parliament.²²³ This Act has over the years been reviewed in a bid to strengthen the anti-corruption legislation in Zambia. In 2012 the Anti-Corruption Act No. 3

²²⁰ SSP/13/ 2004

²²¹ Act No. 3 of 2012

²²² Corruption is a twin offence in that it results in the obtaining of funds from criminal proceeds which has to be laundered usually through financial institutions and expended as though the same had been genuinely earned when in fact not

²²³ The Corrupt Practices Act No. 14 of 1980 (which was repealed and replaced by the Anti Corruption Commission Act, Chapter 91 of the Laws of Zambia)

was enacted following the repealing of the previous Anti Corruption Act.²²⁴ This Agency is mandated to fight corruption through investigation and prosecution of suspected offenders and to establish corruption prevention mechanisms. In addition, the Agency is mandated to prevent corruption in the public and private bodies. Besides that, the commission is allowed by law to initiate, receive and investigate complaints of alleged or suspected corrupt practices.²²⁵

Furthermore, this agency is obliged to co-operate with other institutions authorised to investigate, prosecute, prevent and combat corrupt practices so as to implement an integrated approach to the eradication of corruption.²²⁶ The Commission is also allowed to consult, co-operate and exchange information with appropriate bodies of other countries that are authorised to conduct inquiries or investigations in relation to corrupt practices.²²⁷ However, like the Drug Enforcement Commission, the Anti-Corruption Commission requires prior approval or consent of the Director of Public Prosecutions in order to prosecute the suspect even amid overwhelming evidence of corruption.²²⁸ Research has revealed that this regulation was put in place to prevent arrests that are not in the public interest or arrests that contradict public policy. This is to protect the interests of the Government of the day and prevent actions that may ridicule Government particularly on matters that affect public security, public health and the good order of society.²²⁹

3.8.1 THE STATUTORY POWERS OF THE ANTI-CORRUPTION COMMISSION OF ZAMBIA

The Anti-Corruption Commission is empowered under the Act to investigate any public officer whom they reasonably believe has abused or misused the authority of his office to obtain property, wealth, advantage or profit directly or indirectly for himself or any other person.²³⁰ In addition, the Commission can investigate any person who maintains a living standard above that which is commensurate with his present or past official emoluments.²³¹

²²⁴ Act No. 38 of 2010

²²⁵ Section 6(b)

²²⁶ Section 6(e)

²²⁷ Section 6

²²⁸ Section 6(b)

²²⁹ Mission statement of the Anti Corruption Commission of Zambia

²³⁰ Section 21

²³¹ Section 22

The Commission can investigate any person who is in receipt or possession of pecuniary resources or property disproportionate to his present or past emoluments.²³² This includes allegations that a suspect is in receipt of benefits of any services which he may reasonably be suspected of having received corruptly and in circumstances which amount to an offence under the Act. The Anti Corruption Commission has power to search, with or without a warrant any person or dwelling for the purpose of removing any record, return, report, document or article which is alleged to be in the possession of the suspect.²³³

The latter provision is somewhat arbitrary as this provision may infringe on the right of privacy of the suspect that is guaranteed by the Zambian Constitution in Part III of the Bill of Rights. Such provision is a derogation also of the presumption of the suspects innocence and hence the Anti Corruption Commission like all other law enforcement agencies should obtain a search warrant prior to conducting a search in order to safeguard the interests of the suspects. Such measures are intended to enhance transparency and accountability of the exercise of public authority while striking a balance with the interest of the suspect. This is also necessary to prevent abuse of such arbitrary powers

The Anti Corruption Commission is empowered under the Act to seize or restrict any property reasonably believed of having been acquired corruptly.²³⁴ Incidental to this, the Commission is also empowered under the Act to arrest any person suspected of having committed a crime under the Act.²³⁵ Furthermore, the commission is mandated to seek mutual legal assistance for the seizure, arrest and extradition of a suspect resident outside the territorial jurisdiction of Zambia.²³⁶ Finally, the Commission is by law empowered to restrict dealing in suspicious bank accounts and freeze assets suspected to have been obtained through corrupt practices.²³⁷

3.8.2 TERRITORIAL JURISDICTION OF THE ANTI CORRUPTION COMMISSION OF ZAMBIA

The Anti Corruption Commission has power to investigate any public officer, or a citizen of Zambia or a person ordinarily resident in Zambia and shall also have power to investigate any

²³² Section 22(b)

²³³ Section 50 and 51

²³⁴ Section 54

²³⁵ Section 53

²³⁶ Section 77

²³⁷ Section 68

offence notwithstanding that such an offence was committed outside Zambia. Such offence may be dealt with as though it had been committed in Zambia.²³⁸ However, prior to conducting any investigation, the Director General of the Anti- Corruption Commission must consent to such an investigation and if he or she objects, no such investigation can proceed.²³⁹ This may be so even in cases where the evidence against the suspect is overwhelming. It is such leeway in the law that erodes the effectiveness of the Commission. It is submit that an individual must never be greater than this very important Institution. Notably also, this power promotes “selective justice” in the fight against corruption. There should be no “sacred cows” in the fight against corruption as no persons should be immune from being investigated except the Head of State who enjoys constitutional immunity from prosecution.

In a similar way, the Anti-Corruption Commission Act provides that all prosecutions of accused persons require the consent of the Director of Public Prosecutions.²⁴⁰ It is such clauses that are retrogressive in the fight against corruption. Such provision also erodes public confidence in the fight against corruption. The power of the Director of Public Prosecution to decide who should be prosecuted or who should not be prosecuted has the potential of undermining the credibility of the Commission in the fight against corruption.

Thus the Anti Corruption Commission must be left to operate independently and as an autonomous institution. The role of the Commission in combating corruption is very important, hence the need to allow this Agency to be independent. For argument’s sake, what if the Director of Public Prosecution is the one who is a subject matter of the investigation or his relative, friends and colleagues? This brings about selective justice as most clearly, the Director of Public Prosecution would decline to sanction the prosecution as was seen in the case of **The People v. Kashiwa Bulaya**.²⁴¹ The failure to amend the law will continue to undermine the credibility of the Anti Corruption Commission in the fight against corruption. There is need to amend the Anti- Corruption Commission Act in order to remove the hurdle of the consent of the Director General of the Anti Corruption Commission before investigating a suspect. The Director of Public Prosecution’s power to sanction prosecution would be hard to curtail as this power is constitutionally mandated.

²³⁸ Section 76

²³⁹ Section 11(1)(a)

²⁴⁰ Section 59

²⁴¹ SSP/13/ 2004

3.9 SUMMARY

It has been observed that Zambia has several institutions created for purposes of combating money laundering. The Anti Money Laundering Investigations Unit for example has been seen as being very instrumental in the fight against money laundering in Zambia. This is despite the several challenges that this very important agency is faced with in executing its mandate. The enactment of the Prohibition and Prevention of Money Laundering Act of 2001 is seen as a very big milestone in the fight against money laundering in Zambia. The Unit has since its inception in 2001 helped to address the problem of money laundering. This may be as evidenced by the various arrest and successful prosecution of prominent personalities in Zambia. The Drug Enforcement Commission is yet another agency created in Zambia with a view to effectively combat the scourge of money laundering through drug trafficking. The Commission has since its creation in 1989 played a pivotal role in an attempt to eradicate the problem of money laundering. The Narcotic Drugs and Psychotropic Substances Act which creates the Drug Enforcement Commission contains progressive provisions which empowers the Commission to effectively and efficiently fight drug trafficking and money laundering. The study among others also examined the creation of the Financial Intelligence Centre which was created in 2009 with the sole mandate helping to combat the problem of money laundering. The Financial intelligence Centre Act of 2011 is comprehensive and brainchild of the international convention called Egmont convention which requires member countries to form financial intelligence units. It was evident during the study that Zambia has being making strides in eradicating the problem of money laundering. The Office of the Auditor General of Zambia was also evidently another key institution discussed. This institution was seen as a cornerstone in the fight against money laundering involving public funds. The Auditor General's Reports and the role of the Parliamentary Accounts Committee have been among the key measures in providing oversight mechanisms in public finance expenditure.

There is no doubt that this Office is key in the fight against all forms of money laundering activities particularly by those entrusted with the administration of public funds. The Anti Corruption Commission has also been seen as being a vital tool in combating money laundering through eradication of corrupt practices. The Commission focuses its functions on integrity in public life. The Anti Corruption Commission has since its inception demonstrated desire to combat corrupt practices by those that abrogate the law. The functions of the officers of the Anti Corruption Commission are further strengthened by the Anti Corruption

Commission Act of 2012. This Act contains progressive provisions aimed at giving the Commission all the necessary impetus to eradicate the problem of money laundering through corrupt practices. The study examined the intensive powers of the Commission and considered them as being efficient if fully harnessed. In Chapter Four, this dissertation will discuss the role of financial institutions in preventing and combating money laundering.

CHAPTER FOUR: THE ROLE OF FINANCIAL INSTITUTIONS IN COMBATING MONEY LAUNDERING

4.1 INTRODUCTION

This Chapter examines the role of the Bank of Zambia in the prevention and combating of money laundering with particular focus on its role as a financial sector regulator and supervisor. In doing so, the Chapter will focus on the Bank of Zambia Anti Money Laundering Directives, 2004 as the regulatory framework for combating money laundering in the financial sector in Zambia. The Bank of Zambia, Anti money Laundering Directives were inspired by the international best practices against money laundering particularly the Basel Core Principles²⁴² on Effective Banking Supervision which states that;

Supervisors must be satisfied that banks have adequate policies and processes in place including strict Know Your Customer rules, that promote high ethical and professional standards in the financial sector and prevent the Bank from being used, intentionally or unintentionally for criminal activities.

In line with that dictate, the Bank of Zambia Anti Money Laundering Directives, 2004 were passed by the Bank of Zambia pursuant to Section 12(4) of the Zambian Prohibition and Prevention of Money Laundering Act, 2001. The said Section 12(4) provides as follows:

“A supervisory Authority shall issue such directives as may be approved by the Anti Money Laundering Investigations Unit which may be necessary for the regulated Institutions to prevent and detect money laundering”.

This Chapter also highlights some short comings of the Bank of Zambia, Anti Money Laundering Directives, 2004. The chapter discusses the shortcomings of these Directives and highlights some possible ways in which the regulatory framework can be strengthened. The Chapter is intended to highlight the significant role of the Bank of Zambia in the prevention and detection of money laundering in the banking sector through regulation. It takes

²⁴² Principle No. 18 of the Basel Principles on the Prevention of Criminal Use of the Banking System for purposes of Money Laundering, 1988 and The Basel Committee on Banking Supervision: Core Principles of Effective Banking Supervision, 1988. The Basel committee on Banking Supervision is a group of Banking Supervisory authorities that was first established in 1974 by the Central Bank Governors of the Group of Ten Countries. Its objectives was to provide supervisory regulations and improve quality of Banking Supervision worldwide

cognizance of the fact that Anti- Money Laundering Directives are the central instruments through which the Bank of Zambia helps to monitor and prevent vices in the financial sector.

4.2 THE BANK OF ZAMBIA, ANTI-MONEY LAUNDERING DIRECTIVES OF 2004

In response to the exploitation of proceeds of crime particularly drug trafficking through the use of financial institutions, international banks agreed in October, 2000 to issue special Anti Money Laundering Guidelines for private banking. These Guidelines came to be known as the Wolfsburg Principles.²⁴³

In compliance with these Guidelines, the Zambian Government enacted the Prohibition and Prevention of Money Laundering Act, 2001. This was a way of domesticating these international guidelines against money laundering. The Prohibition and Prevention of Money Laundering Act, particularly in section 12(4) empowers the Bank of Zambia, as the Central Bank and Supervisory Authority to issue necessary guidelines to regulated institutions to prevent money laundering. By virtue of such powers the Bank of Zambia, issued regulations called the Bank of Zambia- Anti Money Laundering Directives, 2004.

The Prohibition and Prevention of Money Laundering Act of 2001, also places a statutory obligation on all organisations that qualify as supervisory authorities under section 2 of the Act to issue anti money laundering directives. It is on this legal basis that the Bank of Zambia issued the anti-money laundering directives, 2004. The Act provides that these directives may be shared with the Anti-Money Laundering Investigations Unit so that the Anti Money Laundering Unit vets and approves them.

Since all financial institutions are regulated by the Supervisory Authority, they are bound by the said directives, as all of them are mandated to comply with the directives which serve as a tool for preventing and detecting money laundering. The Bank of Zambia Anti Money Laundering Directives, 2004 in Directive 23 states that;

Any person who contravenes any of the directives under the Bank of Zambia Anti Money Laundering Directives, 2004 shall be guilty of an offence under Section 13 of the Prohibition and Prevention of Money Laundering Act, 2001.

²⁴³Held in Switzerland under the auspices of the International Monetary Fund (IMF), World Bank and other 50 leading International banks and their regulators from around the World, Supranational bodies and NGO's

The above provision in Section 13 of the Prohibition and Prevention of Money Laundering Act, 2001 prescribes a penalty of a fine not exceeding 200,000 penalty units. As a general rule, the Bank of Zambia, Anti Money Laundering Directives, 2004 apply mutatis mutandis only to Banks and financial institutions regulated and supervised by the Bank of Zambia.

4.2.1 THE SCOPE OF THE BANK OF ZAMBIA ANTI MONEY LAUNDERING DIRECTIVES, 2004

The Bank of Zambia, Anti Money Laundering Directives of 2004 were issued by the Bank of Zambia in exercise of the powers contained in section 12(4) of the Prohibition and Prevention of Money Laundering Act, 2001. The purpose of these Directives was to ensure that banks and other financial institutions play their role in the enhancement of measures to prevent and detect money laundering and related activities. These Directives provide a well structured system designed to curb money laundering. This is the key feature and purpose upon which these Directives were premised. The authority of the Bank of Zambia under these Directives is asserted in Directive No. 4 which states that:

“The Bank of Zambia shall be the supervisory authority for the purpose of giving effect to these Directives”

In order to effectively combat money laundering, the Bank of Zambia as a Supervisory authority has, through these Directives, created obligations and procedures to be adhered to by regulated institutions. It is to these obligations that we now turn in subsections 4.2.2 to 4.2.9 of this Chapter.

4.2.2 The Customer Due Diligence and other Obligations

The Bank of Zambia Anti Money Laundering Directives, 2004 in Part Three provide the procedure to be adhered to by Reporting Agencies in ensuring Customer Due Diligence and other obligations. Specifically Directive No. 5 states that:

“A regulated institution shall put in place such anti money laundering measures and adopt such practices as are necessary for the detection and prevention of money laundering as set out in these Directives.”

These obligations are provided in Directive Number 6 to 14 discussed hereafter,

Firstly, the words ‘Customer Due Diligence’ are not defined under the Bank of Zambia Anti Money Laundering Directives, 2004 and the Prohibition and Prevention of Money Laundering Act, 2001 or any other law for that matter. However the Wolfsburg principles²⁴⁴ have described Customer Due Diligence to mean all those procedures and steps that must be taken in identifying the client and verifying their identity on the basis of documents, data or information obtained from reliable and independent sources. This includes identifying the beneficial owner who is not the Client, taking necessary steps and measures to prevent money laundering.

It is a legal requirement under the Bank of Zambia, Anti Money Laundering Directive, 2004 for a regulated Institution falling under the supervisory mandate of the Bank of Zambia to have in place anti-money laundering measures and adopt such practices as are necessary for the detection and prevention of money laundering.²⁴⁵

It is an obligation on a regulated institution to ensure that it requests its individual customers, opening accounts or conducting other business transactions with it to produce the following documents for identification purposes:²⁴⁶

- a) In the case of a Zambian national, a National Registration Card (NRC) or valid passport or driver’s licence; or
- b) In the case of a foreign national, a National Registration Card and a valid Passport with and where applicable, a duly issued and valid visa.

Research on the impact of this Directive reveals that it has been very progressive in detecting the perpetrators of money laundering. The Customer Due diligence procedure on all business transactions support the principle of Know Your Customer, which principle has been fully dealt with in Chapter Three. Though progressive, this directive has some flaws in that it does not contain specification as to whether or not the driver’s licence in issue, required to be valid at the time of presenting such identity or whether it is necessary that such licence needs to have been issued in Zambia. The same applies to foreign nationals, as one wonders whether or not a Zambian national registration card issued to a foreign national of permanent residence satisfies the requirements of the law.

²⁴⁴ Regulation 5

²⁴⁵ Directive No. 5 of the Bank of Zambia Anti Money Laundering Directives, 2004

²⁴⁶ Regulation 6

If the questions we are asking are valid, it would be necessary to address the identification flaws in order to prevent the possibility of perpetrators of money laundering from taking advantage of loopholes in the law. The failure to seal such loopholes would defeat these well intended regulations against money laundering. Given that precision is a virtue of law, it is submitted that the same observations can be made on the requirement for customers to identify themselves by producing a visa. The question however that begs an answer is; are these visas for purposes of entry in Zambia or is it the intention that even visas for entry into other Countries would be acceptable for this purpose?

It is a requirement, under the Bank of Zambia, Anti-Money Laundering Directives,²⁴⁷ that any regulated institutions except for a bureau de change should identify the beneficial owner of an account opened with it and any person using remittance and safe custody facilities. This is to ensure sufficient traces of customer dealings with the bank through the Customer Due Diligence procedures. Compliance with this requirement makes it easy not only to trace, through records, the activities of a customer but also this helps to sustain the Know your Customer modalities of financial institutions.

However, where such regulated institutions fail to ascertain the identity of a beneficial owner of an account opened with it or the identity of a person using remittance and safe custody facilities, the regulated institutions should make a report to the Anti-Money Laundering Investigations Unit (AMLIU) for further action.²⁴⁸

The Directives further require that, with the exception of bureau de change businesses, any institutions regulated by the Bank of Zambia should establish clear procedures on how to identify a customer who applies to open an account through the internet or other electronic means, and should not permit a customer to establish a business relationship through this means unless the identity documents of the customer have been verified or confirmed.²⁴⁹

This Directive is also not clear or precise as to who bears the responsibility of verifying and confirming these documents. Is it the role of the Bank of Zambia as regulator or the regulated

²⁴⁷ Directive 6(3)

²⁴⁸ Directive 6

²⁴⁹ Directive 9

institution itself that should bear the responsibility of confirming and verifying the documents of the applicant for account opening?

The practice by regulated institutions in Zambia is that it is the regulated institutions that verify individual customers' names and addresses. The Institutions regulated by the Bank of Zambia have been verifying the names and addresses of their individual customers by any one or more of the following methods;

- a) Obtaining a reference from a professional, an employer of the individual customer, an introduction letter from a known customer of the regulated institution or a customary authority that knows the applicant, all of whom should have known the applicant for not less than one year.
- b) In case of non residents, obtaining references from the individual customer's foreign banks, where possible is required;
- c) Conducting a credit reference agency search or requesting an original certified true copy of recent council or applicable rates or utility bill receipts;
- d) Using one of the address validation or verification services on offer; or
- e) In addition to one or more of the above, doing all things that the regulated institution may deem necessary to verify the documentation submitted by the applicant.

The regulated institutions' over reliance on third parties to introduce clients to it is not satisfactory for purposes of Due Diligence Procedure and the Know Your Customer principle. This is very much so in those cases where third parties are not very well known to particular financial institutions. Even in the situations where new customers are introduced by third parties that threaten the establishment of the authenticity of such introductory letters. It is contended here that although a regulated Institution may choose to rely on third-party introductions, the onus of verifying the particulars of the client being introduced to the Bank rests and remains with the regulated institution itself.

In response to the flaws, it suggested that scrutiny mechanism by the Bank of Zambia to vet the 'Know Your Customer' and the 'Customer Due Diligence' standards of the regulated institutions be put in place. This would work as a mechanism to ensure that the regulated institutions are monitored to establish compliance.

The verification of Customer details or credentials or data is done in the form described with relation to non-corporate bodies. With regard to corporate bodies, the Bank of Zambia, Anti-Money Laundering Directives, 2004 provide that where a corporate body opens an account with a regulated institution, then that regulated institution should verify the legal existence of such corporation and identify the directors, the beneficial owners and the persons in the management of that corporate body.²⁵⁰ The regulated institution is required to collect the following information and documents for such corporations, prior to allowing them to open Bank Accounts²⁵¹

- i) A certified copy of the Certificate of Incorporation or its equivalent;
- ii) Details of the location of its registered office and place of business;
- iii) Details of the nature of the corporate body's business;
- iv) The reasons why such organisation wishes to open an account, the expected turnover and source of funds and a copy of the last available accounts, where applicable.
- v) Where there are more than one account signatories to the account, satisfactory evidence of the identity of all the signatories.
- vi) A certified copy of the Resolution of the Board authorising the account signatories.
- vii) A certified copy of powers of attorney, or other authority affecting the operations of the account given by the Directors in relation to the corporate body; and
- viii) Such other additional documents as the regulated institution may deem necessary for this purpose.

It is shown in this section that Customer Due Diligence is a fundamental measure that must be adhered to by all regulated institutions in order to promote the concept of Know Your Customer. The only challenge is that these Directives, as drafted, require clarification. I have indicated what changes could be made to the drafts to overcome the flaws.

²⁵⁰ Directive 8(1)

²⁵¹ Directive 8(2)

4.2.3 RECORD KEEPING AS AN OBLIGATION ON REGULATED INSTITUTIONS

Directive No. 10 of the Bank of Zambia, Anti Money Laundering Directives, 2004 makes it mandatory for all institutions regulated by the Bank of Zambia, including bureau de change institutions, to keep and maintain records by way of original documents in form of hard copies or by using electronic storage devices²⁵².

Directive No 10 states that a regulated institution shall maintain:

- a) a business transaction record for a period of ten years after termination of the business transaction; and
- b) Copies of identification records for a period of ten years after termination of the business transaction with the customer.

Where these records relate to an on-going investigation or business transaction, which has been the subject of a disclosure, the regulated institution should retain those records, for a period of ten years. This must be so in the case of an on-going investigation until the law enforcement agencies confirm that investigations have been closed or completed.²⁵³ These Directives envisage that the record referred to above shall be sufficient to permit a reconstruction of individual business transactions, including the amounts and types of currency involved so as to provide, if necessary, evidence for prosecution of criminal conduct.²⁵⁴

4.2.4 Reporting of Suspicious Activities and Transactions

The Bank of Zambia, Anti-Money Laundering Directive, 2004 makes it mandatory for all institutions regulated by the Bank of Zambia including bureau de change institutions to report to the Anti-Money Laundering Investigations Unit any suspicious activities by any of its customers.²⁵⁵

²⁵² Directive 10(2)

²⁵³ Directive 10(3)

²⁵⁴ Emphasis mine

²⁵⁵ Directive 11(1)

The Directives also provide that a person making a suspicious transaction report or investigating such report or one in receipt of such report shall not disclose to an unauthorised person that such a report is being, has been or is about to be made.²⁵⁶

This by implication means that, an employee of an institution regulated by the Bank of Zambia should not disclose to a customer that the customer is being, has been or is about to be investigated for money laundering²⁵⁷ activities. This directive reinforces the statutory rule against tipping off suspected money launderers. The Directive requires that the employee does go ahead and report to a principal officer of the regulated institution or the Anti Money Laundering Investigations Unit any money laundering offence in which the third party is involved.²⁵⁸

It is thus a requirement under the Bank of Zambia, Anti Money Laundering Directives, 2004 that all employees of regulated Institutions swear an oath of secrecy before a Commissioner for Oaths.²⁵⁹

Directive No. 11(3) of the Bank of Zambia Anti Money Laundering Directives, 2004 states as follows:

“A regulated Institution shall ensure that all its employees swear an Oath of Secrecy to be administered by a Commissioner for Oaths.”

The underlying objective behind this directive is to reduce the prospects or likelihood of employees tipping off suspected money launderers. The Oath is also necessary for attaching credibility to money laundering investigations in order to prevent tipping-off of suspects who are the subject matter of an investigation.

The Bank of Zambia Anti-Money Laundering Directives, 2004 and the Prohibition and Prevention of Money Laundering Act, 2001 do not define what amounts to suspicious activities. The Directives also do not explain the procedure of reporting suspicious transactions to the Anti Money Laundering Investigations Unit. The question that begs to be answered is whether such reports must be forwarded in hard or electronic copies and whether a report on suspicious transactions can be forwarded by telephone, fax or

²⁵⁶ Directive 11(2)

²⁵⁷ Directive 20

²⁵⁸ Directive 11

²⁵⁹ Section 14 of the Prohibition and Prevention of Money Laundering Act, 2001 and Directive 11(3)

any instantaneous device. This Directive does not state who a Principal Officer is, for purposes of reporting suspicious transactions.

It is also observed that the option of reporting suspicious transaction reports observed by an employee either to the Principal Officer of the regulated institution or to the Anti-Money Laundering Investigations Unit is not very ideal because regulated institutions at times become interested parties. The bureaucracy of one reporting to the Principal Officer may also give room to tipping off the suspected money launderer.

The arrangement is faulty too in that it can also place the employee of a regulated institution in danger particularly having understood that money laundering is an organised crime. It is submitted that there is need to reform this directive on this aspect as the employee can even lose his job or life for such reporting if discovered through the bureaucratic reporting of suspicious transactions to the principal officer of the regulated institution.

It is thus suggested that there is need to encourage Anti Money Laundering reporting officers of regulated institutions to report suspicious transactions to the Anti Money Laundering Compliance Officers of the regulating Institutions or the Anti Money Laundering Investigations Unit or the Financial Intelligence Centre, as the case may be, directly without having to report to their principal officers. Principal Officers in this case may mean branch managers, regional managers and other such officers in the regulated institution.

It is also suggested that all regulated Institutions must file daily transaction reports encompassing transactions above a particular threshold to be determined by the Bank of Zambia from time to time. This will in turn give the regulating authority chance to analyse such transactions without necessarily having to wait for the regulated institution to file the suspicious transaction reports on weekly, monthly and annual basis. This is so because, perpetrators of money laundering act swiftly to an extent that by the time such report is being filed, the funds would have already been removed to safe havens.²⁶⁰

²⁶⁰Safe haven are places where one can go and harbour their funds knowing that such places are safe with strict rules of protection and secrecy, such as the Bahamas. This is according to Wikipedia, free Encyclopedia.

It is suggested that the above measure if implemented, may help restore credibility in the fight against money laundering by enhancing transparency and oversight mechanisms. It may also help enhance compliance levels of the Bank of Zambia Anti Money Laundering Directives, 2004. There is need for the Bank of Zambia and all other financial institutions to conduct full Customer Due Diligence to help in the detection of suspicious or unusual transactions.

4.2.5 The Role of Money Laundering Reporting Officers in Combating Money Laundering

The Bank of Zambia, Anti Money Laundering Directives, 2004 in Directive No. 12 directs that a money laundering reporting officer should be a person at management level in the regulated institution. The functions of the Anti Money Laundering reporting officers shall be as follows:

- a) Keep a register of all reports made by employees of the regulated institution and of all reports to the anti money laundering investigations unit;
- b) On written request by the law enforcement agencies, i.e. give to them an acknowledgement receipt of the reports, from the Anti Money Laundering Investigations Unit and those made to money laundering reporting officers by employees of the regulated Institution; and
- c) After receiving a report in terms of Directive No. 13, promptly evaluate whether or not there are reasonable grounds for believing that a customer has been engaging in illegal activities or crime, and after such evaluation, the money laundering reporting Officer finds that such grounds exist, the money laundering reporting officers shall immediately report the case to the Anti Money Laundering Investigations Unit.

The significance of this directive lies in the fact that for the money laundering reporting officer to be effective and independent, such officer must be occupying a Management position. This is to ensure that such officer is protected from possible intimidation and harm from culpable members of the management team.

However, the challenge being faced by regulated institutions is that they are unable in most cases to employ qualified persons with requisite knowledge and expertise in anti-money

laundering activities. This challenge has mostly hampered the efficient fight against money laundering. It is suggested that regulated institutions must ensure that they provide adequate training to their employees on matters of anti money laundering. This is so because money laundering does not only affect the Government alone, but also impacts negatively on the financial Institutions themselves.

The point has been made that money laundering is a sophisticated crime that is extremely difficult to detect. Detection of money laundering has been complicated by the emergence of the worldwide web. The use of advanced Information and Communication Technologies has

paved way for money launderers to enhance their modus operandi. They have introduced complex laundering techniques which require employees of financial institutions and law enforcement officers to undergo regular intensive training on money laundering so as to remain and keep in tandem with these developments.

The use of the internet and hi-tech telecommunication systems which include electronic transfers across the world's financial systems has posed an obvious challenge that has also supported money laundering activities particularly in emerging economies and least developed countries which are usually the target of these launderers.

4.2.6 Requirement of Regulated Institutions to Co-operate with Law Enforcement Agencies

As a standard practice, all Institutions that are regulated by the Bank of Zambia, financial or otherwise are required to co-operate with the law enforcement agencies to facilitate the exchange of information relating to money laundering.

Furthermore, regulated institutions are under a legal obligation to abide by any law requiring the provision of information to law enforcement agencies to assist the agencies in conducting investigations.²⁶¹ In addition to that, Section 16(2)(a) of the Prohibition of Money Laundering Act, 2001 reinforces this provision by conferring immunity to officers reporting, investigating or prosecuting cases of money laundering.

²⁶¹ Directive 15(1)

4.2.7 The obligation of the Board and the Anti Money Laundering Principal Officers of Regulated Institutions

The Bank of Zambia, Anti Money Laundering Directives, 2004 describe the functions of the Board and the anti money laundering principal officers of the regulated institutions.²⁶² This provision places a responsibility on these officers to put in place anti money laundering programmes. These programmes consist of anti-money laundering measures and practices that should be adopted in order to detect and prevent the offence of money laundering. The aforesaid anti-money laundering measures and practice must include the following:

- a) The development of internal policies, procedures and controls with regard to the risks posed by money laundering.
- b) The establishment of ‘Know Your Customers’ procedures, which should include knowing the customers business, establishing systems that would recognise suspicious activities and having in place internal reporting procedures of suspicious transactions;
- c) The appointment of money laundering officers;
- d) The establishing of a sound anti-money laundering compliance policy which should be reviewed by the regulated authority annually and approved by the Bank of Zambia;
- e) Procedures to be followed by directors, principal officers, officers and employees of a regulated institution in the conduct of business of the regulated institutions.
- f) Instructions given to directors, principal officers and employees of a regulated institution on the prevention of the use of the regulated institution for the purpose of engaging in activities of money laundering; and
- g) Training of directors, principal officers, officers and employees of a regulated institution for the purpose of enabling them to identify business transactions which may be related to the commission of the offence of money laundering²⁶³

²⁶² Directive 16(1)

²⁶³ Directive 16(2)

4.2.8 The requirement of staff training and other obligations of regulated institutions

The Bank of Zambia, Anti-Money Laundering Directives, 2004 require all regulated institutions to train their employees, irrespective of their level of seniority on money laundering and the significance of reporting any suspicious transaction to money laundering reporting officers of regulated institutions.²⁶⁴

The directive further provides that the regulated institutions in pursuance of this goal should seek assistance on training from the Anti-Money Laundering Investigations Unit. This will thus enable regulated institutions to come up with programmes for the training of their employees which courses must be adequate to cover detection and prevention of money laundering by the regulated institution.

4.2.9 The Role of External Auditors in Combating Money Laundering

In an effort to promote and maintain a safe and sound banking system, the Bank of Zambia has made provision for inviting independent external auditors to conduct a special audit of any institution regulated by the Bank of Zambia to ascertain the adequacy of the institution's anti-money laundering measures, practice and the enforcement thereof.²⁶⁵ It is provided that such special audit would be conducted at the expense of the regulated institution itself²⁶⁶ though from the above directive, it is not clear what expertise or qualifications that accounting or auditing firm must possess for it to act as external auditor of the regulated institutions.

It is suggested that the Bank of Zambia must not appoint any firm without anti-money laundering expertise to act as external auditor of a regulated institution. This is so because

²⁶⁴ Directive No. 22(1)

external auditing firms may not possess the necessary skill and expertise to audit a regulated institution.

Finally, the Bank of Zambia, Anti Money Laundering Directive, 2004 on Directive No. 22(1) requires that external auditors should report in writing to the Bank of Zambia any finding resulting from the audit of the regulated institution on its policy and anti money laundering regulations.

4.3 SUMMARY

The intention in this Chapter was to demonstrate the regulatory role of the Bank of Zambia and other financial institutions in the prevention and combating of money laundering. It has been shown that while the Bank of Zambia, Anti-Money Laundering Directive, 2004 was well intended in the prevention and combating of money laundering, it is evident that these Directives need to be revisited in certain areas as has been discussed.

The Chapter has also demonstrated that the Bank of Zambia as a Supervisory or Regulatory Authority of all financial institutions plays a pivotal role in the prevention and detection of money laundering in Zambia. The study also examined the role played by other financial institutions in combating money laundering. The study held a considered view that if fully executed the mandate of the Central Bank and other financial institutions can effectively contribute to the eradication of the scourge of money laundering in Zambia.

In Chapter Five, the research will discuss some of the international best practices of combating money laundering by conducting a comparative study upon which Zambia can draw lessons which may help it to effectively combat money laundering.

CHAPTER FIVE: THE INTERNATIONAL BEST PRACTICES FOR COMBATING MONEY LAUNDERING

5.1 INTRODUCTION

This Chapter discusses the international best practices for combating money laundering with a view of providing comparative information upon which Zambia may draw lessons in the fight against money laundering. It is hoped that the comparative materials, may be useful to the Zambian authorities for evaluating the strategies, policies and instruments adopted in the fight against money laundering. The purpose of discussing the best practices in combating money laundering at international level is aimed at demonstrating the economic impact of the problem of money laundering to the international community. According to the International Monetary Fund ²⁶⁷ global report on money laundering estimates that between \$ 800 billion and \$2 trillion dollars is laundered every year (IMF, 2003). This is the basis upon which this study delves in the international perspective of money laundering to give a clear picture to those in authority and those concerned to appreciate the gravity of the problem of money laundering in general.

To streamline the discussion, this Chapter will focus its attention particularly on the Eastern and Southern Africa Anti –Money Laundering Group (hereinafter ESAAMLG), the Financial Action Task Force (FATF) and the Basel Committee on Banking Supervision.

It must be stated from the outset that the fight against money laundering at international level has been reinvigorated by the terrorist bombing at the United States Embassy in Nairobi, Kenya. Calvin,²⁶⁸ explains that this terrorist attack was conceived from the Islamic terrorists group linked to *al Qaeda* network which funds the *al shabaab*.²⁶⁹ This writer discusses the problem of money laundering and terrorism. In his writing, Calvin states that money laundering and terrorism are both a new phenomenon in world order. The author laments the gruesome threat posed by these syndicates to the international community in particular the

²⁶⁷ Global Report 2003 on the IMF website

²⁶⁸ Calvin Lee Pacleb, B.S , International Money Laundering; A comprehensive review of financing of terrorism. (Washington DC: Longmans, 2006) 14

²⁶⁹ Al shabaab is a terrorist group operating in Somalia with network with other terrorist groupings. It is believed that these terrorist groups with links to al Qaeda raise their finances through drug trafficking, piracy or sea raids and launder such funds to finance their terrorist attacks. They are responsible for the political quagmire in Somalia, Syria and Afghanistan among other countries

world peace and security. As already alluded to in Chapter One the terrorist attack of 9/11 has set pace for enhanced international cooperation in the fight against money laundering. Terrorism in modern time cannot be separated from the offence of money laundering. This may also be seen from the writing of Gordema²⁷⁰ who evaluates the report of the Federal Bureau of Investigations (FBI) on the terrorism bombing of the United States embassy in Dar es salaam in August 1998 where over 10 people were killed while over 70 others were left seriously wounded. As already espoused by writers Calvin and Gordem, the problem of money laundering is no doubt linked to terrorism and other such predicate crimes such as human and drug trafficking which all have international dimensions as forms of organised crime. This is the reason why several countries and the international Community at large have come together in designing a number of initiatives to combat money laundering. Money laundering, as has already been explained earlier Chapters is a trans- nationally organised crime. The success therefore in combating money laundering and counter financing of terrorism more particularly depend on consented efforts by the international community as no country today can single-handedly win the fight against this scourge.

Incidental to the fight against money laundering and its related crimes, there has been a number of international treaties that have been signed by States in an effort to standardise international best practices for combating money laundering. These initiatives contain Regulations urging member States to enforce the agreed standards so as to prevent, detect and eradicate the crime of money laundering. As already alluded to in earlier Chapters, money laundering has been complicated by the global advances in technology, expansion of international trade and financial systems. These challenges put together has propelled money advancements and development of international organised crime which helps contribute to criminals' arsenal for laundering of funds. Due to the space available for purposes of this paper, we will limit the discussion to the three international best practices against money laundering outlined above. We now address the Eastern and Southern Africa Anti- Money Laundering Group (hereinafter called the ESAAMLG).

²⁷⁰ G. Gordema, Towards Effective Control of Money Laundering in Southern Africa: Some Practical Dilemmas in African Security Review, Vol. 11. No.1. 2002; 14

5.2 THE EASTERN AND SOUTHERN AFRICAN ANTI- MONEY LAUNDERING GROUP (ESAAMLG)

The ESAAMLG is a grouping of States in the Eastern and Southern Africa consisting of fourteen (14) member States, namely; Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. It was founded during the Council of Ministers and high level representatives in Arusha, Tanzania, on 26-27th August, 1999 and took effect in the year 2000. This international grouping was promulgated through a Memorandum of Understanding (MOU) in the year 2000 for the purposes of combating money laundering. The MOU was based on the experience of the FATF- style.

The International Regional Grouping was designed to render coordinated mutual support at the level of political governance in money laundering and terrorism financing. Since this research is on money laundering, this shall be my focus and deliberately overlooks the component of terrorism financing. The ESAAMLG Secretariat is located in Dar salaam, Tanzania.

5.2.1 THE OBJECTIVES OF THE ESAAMLG

A renowned writer on Money laundering, Charles Gordema²⁷¹ has asserted that laundering in the ESAAMLG was conceived to examine and monitor incidents of money laundering and its related offences at regional level. The international regional grouping aims at coming up with initiatives that would curtail organised crime that threaten the economic, political and security stability of the member Countries. The International Police reinforces the work of this grouping. The objectives of the ESAAMLG are based on the Memorandum of Understanding (MOU). The ESAAMLG was established to meet three objectives namely:

1. To ensure adoption and implementation of the Financial Action Task Force (FATF)'s Forty Recommendations against Money Laundering and Financing of Terrorism.

²⁷¹Profiling Money Laundering in Eastern and Southern Africa: Money Laundering Experiences, (London: Cambridge Press, 2004) 12

2. To ensure application of Anti Money Laundering measures to all serious crimes; and
3. To ensure implementation of any measures contained in the multilateral agreement and initiative to which the member governments subscribe for the prevention and control of money laundering or the proceeds of all serious crimes.

The study will consider each of these objectives of the ESAAMLG in turn.

Firstly, this regional grouping was designed to adopt and implement the Financial Action Task Force (FATF)'s Forty Recommendations against Money Laundering. The forty FATF Recommendations were adopted in 1989.²⁷² Since then these recommendations have set standards for international best practices against money laundering. Consequently, the ESAAMLG found it appropriate to adopt and implement the FATF Forty Regulations. Further, the member States of ESAAMLG agreed to implement the FATF Recommendations both at the levels of the regional grouping and at individual member States.

The Second objective of the ESAAMLG was to ensure application of Anti Money Laundering measures to all serious crimes. In doing so, the regional grouping has adopted measures for implementation by individual member States. This has been seen as an effective way of exchanging information against money laundering at international level. Through this regional grouping, member States are assured of mutual legal assistance and exchange of vital information against money laundering.

The third objective of the ESAAMLG was to ensure the implementation of any measures contained in the multilateral agreements and initiatives to which the member Governments subscribe for the prevention and control of Money Laundering or the proceeds of all serious crimes. This by implication means that the regional grouping will ensure development and review of the implementation of the national anti money laundering strategies so as to effectively contribute to regional policy formulation. In addition, the ESAAMLG ensures sustainable evaluation and monitoring of member States' compliance levels with international standards against money laundering.²⁷³

²⁷²www.eurasiangroup.org/esaamlg.phl visited on 27th May, 2014

²⁷³ESAAMLG Memorandum of Understanding, Anti Money Laundering Guidelines, Dar es salaam, Tanzania, 2000

The other notable features of the ESAAMLG in its objects are that the regional grouping is founded on strengthened multi-lateral cooperation and participation in the anti money laundering global environment. The regional grouping thrives on the consolidation of the regional anti money laundering capacity building, training and awareness raising programmes. The regional grouping also provides sustainable anti-money laundering advisory services to member Countries as a way of implementing international best practices and standards regarding the regulations of the Financial Action Task Force (FATF) and anti money laundering best practice standards.

In order to achieve these objectives, the ESAAMLG has adopted a number of strategies which include the establishment of an Asset Forfeiture Unit to effectively deal with freezing and confiscation of assets acquired through illegal means such as money laundering and terrorist financing. The regional grouping encourages member States to enact legislation which would enable Mutual Legal Assistance in the prosecution and related matters pertaining to the identification, freezing, seizure or confiscation of proceeds of crime. To achieve this objective, ESAAMLG encourages its member States to ensure effective supervision of designated Institutions. This may be achieved through effective law enforcement that should result in the restriction of assets suspected to have been illegally acquired through money laundering and, or terrorism financing.²⁷⁴

5.2.2 THE ORGANISATIONAL STRUCTURE OF THE ESAAMLG

The ESAAMLG as a regional grouping consists of three key bodies, namely;

1. The Ministerial Council (hereinafter called the Council)
2. The Task Force of Senior Officials; and
3. The Secretariat

The Council is the decision making body of ESAAMLG and consists of at least one representative from each member country. The Council annually elects a President and a Vice President. The Council's role includes approving the work programme for the following year, approving sources of funding and deciding on policy matters.

²⁷⁴ESAAMLG official website: <http://www.esaamlg.org>

The Task Force of Senior officials meets twice annually and is responsible for reviewing implementation of the approved work program, considers self and mutual evaluation reports on member Countries and makes recommendations on policy matters. The Secretariat on the other hand, performs the day to day activities of the Regional Grouping. It is responsible for convening international meetings for member states and the sensitization of the functionaries of the Grouping.

5.2.3 THE CHALLENGES FACED BY THE ESAAMLG

This regional grouping against money laundering and terrorism financing has been very innovative in combating trans-national organised crime and has been operating since the year 2000 when it was created by member States. Research conducted at the Institute of Defence and Security Studies in Lusaka revealed that from the time the Regional Grouping was founded, it has helped to reduce the trends of money laundering in the Region from US \$ 22 billion laundered between 2000 and 2001 to US \$ 7 billion in 2003. This is in accordance with the ESAAMLG Report of 2003 available on its website.

Even if this may be the case, this Regional grouping is facing a number of challenges in the implementation of their its desired objectives. Amongst the most notable challenges is the lack of a legal framework yet to guide the vision and mission statement of the ESAAMLG. This is so due to the fact that the regional grouping is faced with administrative and operational challenges. It is vital that the Regional grouping act swiftly by putting in place a regional legal framework to combat money laundering and its associated crimes. This is necessary to render policy direction to this very important international body.

During the research, it was also revealed that the other challenge facing this Regional body is low compliance levels to the Memorandum of Understanding by member States. This has been complicated by weak monitoring mechanisms by its Secretariat. In addition, the ESAAMLG lacks institutional capacity to effectively fight money laundering and counter terrorist financing. This challenge is complicated by uncoordinated efforts at regional and national levels in the implementation of the Financial Action Task Force's Forty Recommendations which constitute one of the core objectives for which the Regional grouping was promulgated in the year 2000.

The other challenges facing the ESAAMLG is that the region is a high risk area for organised crime and money laundering owing to lack of a legal framework for the effective control of

these activities. Except for South Africa, the sub- region has a weak financial sector which is under policed and the law enforcement agencies lack trained capacity and have poor or no facilities to detect economic crimes rendering the Countries vulnerable to these organised crimes. It is also noticeable that the law enforcement agencies in the SADC sub region are also technologically under resourced to contain with organised criminal groupings.

The study observed that the vision carried by the ESAAMLG in the fight against Money Laundering could be said to have been well intended. The view taken by the finding of the Research is that Money Laundering being a trans- national organised crime is best dealt with through cooperation at international level. There is therefore need for member States of ESAAMLG to redouble their efforts and enhance their Institutional and legislative capacity on Money laundering. The need to create a policy framework for implementation by member States in combating money laundering cannot be over emphasised. Thus Zambia can do well to adopt the stance of enhancing the fight against money laundering through domesticating and implementing the FATF Forty recommendations against money laundering being espoused in the objectives of the ESAAMLG.

5.3 THE FINANCIAL ACTION TASK FORCE (FATF)

The Financial Action Task Force on Money Laundering(FATF) which is also known by its French name, *Groupe d'action finance (GAFI)*, is an intergovernmental organisation founded in 1989 on the initiative of the G7 countries at a summit in Paris, France. This Organisation was formed as a response to mounting concern over money laundering. Recognising the threat posed to the banking system and other financial Institutions, the G7 Heads of State and Government and the President of the European Commission convened the Task Force from the G7 member States, the European Commission and eight other countries.²⁷⁵

The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the actions which had already been taken at national or international levels, and setting out the measures that still needed to be taken to combat money laundering. The FATF website further highlights that in April, 1990, less than a year after its creation, the

²⁷⁵ Official website of the FATF on <http://en.m.wikipedia.org> and [wiki/financialactiontakforce.org](http://wiki.financialactiontakforce.org)

FATF issued a report containing a set of forty recommendations which provide a comprehensive plan of action needed to combat money laundering.²⁷⁶

In October, 2004 the FATF published nine Special Recommendations, further strengthening the agreed international standards for combating money laundering, on what is commonly known as the 40+9 Recommendations. The FATF has expanded membership from the original 16 at inception to 28 in 1999. In the year 2000, the FATF expanded its membership to 31 and as at 2012, the FATF membership stood at 36 members.²⁷⁷ Today, the FATF recommendations are internationally endorsed as global standards for combating money laundering. With a total membership of over 130 Countries worldwide that have ratified these Regulations, the Regulations have won international acclaim which is endorsed by the International Monetary Fund and the World Bank.²⁷⁸ Therefore, these Recommendations are trend setters for international best practices against money laundering and its associated crimes.

The FATF since its establishment has been an inter-governmental policy making body with the role of developing and promoting effective anti- money laundering standards. The FATF focuses its work in three main activities. Firstly, the FATF has been concerned with the setting of international standards in the fight against money laundering by ensuring effective compliance with its Recommendations. Secondly, the FATF has also been concerned with member States' legal systems and their policies aimed at combating money laundering. Thirdly, the FATF has devised mechanisms aimed at prevention; detection and prosecution of perpetrators of money laundering that are to be applied both at national and international levels.

In order to effectively appreciate the FATF Recommendations, it is useful to understand that these Recommendations cover four broad areas. The areas covered by the FATF recommendations are; firstly, that member States must endeavour to establish legal systems that make provision for the criminalisation of money laundering and its related offences. Secondly, that member Countries must take measures to ensure that financial institutions put

²⁷⁶ Peter Reuter and Edwin M. Truman, *Chasing Dirty Money* (Washington DC: The Institute for International Economics, 2004) 23

²⁷⁷ Global Money Laundering and Terrorist Financing Threat Assessment (July, 2010) available at <http://www.fatf-gafi.org/document/51>

²⁷⁸ www.fatf-gafi.org

up measures to prevent money laundering and its associated offences. Thirdly, that member States should put in place institutional and other measures necessary for the purpose of combating money laundering. Finally, the FATF urges member Countries to work on promotion of international cooperation amongst member States by employing methods for rapid information exchange of financial data pertaining to suspicious transactions relating to money laundering.

5.3.1 THE OBJECTIVES OF THE FINANCIAL ACTION TASK FORCE

The objectives of the FATF were inspired by the desire of the G7 summit to respond to mounting concerns over money laundering and were designed so as to counter the threats posed to the banking system and financial institutions. The other factors that motivated the objectives of the FATF include the threat posed by terrorist networks such as the Al-Qaida following the September, 11th attack of 2001 that devastated the United States of America. The United States bombing according to the Central Intelligence Agency (CIA) Report, 2002 over the United States bombing findings, reveals that the terror attack had connections with money laundering activities which financed the terrorist attack. There was therefore need to set out goals in the FATF Special recommendations aimed at countering money laundering and financing of terrorism.

The FATF set out ten objectives as international best practices against money laundering and counter terrorism financing. The objectives of the FATF are to set standards aimed at promoting effective implementation of the regulatory and operational measures for combating money laundering and other related threats. This is necessary to guarantee the integrity of the financial systems both at national and international levels. The FATF is a policy making body which works to generate the necessary political will to bring about national legislative and regulatory reforms in the aforesaid areas. The FATF coordinates responses to threats against the integrity of the financial system and help ensure a level playing ground. The FATF also ensures assistance in the arrest and prosecution of perpetrators of financial crimes. This is done by ensuring seizure or restriction of property suspected to have been acquired through proceeds of crime by rendering mutual legal assistance to member States. The inter-governmental organisation also ensures effective regulation for prevention and detection of money laundering. This may be achieved by effective regulation and supervision of reporting agencies. The FATF also encourages

coordinated efforts in the fight against money laundering. This is aimed at protecting the international financial system from misuse.

5.3.2 Key Features of the Financial Action Task Force Recommendations against Money Laundering

The 40+9 Special Recommendations are the key feature of the Financial Action Task Force (FATF). The 2003 revised Recommendations that impact particularly on the fight against money laundering are the following:

1. States are encouraged to criminalise money laundering and enable authorities to confiscate the proceeds of money laundering;²⁷⁹
2. Member states are encouraged to implement relevant international conventions to prevent Money laundering;²⁸⁰
3. States must make provision and arrangements necessary for the detection of money laundering;²⁸¹
4. States are persuaded to implement the Due Diligence procedures (e.g., identity verification), record keeping and reporting of suspicious transaction reports requirement for financial institutions and designated non financial businesses and professions;²⁸²
5. States should establish a Financial Intelligence Unit to receive and disseminate suspicious transaction reports;²⁸³
6. States are encouraged to co-operate internationally in investigating and prosecuting Money Laundering through Mutual Legal Assistance and extradition of persons arrested for money laundering;²⁸⁴
7. Member states are encouraged to implement relevant international conventions to prevent Money laundering;²⁸⁵
8. States are persuaded to compel regulated institutions to maintain high standards of record keeping and reporting of suspicious transaction reports to designated authorities.²⁸⁶

²⁷⁹FATF Recommendation No. 1, 2 and 3

²⁸⁰FATF Recommendation No. 4

²⁸¹FATF Recommendation No. 26- 32

²⁸²FATF Recommendation No. 4

²⁸³ FATF Recommendation No. 5-12

²⁸⁴FATF Recommendation No. 36-39

²⁸⁵FATF Recommendation No. 4

This paper now addresses in detail the key features of the FATF Recommendations against money laundering. Firstly, States are encouraged to establish Financial Intelligence Units in their Countries for purposes of receiving and disseminating suspicious transaction reports,²⁸⁷ to relevant law enforcement agencies. In addition, member States are urged through these Recommendations to ensure that they co-operate at international levels in investigation and prosecution of money laundering through mutual legal assistance and extradition of persons arrested for money laundering.²⁸⁸ Furthermore, member states are encouraged to implement relevant international conventions to prevent Money laundering.²⁸⁹ This may be achieved through the State parties criminalising money laundering and enabling authorities to confiscate the proceeds of Money laundering.²⁹⁰ By so doing, perpetrators of money laundering and its related offences will be deprived from benefitting from their illicitly acquired properties.

Notably also, member States are persuaded to put in place provisions and procedures aimed at enhancing transparency for purpose of detection and prevention of money laundering.²⁹¹ As a sound mode of achieving the goal of transparency, member States are being urged to implement the Due Diligence procedures (e.g., identity verification), record keeping and reporting of suspicious transaction reports requirement for financial institutions and designated non financial businesses and professions.²⁹² All member States must endeavour to cooperate internationally in investigating and prosecuting money laundering through Mutual Legal Assistance and extradition of persons arrested for money laundering.²⁹³

The FATF recommendations encourage State parties to provide alternative remittances in their countries. This means that each country should take measures to ensure those persons or legal entities and their Agents that provide a service for transmission of money or value, including transmission through an informal money or value transfer system or network to be licensed or registered. This should be done subject to all the FATF recommendations that apply to banks and non financial institutions. In doing so, each Country should ensure that

²⁸⁶FATF Recommendation No. 4

²⁸⁷ FATF Recommendation No. 5-12

²⁸⁸FATF Recommendation No. 36-39

²⁸⁹FATF Recommendation No. 4

²⁹⁰ FATF Recommendation No. 1, 2 and 3

²⁹¹ FATF Recommendation No. 26- 32

²⁹²FATF Recommendation No. 4

²⁹³FATF Recommendation No. 36-39

persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

The FATF regulations also encourage member States to curtail money laundering through regulated wire transfers. A wire transfer may be defined as a method used to electronically transfer funds from one person or institution's account to another across a network of banks around the world.²⁹⁴

Through regulating of wire transfers, the FATF urges member States to take measures requiring financial Institutions including money remitters, to include accurate and meaningful originator's information. Such information must include name, address and account number on funds transfer and related messages that are sent. Thereafter, such record should be kept with the transfer or related message pertaining to the chain payment. The FATF advises States to take measures to ensure financial institutions including money remitters conduct enhanced scrutiny of and monitor suspicious transaction activity through fund transfers which do not contain complete originator's information such as those already outlined above.

The other aspect of FATF regulations deals with the monitoring of operations of non profit making organisations. States are encouraged to closely ensure that non profit making organisations are not used as conduits of money laundering and its associated offences. This is particularly common in least developed countries where non profit making organisations are used as vehicles for criminal activities. Such organisations usually target such countries knowing they have weak legislative and Institutional capacities of detecting money laundering activities.

Finally, States are persuaded to take measures to regulate cash couriers across their international borders. The FATF urges State parties to adopt measures that will help in detecting the physical cross- border transportation of currency and bearer negotiable instruments, including putting in place a declaration system or other disclosure obligations. In doing so, State parties are encouraged to ensure that effective and dissuasive sanctions are meted out to persons who make false declarations or disclosures. Where States have reasons to believe that the cash couriers or bearers of currency or negotiable instruments intend to use

²⁹⁴ FATF Recommendation No. 36

such funds for money laundering or related activities, they should in accordance with FATF special Recommendation No. 3 confiscate such currency or instruments.

5.3.3 Challenges faced by the FATF Member States and International Organisations

The member States and international organisations that subscribe to the FATF 40+9 special Recommendations face a number of challenges in satisfying these international best practices against money laundering. Research at the Institute of Defence and Security Studies has revealed a number of challenges faced by member countries.

The most notable challenges included Globalization. Globalization is defined as the process of international integration arising from the interchange of world views, products, ideas and other aspects of culture.²⁹⁵ Globalisation has created potential new risks as criminals and terrorists seek to penetrate the global financial systems. With the advent of electronic banking and electronic commerce, criminals have been changing tactics and techniques of laundering money through the financial systems. The use of advanced techniques such as telephone banking, internet banking and the use of visa debit and credit electronic cards have complicated the fight against financial crimes.

The other challenge faced by States in implementing the FATF Recommendations has to do with the proliferation of multiple financing arrangements. This alludes to the promotion of bureau de change and such other institutions responsible for electronic transfers such as Swift Cash, Western Union, Airtel money, Kazang money transfers and others. These institutions in some countries are used as vehicles for committing money laundering activities and related offences. This is more so because of weak monitoring mechanisms by the regulatory authorities, especially where they wait for reports of suspicious transaction from the same financial institutions. Financing institutions have shown resistance to the law requiring them to act as police officers for the regulatory authorities. The objectives of financial Institutions as business houses are to make profits for their shareholders and therefore reporting customers for suspected money laundering is the least of their interests. This attitude, to a great extent frustrates public policy against money laundering as envisaged and set out in the FATF Recommendations.

²⁹⁵Abdullah Y. Shehu, " Promoting Financial Sector Stability through an effective AML/CFT Regime" Journal of Money Laundering Control, Vol. 13 No. 2 (2010)

The other challenges in the fight against money laundering have to do with non adherence to the FATF Recommendations by member States. This mostly occurs as a result of lack of political will to domesticate these international best practices against money laundering. This challenge is perpetuated by weak legislative and institutional framework against money laundering. As a result of this loop-hole, Money launders have been targeting such countries in their illicit activities.

The study in shown that the FATF is indeed an inter-governmental policy making body with a primary role of developing anti money laundering regulations intended to thwart and counter the threat posed to the banking system and other financial institutions globally. It could be said in this regard that Zambia has made a number of strides in terms of regulating threats posed by money laundering activities as set out by the FATF Recommendations. For example, Zambia has enacted the Forfeiture of Proceeds of Crime Act²⁹⁶ which is in conformity with FATF Recommendation No. 3 which provides for measures for the confiscation of proceeds of money laundering. In addition, Zambia has made progress by meeting nearly all FATF Recommendations which are too numerous to outline.

With the conclusion of the FATF discussions, the dissertation now discusses the Basel Committee on Banking Supervision which provides the core principles of effective banking supervision.

5.4 THE BASEL COMMITTEE ON EFFECTIVE BANKING SUPERVISION

The Basel Committee on Banking Supervision (hereinafter referred to as the Committee) is a brain child of the Central Bank Governors of the G10 Countries established as a Committee on Banking Regulations and Supervision Practices.²⁹⁷ This Committee was formulated in 1974 in a city called Basel, in Switzerland as a response to challenges in the banking sector at international level following closures of several important banks on the basis of incurring huge losses. This posed a threat to the banking community who needed protection from regulatory authorities. This then prompted the need to have standardised policies and regulations in the banking sector both at national and international levels.²⁹⁸ Research has revealed that some banks genuinely closed after incurring huge financial losses resulting from

²⁹⁶ Act No. 19 of 2010

²⁹⁷ Dieter Kerwer, Standards and Global Regulation in the banking sector, (US) vol. 18, Issue No. 4, 616

²⁹⁸ Facts Sheet, Basel Committee official website on www.bis.org/bcbs/history.htm

foreign exchange losses through international currency devaluation. Some banks closed as a result of abuses of the banking industry through money laundering activities and its associated crimes such as bank fraud and cyber crimes. There was therefore urgent need to provide a framework of standard banking guidelines to bring about international banking regulations to foster integrity in the banking system.²⁹⁹

The Basel Committee on Banking Supervision therefore was designed as a forum for regular co-operation with its member countries on banking supervision matters. Its aim was and is to enhance financial stability by improving supervisory knowhow and the quality of banking supervision world-wide. The Committee seeks to achieve its aims by setting minimum supervisory standards for all reporting agencies in the financial sectors of the economy. This is to ensure and guarantee integrity in the banking sector. Besides that, the Committee seeks to ensure that the banking sector must not be used as conduits or vehicle to perpetrate illicit activities such as money laundering and financing of terrorism. The Basel Committee also wishes to improve the effectiveness of the techniques for supervising international banking business. In doing so, the Committee encourages exchange of information between national supervisory authorities and engagement on challenges facing the international financial system.

5.4.1 The Objectives of the Basel Committee on effective Banking Supervision

The Basel Committee on Banking Supervision is a forum for regular cooperation on banking supervisory matters. Its objectives are to enhance understanding of key supervisory issues and improving the quality of banking supervision worldwide. The Committee also frames guidelines and standards in different areas particularly on the Core Principles for effective banking supervision. The Basel Committee on effective Banking Supervision is responsible for the formulation of broad supervisory standards and guidelines pertaining to best practices in banking supervision. It is from there that member Authorities and States are expected to take steps to implement them through their own national systems, whether in statutory form, administrative or otherwise. The other objective of the Basel Committee on Banking Supervision is to encourage convergence towards common approaches and standards. It must be understood that the guidelines issued by the Committee are not binding on member States

²⁹⁹ Emphasis mine

and their Authorities. Nonetheless, the guidelines developed by the Basel Committee are still important as best practices in banking supervision.

5.5 THE ECONOMIC IMPACT OF MONEY LAUNDERING AT INTERNATIONAL LEVEL

The impact caused by money laundering has been a subject of debate by writers in the subject of money laundering. It is however agreed that money laundering suffocates the health of financial institutions and the political stability of nations. As already demonstrated, the situation depicting the effects of money laundering and terrorism financing in Somalia, Syria and Afghanistan, money laundering no doubt affects political and institutional governance of particular states. We are fortified in this position by the United Nations, in their Declaration and Action against Money Laundering which made this threat clear by stating (United Nations website, 1998):

The laundering of money derived from illicit drug trafficking, as well as from other serious crimes, has become a global threat to the integrity and stability of financial and trading systems. The international community must work together to stop these practices to protect itself and to deny drug traffickers their ill gotten gains.

However, according to the United States of America, Department of State, there are seven, main consequences an economy faces when confronted with money laundering (Mcdowell,2001). Mcdowell explains that money laundering undermines the legitimate private sector in that criminals will use front companies to launder illicit funds and mix legally obtained money with illegal cash. This is done in order to disguise their true source of funds. Due to the criminal's ability to draw on these excess funds, they are able to subsidize their products, offering them at below market value. It is observed that launders are even able to offer their products at prices below the manufacturer's cost. Like already observed in earlier Chapters on the effect of money laundering at national level, similar dimensions apply even at international levels. The effects of money laundering on the economy are somewhat similar.

As a consequence of unfair competition in trade, the front companies have a competitive advantage over legal enterprises that borrow capital from the capital markets, making it extremely hard for these legitimate companies to favourably compete with front companies. The resultant effect is the winding up of legitimate businesses which get crowded out by criminal elements on the market.

The effects of money laundering also arise as a challenge to the integrity of financial markets. This occurs in such a manner that criminals are known to possess large sums of money, and without notification to the bank, suddenly effects wire transfers causing liquidity problems which result in winding up of financial institutions.³⁰⁰ The effect of money laundering is also known documented as a being the main resultant effect for bank failure and premature closure.

The problem of money laundering compromises the economic policy of the affected state. As a result of large amounts of money laundered each year, these funds have the potential of creating an underground economy which has a tendency of distorting macro and micro finance dimensions. This in effect was propensity to dwarf the economic fibre of the countries concerned. The study also observes that as a result of the effect of money laundering on the economy the currency and interest rates are also negatively affected as money launderers move their assets from one place to another in order to escape detection. Money launderers are more concerned with concealing of their funds rather than to a market where their funds will yield a higher interest or returns. The study observes that money laundering distorts money demand and creates volatility in global capital flows. Money laundering escalates the inflation rates and sabotage economic development in the country where the scourge is prevalent.

The other noted effects of money laundering at international level are that the scourge promotes loss of government revenue. We note that the loss of government revenue are based on the fact that criminal proceeds are hidden to escape detection, governments are not able to tax the funds causing government to lose millions of dollars in revenue. It was also noted that money laundering also affects the nation in that it erodes the market confidence of a country in international trade.

5.6 SUMMARY

It has been demonstrated in this Chapter that the vision carried by the ESAAMLG in the fight against Money Laundering is evidence of a desire by member States to join hands in combating a very serious problem of money laundering. The position of ESAAMLG on

³⁰⁰ A wire transfer is an electronic funds transfer from one bank account to another usually done in the comfort of an office using an electronic devise such as a computer or via telephone or digital means

money laundering is informed by the view that money laundering is an organised trans-national crime which is tackled through co-operation at international level. This study has pointed out that there is need for member States of ESAAMLG to work together in order to enhance their institutional and legislative capacities in combating money laundering. The need to create a policy framework for implementation by member states in combating money laundering has also been stressed. The upshot is that a country like Zambia can do well to embrace strong measures espoused in the objectives of the ESAAMLG. On the other hand, this Chapter has also shown that FATF is another inter-governmental policy making body with a primary role of developing anti money laundering regulations intended to thwart and counter the threat of money laundering posed to the banking system and financial institutions of the world. Zambia has, through her activities and participation in the ESAAMLG, already made headway in regulating threats posed by money laundering as set out by the FATF recommendations.

It has also been shown in this Chapter that the Basel Committee on Banking Supervision has had a profound influence in formulating the best practices for effective banking supervision. The standards set by the Basel Committee have been accepted by many countries of the World including Zambia. The study has also discussed the effects of money laundering at international level. These effects help to encourage countries to effectively combat money laundering.

With what has been discussed in this Chapter and proceeding Chapters, the stage is set to draw the findings, conclusion and recommendations of this study in Chapter Six.

CHAPTER SIX: FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

The general objective of the study was to evaluate the efficacy of the legislative and institutional framework for combating money laundering in Zambia. In doing so, the study examined four specific objectives in a bid to investigate the general objective of the study. These specific objectives included having to evaluate the legislative framework for combating money laundering. The second specific objective was to examine Zambia's institutional framework for combating money laundering. In the third specific objective, the study examined some of the international best practices for combating money laundering. In the fourth specific objective, the study narrowed itself to the assessment of Zambia's compliance levels to the international practices for combating money laundering. The study is packaged in six Chapters with the first Chapter being the introductory part. In the introductory Chapter, the study among others considered the background of the Research, the statement of the problem and the rationale of the study. Further, Chapter One also discussed the methodology of the study and the literature review before concluding with a summary.

In Chapter Two, the study discussed *inter alia* the Concept of Money Laundering in Zambia and at International level. In this Chapter, the study also discusses the historical evolution of the problem of money laundering in Zambia. Also discussed are the various measures that the Zambian Government has put in place since 1980 in combating the problem of money laundering and its predicate offences. In Chapter Three, the study discusses the institutional and legislative framework for combating money laundering in Zambia. In this Chapter, we invaluablely among others discuss the various statutes and institutions mandated to combat money laundering in Zambia. Some of the prominent statutes discussed include the Prohibition and Prevention of Money Laundering Act and the Narcotic Drugs and Psychotropic Substances Act. As regards the law enforcement agencies, in the lime light of the study was among others, the Anti Money Laundering Investigations Unit and the Financial Intelligence Centre.

In Chapter Four, the study examines among others the role of financial institutions in preventing and detecting of money laundering syndicates. In this Chapter, the study discusses the role of the Bank of Zambia as the Regulator of financial institutions in combating the scourge of money laundering. The study thereafter in Chapter Five analyses the International

Best Practices for combating Money Laundering. In this part of the study, we discuss among others the Financial Action Task Force (FATF) which is one of the most comprehensive international conventions against money laundering and counter of financing of terrorism. We also discuss the Basel Committee on Effective Banking Supervision. This international convention is considered the best mechanism by banks at national and international level in the fight against money laundering and counter of terrorism financing. The guidelines of the Basel Committee are today considered pivotal and key in wiping out money laundering syndicates by financial institutions. The study sets the conclusion in Chapter Six and further discusses the Findings, Conclusion and the Recommendations of the study.

The study considered that the objectives of the research were met. This may be as evidenced by the findings contained in the conclusion. The study outcomes were however not without challenges as most law enforcement agencies were generally unwilling to avail data and files pertaining critical information particularly on statistics of convictions and prominent money laundering cases. The reasons advanced for the restriction were *inter alia* that of public policy and national security concerns. We are particularly indebted to the office of the Auditor General of Zambia, the Anti Money Laundering Investigations Unit and the Financial Intelligence Centre. These are among the seven (7) law enforcement agencies that were surveyed during the study.

6.2 FINDINGS

The study has established that the problem of money laundering is known to have evolved from the illicit disposal of proceeds of crime, particularly, drug trafficking. In Zambia, the problem of money laundering first came to the lime light in 1980. The study also established that in response to the ‘*drug boom*’ syndicate, the then President of the Republic of Zambia constituted a Commission of Inquiry which was called the ‘Justice Matthews Chaila Commission’ with a view to establishing the extent of the problem of drug trafficking and money laundering in Zambia. The findings of the Justice Matthews Chaila Commission of 1985, established that there were a number of persons of Zambian and foreign origin who were engaging themselves in drug trafficking and money laundering. It is on that basis that the President appointed an ad hoc body to combat the money laundering and drug trafficking problems. This law enforcement agency was known as the Special Investigations Team on Economy and Trade (SITET).

The study found that since then the Zambian Government has made a number of institutional and legislative reforms for the purpose of combating money laundering. The study found out that after the creation of SITET, an *ad hoc* body, the Government created the Drug Enforcement Commission as a permanent institution to regulate the problem of money laundering and drug trafficking. This institutional reform was supported by legislative reforms which saw the repeal of the Dangerous Drugs (Amendment) Act and its replacement by the Narcotic Drugs and Psychotropic Substances Act.

The institutional framework was further strengthened by the creation of the Anti Corruption Commission of Zambia, the Auditor General's office and the Anti Money Laundering Investigations Unit. The other institutions that were created for the purpose of combating money laundering through the illicit disposal of illegally acquired proceeds were the Financial Intelligence Centre and the Anti Money Laundering Authority. Other institutions were given additional powers to deal with money laundering. These include the Zambia Police Force, the Bank of Zambia and the new National Prosecutions Authority. This Institutional framework is supported by various pieces of legislation as already alluded to above.

It is therefore the finding of this study that Zambia has an adequate institutional and legislative framework for combating money laundering and related vices. The only challenge lies in the interface of such institutions with one another in the fight against money laundering. It was the findings of this study that there has been lack of political will to create an independent and autonomous Anti Money Laundering Investigations Unit. The interface of the Anti Money Laundering Investigations Unit with the Drug Enforcement Commission has reduced the efficacy of the Unit in the fight against money laundering. The Study established that the Anti Money Laundering Investigations Unit receives funding through the Drug Enforcement Commission. Further that the Anti Money Laundering Investigations Unit is headed by the Commissioner who is also the Commissioner for the Drug Enforcement Commission. The study reveals that the aforesaid Commissioner serves at the pleasure of the appointing authority and can be dismissed for any reason or no reason at all. This state of affairs is undesirable considering the significance of this institution. The lack of protected tenure of office for the Commissioner of the Unit is a recipe for unprofessional conduct by the office bearers for fear of loss of employment.

The study also found that the Anti Corruption Commission of Zambia has gone through a number of legislative reforms since 1980. It now suffices to state that the Anti Corruption Commission has been a strong instrument in combating corruption, a crime that is a twin offence with money laundering. The only challenges observed during the study pertain to bureaucratic reporting procedure of corruption cases which require authority of the Director General of the Commission in order to conduct a surveillance or arrest of the perpetrator of corruption. Further the Study found out that for there to be prosecution of a perpetrator of corruption, the Director of Public Prosecutions must sanction such prosecution. This state of affairs is undesirable in the promotion of autonomy of this vital agency of Government.

As regards the Auditor General's office, the study found that this office has played a pivotal role in combating abuse of public funds in governmental and quasi government institutions. The study established that this office has been instrumental in ensuring enhanced monetary and fiscal policy by spending agencies of Government. However, the study reported the lack of political will on the part of Government in ensuring that perpetrators of abuse of public funds are punished. The inertia extends to the Anti Corruption Commission, the Anti Money Laundering Investigations Unit for failing or neglecting to prosecute public officers cited in the Auditor General's Report. This state of affairs is responsible for the rampant abuse of public funds.

During this study, it was also found that the Drug Enforcement Commission has since inception in 1989 been instrumental in combating money laundering and drug trafficking. The study revealed that Zambia, the country once considered a major transit point for illegal drugs, has significantly reduced the rate of drug trafficking, through the Drug Enforcement Commission.

The study also found that the Drug Enforcement Commission's mandate was further strengthened and streamlined by the enactment of the Prohibition and Prevention of Money Laundering Act and other Acts which include the Forfeiture of Proceeds of Crime Act. The other pieces of legislation that reinforce the mandate of the Commission include the Mutual Legal Assistance in Criminal Matters Act and the Extradition Act.

It is thus evident from the above actions by the Zambian Government that there has been a desire on its part to combat money laundering and drug trafficking. The creation of a permanent agency of Government called the Drug Enforcement Commission with a specific

mandate of combating money laundering and drug trafficking may, as discussed above, be taken to further demonstrate the abundance of political will to deal with the problem.

Finally the study has found that Zambia has participated in the international grouping of ESAAMLG for the purpose of enhancing its fight against money laundering. The challenge that remains has to do with the implementation of the international best practices through domestication.

6.3 CONCLUSION

It has been demonstrated in this study that money laundering has been in existence in Zambia for a long time even before it became apparent to the Government that this crime was being perpetrated. The Zambian Government has undertaken various measures to fight the crime of money laundering and its associated offences through enactment of appropriate legislation and the creation of Institutions for the purpose of eradicating this crime.

It is therefore concluded that Zambia has sufficient institutions and legislative framework for purposes of combating money laundering. The challenge lies on the implementation and enforcement of these laws. It is clear that having legislation in place is one thing and implementation of such legislation is yet another thing. There is need to increase funding to the institutions mandated to combat money laundering and its associated crimes in Zambia. Further, that all institutions must be left to operate in an autonomous manner so as to enhance and strengthen their roles in combating this vice.

Notably also, there is need for a deliberate policy to retain staffing levels in these institutions by motivating these officers to prevent the possibility of their being engaged in criminal activities or seeking 'greener pastures'. The need for professional training in these institutions cannot be overemphasised. As Zambia undertakes her Legal and Justice Reforms, this is the appropriate time to take these proposals into consideration.

There is need also for enhanced collaboration amongst the law enforcement agencies to eradicate duplicity of action. This collaboration must also be sustained with foreign designated authorities mandated to combat money laundering. This is on the premise, that money laundering is a crime with global dimensions committed in an organised manner.

The study has also concluded that the Bank of Zambia as a Supervisory Authority of all financial institutions must continue to play a pivotal role in the prevention and detection of money laundering in Zambia. However this effort must be redoubled.

It was evident during the study that the ESAAMLG is a very progressive regional grouping in the fight against Money Laundering. There is need for member States to continue to do more and prioritise the fight against combating money laundering. The position of ESAAML on money laundering is informed by the view that money laundering is a trans-national organised crime which is tackled through co-operation at international level. There is need for member States of ESAAMLG to continue to work together in order to enhance their institutional and legislative capacities in combating money laundering. There is every need now than ever before to create a policy framework for implementation by member States in combating money laundering. The upshot is that a country like Zambia can do well to embrace strong measures espoused in the objectives of the ESAAMLG. On the other hand, the FATF as another inter-governmental policy making body with a primary role of developing anti money laundering regulations intended to thwart and counter the threat of money laundering posed to the banking system and financial institutions of the world. Zambia has, through her activities and participation in the ESAAMLG, already made headway at regulating threats posed by money laundering as set out by the FATF Recommendations.

The Basel Committee on Banking Supervision, as already alluded to, has had a profound influence in formulating best practices for effective banking supervision. The standards set by the Basel Committee have been accepted by many Countries of the World including Zambia. With what has been discussed in the proceeding Chapters, I conclude that Zambia will do well to domesticate the recommendations of these international best practices against money laundering.

6.4 RECOMMENDATIONS

6.4.1 It is recommended that measures be taken urgently to address the many challenges facing the institutions mandated to combat money laundering in Zambia. There is need to create a fully fledged and autonomous Anti-Money Laundering Investigations Unit with its own head as envisaged by the empowering statute. This

will go a long way in the fight against money laundering which threatens the economic development of emerging States such as Zambia.

6.4.2 It is further recommended that the officers of the Anti-Money Laundering Investigations Unit be allowed to enjoy protected tenure of office just like the Office of the Auditor General of Zambia. This will help in promoting professionalism in the operations of the Unit.

6.4.3 It is also recommended that the Treasury should fund the Unit directly to enhance its operational efficiency.

6.4.4 There is need to improve the conditions of service for the officers working under the Unit to halt the high staff turnover.

6.4.5 Further, it is submitted that the Unit should be provided equipment embracing modern technologies to enhance its efficiency.

6.4.6 As regards the Office of the Auditor General of Zambia, we recommend that the law enforcement agencies should act decisively on the Annual Reports to curb continued rampant abuse of public funds. In the alternative, it is the considered view that the Auditor General's office be conferred with prosecution powers just like in Lusophone countries to deal with erring public officers. This is necessary in order to save the much desired public resources from abuse.

6.4.7 The Anti Corruption Commission of Zambia is yet another important agency of Government in the fight against economic crime. We recommend that the Commission be empowered to act on matters of public interest even if there is no particular individual who has submitted a complaint to them. This study observed that the Anti Corruption Commission has displayed a *laissez faire* attitude in the area of following up reports of graft particularly those involving maintaining a living beyond the income threshold. It is recommended that the Commission be motivated to do more in ensuring integrity in public service delivery. This may be achieved through reduced bureaucratic procedures and protection of whistle blowers.

6.4.8 As regards the Financial Intelligence Centre, It was found that it is not operational several years after its creation. It is recommended that this very important

agency be made operational to enhance the fight against money laundering and comply with international standard best practices against money laundering.

6.4.9 Finally, it is recommended that Zambia does take every step necessary to enhance the institutional and legislative framework against money laundering by attaching sufficient political will. This is necessary to overcome the bottlenecks observed in this Study. It is vital that Zambia acts to domesticate international best practice against money laundering in order to stand in solidarity with the international community in the fight against money laundering. Zambia will do well to continue its participation at international level in all measures intended to enhance the fight against money laundering.

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