The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries

NORMAN MUGARURA

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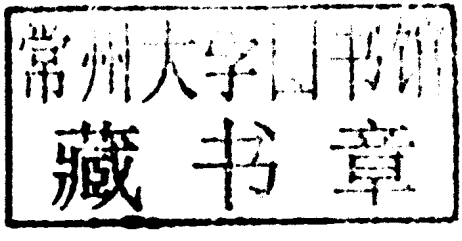

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List of Abbreviations

AIDS	acquired immunodeficiency syndrome
AML/CFT	anti-money laundering/combating the financing of terrorism
ARS	alternative remittance systems
BCCI	Bank of Credit and Commerce International
BIS	Bank for International Settlements
CDD	customer due diligence
CJA	Criminal Justice Act
CTAG	Counter-Terrorism Action Group
CTC	Counter-Terrorism Committee
EAC	East African Community
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EDU	European Drug Unit
EEC	European Economic Community
EFTs	Electronic funds transfers
EU	European Union
EUROPOL	European Police Office
FATF	Financial Action Task Force
FDI	foreign direct investment
FIU	Financial Intelligence Unit
FSAP	Financial Sector Assessment Programme
FSF	Financial Stability Forum
FTR	Financial Transaction Reporting
GDP	gross domestic product
HIV	human immunodeficiency virus
ICT	information and communications technology
IFIs	international financial institutions
IGG	Inspector General of Government
ILO	International Labour Organization
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
IOSCO	International Organization of Securities Commissions
KYC	know your customer
NCCT	Non-Cooperative Countries or Territories
NCIS	National Criminal Intelligence Service
NGOs	non-governmental organizations
NRM	National Resistance Movement
OAS	Organization of American States

OECD	Organisation for Economic Co-operation and Development
OFCs	offshore financial centres
OGBS	Offshore Group of Banking Supervisors
POCA	Proceeds of Crime Act 2002
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
SIS	Schengen Information System
SOCA	Serious Organised Crime Agency
TI	Transparency International
UCB	Uganda Commercial Bank
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDCP	United Nations Drug Control Programme
UNDP	United Nations Development Programme
URA	Uganda Revenue Authority
WTO	World Trade Organization

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Foreword

The book has been precisely written to strike a balanced approach to the study of money laundering in the asymmetric global marketplace. It underscores the importance and challenges of harnessing a global anti-money laundering framework, taking into account the dynamics of development in less developed economies. In conceptualizing the need for a global anti-money laundering framework, the book highlights a dichotomy of challenges. First, there are challenges in relation to the dynamics of the market economy such as deregulation, liberalization and conflict of laws. Secondly, there are challenges inherent in the domestic economy such as corruption, general systemic failure and lack of infrastructural capacity. In deconstructing the aforementioned challenges, the book delineates a need to consolidate the existing global anti-money laundering/ combating the financing of terrorism (AML/CFT) framework so that it is capable of delivering the envisaged AML/CFT standards globally. For the global anti-money laundering framework to work globally, it should be designed with an ethos which reflects the prevailing global climate in which it operates.

While the book proffers insights into money laundering and its predicate offences, it also discusses the infrastructure that facilitates money laundering and a wide range of predicate offences. The thrust of the book is that the global anti-money laundering framework cannot translate locally into practice unless it creates something of a level playing field for the member countries subject to it. Apparently, the playing field is not leveled, which potentially plays in favour of some countries while undermining the ability of others to harness the prescribed global anti-money laundering regimes. The precarious environment in some countries is manifested in the absence of local capacity building, the prevalence of corruption and the absence of tailored reforms to pertinent and novel challenges in particular countries. Thus, the book proffers an alternative approach for further studies and policy development on money laundering, fronted on well-sequenced reforms domestically and, where necessary, at a global level. This approach is an essential requirement, if not a prerequisite, in order for states to domesticate desired global anti-money laundering regimes. The proliferating global anti-money laundering regimes, desirable as they may be, are implemented locally and are inherently prone to the prevailing local environment. For instance, developing countries are deficient in economic and social infrastructure, and are constrained by limited resources and requisite education, not to mention the prevalence of corruption. The above challenges are compounded by a lack of institutional and structural capacity to harness global anti-money laundering standards locally. Similarly, the institutional and structural weaknesses in some countries have translated into an environment conducive to criminal exploitation, while diminishing the same

state's capacity to counteract new challenges, such as money laundering. In the majority of less developed economies, efforts towards harnessing global AML/CFT regimes are derailed by many factors, which it is perhaps needless to reiterate. In part, this predicament translates into an environment for criminal exploitation and renders societies vulnerable in confronting their common challenges. In view of the varying dynamics of development, this book wonders whether countries still need to be clustered together and treated as one or whether regions should forge different arrangements and simply coexist as different entities.

Thus, this book is an essential read for policy and intellectual reasons. In relation to policy, it underscores externalities of the global system on individual local societies. It articulates that in view of overlapping global exigencies such as money laundering and its predicate threats, countries have very little choice but to come together by way of harmonization of internal policies and adopting other common initiatives. For instance, there is a need for a common legal grid to enable countries to deal with conflict of laws and different jurisdictions, and also with regard to sharing resources such as intelligence information. Some states have been sidelined as a result of their participation in the globalization of markets and, in my view, this has been due to the fact that these states have failed to position themselves properly in the face of global changes.

At an intellectual level, the book proffers a scholarly alternative to the study of money laundering in a global regulatory landscape. It highlights the ethos of global AML/CFT regimes, articulating the challenges that this global framework has to confront. While the manuscript would have benefited from the author's earlier scholarly work, this was distinctly done to underscore the broader objectives for writing this book.

Preface

The book articulates that the global anti-money laundering/combating the financing of terrorism (AML/CFT) framework replicates global asymmetries of power in both approach and reality and cannot afford a level playing field to the majority of less developed countries. Globalization generally and the global anti-money laundering regimes specifically are information-driven, and the ability of societies at rudimentary stages of development to harness the potential synergies of the global system is significantly curtailed by the inefficiency of 'local societies' to harness meaningful information. In many developing countries, there are weak or no centralized data registry centres to process and supply data to AML/CFT agencies such as the Financial Intelligence Units (FIUs) and the police. Information is deemed to be meaningful if it is society-oriented and informed by the challenges facing the society in question. Information is the prerequisite for the effective enforcement of laws and regulations. Information is essential for the construction of the money trail, given that the money laundering process would have been executed in stages; however, requisite information is also essential for law enforcement agencies in order to secure a successful prosecution of the alleged money laundering/terrorist culprits. Without the requisite information, these agencies will not be able to function properly in enforcing the implementation of laws and in ensuring that when violations occur, they do not go unsanctioned.[1] I have deconstructed the global AML/CFT framework within the context of some domestic jurisdictions to demonstrate its limitations as a global framework.

The book illuminates the challenges to an effective global AML/CFT environment in some jurisdictions. The aforementioned environment potentially dictates the ease of harnessing normative global AML/CFT standards in a country. The AML/CFT control paradigms, which have evolved at the level of the Financial Action Task Force (FATF) or at a regional level (for example, the EU) and have been adopted by states as a regulatory framework, are difficult to apply, let alone enforce, given that the majority of these regimes function on the strength of generating good information on present and future bank clients. Similarly, in many developing economies, either there is no data generated to help quantify and evaluate the magnitude of money laundering/terrorism threats or the little data generated is too patchy to properly inform any policy choices. Underdevelopment and its attendant shortcomings have generated significant, if not insurmountable,

1 Ian Carrington and Heba Shams, 'The Elements of Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity', Seminar on 'Current Development in Monetary and Financial Law', Washington DC, 23–27 October 2006.

challenges for financial and law enforcement agencies in some countries with regard to developing requisite measures against both local and global-oriented crimes.

The last part of the book underscores the need for countries to first address their novel development challenges before they countenance the adoption of global regimes on money laundering and its predicate crimes. Individual countries will have to address the question of infrastructure deficiencies at home as a prerequisite for assimilating the desired anti-money laundering standards into their domestic law. As such, there is a need to co-opt some developing countries onto the committees charged with the responsibility of producing the global anti-money laundering standards to ensure that the proliferating regimes have an ethos not only of representivity but also of legitimacy in different societies.

Acknowledgements

In part, this book is a culmination of hard work, inspiration and the influence of people like John Strawson, Professor Mads Andenas, Professor George Walker, Dr Richard Alexander, Professor Kofi Oteng Kufuor, Dr Frank Byamugisha of World Bank Washington and Professor Mondo Kagonyera. I am thankful to each one of them for their contribution towards my academic and professional development.

I wish to pay tribute to my parents, who in those formative years impressed on me the importance of education to someone's life. The fact that I understood and internalized the education cause in my early years has instilled in me a sense of academic insatiability. I vividly remember being told that education is a platform where 'the son of a minister and the son of a peasant vie for the same office'. As a matter of fact, writing this book goes a long way towards fostering my early childhood dream.

As ever, I remain indebted to my family, friends and colleagues for their support and encouragement; and, most importantly, I thank God who is my anchor in all my aspirations. To cap it all, this book is a product of hard work, discipline and above all the innate desire to succeed. Perhaps finally I should say that I alone remain responsible for any errors and infelicities it might contain.

Contents

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Chapter 1
The Conceptualization of Money Laundering Offences and Typologies

Introduction

This chapter explores the genesis of money laundering and its underlying offences (hereinafter the money laundering predicate offences). Money laundering is an elusive concept that involves the illicit movement of funds generated from drug trafficking, human trafficking, terrorism, motor vehicle trafficking, etc. In view of this, this chapter addresses multiple issues such as the scope, nature and money laundering typologies.[1] Specifically, it outlines money laundering offences and why it is a preferred method of avoiding law enforcement, its strategies and techniques, and its relationship to other forms of crimes. Money laundering can be described as an opportunistic crime because not only does it 'lubricate the wheels' of other organized crimes, it is also exploited as a strategy to transmit the proceeds of crime to their destination and purpose. Thus, unless robust money laundering counter-measures are devised, it has the potential to fuel the commission of transnational organized crime such as terrorism, drug trafficking and human trafficking. Since money laundering is a transnational crime, its typologies are likely to differ from society to society.[2] Criminals in some countries might choose to launder their profits, while in others they might simply decide to spend them. In this regard, the explosion of corruption and counterfeit currency crimes in some countries constitute money laundering predicate crimes. Thus, the last part of this chapter addresses the nexus of corruption and money laundering within the broad context of money laundering predicate offences.

The Early History of Money Laundering

The term 'money laundering' is relatively new, having come into parlance in the mid-1970s. According to the *Oxford English Dictionary*, the term first came into use

1 Directive 2001/97/EC [2001] OJ L 344/76.

2 For example, tax evasion is a crime in the USA, yet not only is it perfectly legal in Switzerland, it is often encouraged in the quest to maximize shareholders' wealth and investors' returns.

in connection with the Watergate Scandal in 1973–1974.[3] It is derived from the early practice of American criminal organizations operating laundromats as cash-intensive businesses to hide their criminal wealth. It has become the accepted term ever since in relevant legislation and legal texts. It can be found, for example, in titles such as the US Money Laundering Control Act (1986) and the 1990 European Convention on Money Laundering, Search, Seizure and Confiscation of Crime Proceeds.[4] Money laundering was not criminalized in the USA until the passage of Money Laundering Control Act. The earliest legal development against money laundering took place in the USA with the passage of Bank Secrecy Act 1970.[5] This Act fully recognized the link between money laundering, including security fraud and the global dimension of the problem.[6] It required banks to report cash transactions of $10,000 or more and this provision was also enacted in the Money Laundering Act 1986, which for the first time defined money laundering as a federal crime.[7]

In the UK, money laundering was not a distinct offence but would be prosecuted under various statutes in the 1980s. Section 22 of the Theft Act 1968 provided the framework for the prosecution of launderers who dishonestly handled stolen assets. The most famous case to be prosecuted under this provision was the Brink's-Mat bullion robbery case. Michael Relton, a former solicitor, was successfully prosecuted under this provision of the Theft Act 1968. The concept of money laundering in the UK can also be traced back to the House Lords' decision in *R v. Cuthbertson* (1980).[8] This decision revealed the failure of forfeiture laws to deprive the offender of the proceeds of crime. The defendants were engaged in long-term criminal activity involving the supply of controlled substances. They are said to have generated over £750,000, some of which was placed in bank accounts in Switzerland and France. Pleading guilty, the defendants were convicted and the court ordered that their assets be forfeited. The defendant appealed to the House of Lords against the sentence and the forfeiture orders of their assets. The question of law presented before their Lordships was the interpretation of the Misuse of Drugs Act 1971 and the section on which the court was empowered to order the forfeiture of the aforementioned assets.[9] It was concluded that the powers of the court to order the forfeiture of assets did exist, but only as long as the asset in question was a tangible property and not choses in action such as cheques or other

3 Jeffrey Robinson, *The Laundrymen* (London: Pocket Books, 1998), quoted in Heba Shams' paper 'Using Money Laundering Control to Fight Corruption: An Extraterritorial Instrument', 7 *Law and Business Review of the Americas* (2001): 85–133.

4 Shams, 'Using Money Laundering Control to Fight Corruption'.

5 Ibid.

6 Ibid.

7 See the United Nations Drug Control Programme website: www.unodc.org (date accessed 22 November 2011).

8 [1980] 2 All ER 401.

9 Ibid.

intangibles.[10] In 1986 the Drug Control Act was passed, which was to consolidate confiscation orders of criminal assets by stripping criminals of the proceeds of their criminal activities. Section 24 of the Act creates an offence of assisting another to retain the proceeds of drug trafficking. However, to secure a successful prosecution, the defendant must demonstrate that he/she knew or suspected that the owner of the property has been engaged in drug trafficking or has benefited from drug trafficking.[11] Yet, s. 24 was only applicable in relation to the confiscation of the proceeds of drug trafficking, an issue that for some time confined money laundering to drug trafficking. This was later to be addressed by states following the adoption of United Nations (UN) instruments such as the United Nations Convention against Transnational Organized Crime in 2000 signed at Palermo (hereinafter the Palermo Convention).

The Definition of Money Laundering

Money laundering is defined as a process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.[12] Money laundering describes a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means. It is a three-stage process, which is as follows: (i) the dirty money must be severed from the predicate crime generating it; (ii) it must be characterized by a series of transactions designed to obscure or destroy the money trail in order to avoid detection; and (iii) the criminal proceeds must be reinvested in furtherance of the objectives of the business (launderer). In Article 3(1) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and other Psychotropic Substances (1988), states are required to enact legislation necessary to establish a modern code of criminal offences relating to illicit trafficking in all its different dimensions.[13] The scope of criminalization should cover a comprehensive list connected to drug trafficking – from production, cultivation and possession to the organization, management and financing of trafficking operations.[14] This article

10 Shams, 'Using Money Laundering Control to Fight Corruption'.

11 Ibid.

12 Ibid.

13 W.C. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Strasbourg: Council of Europe Publishing, 1999), p. 161.

14 D.P. Stewart, 'Internalising the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances', 18 *Denver J. International Law and Policy* (1990): p. 387.

requires each party to the Convention to establish money laundering as a criminal offence in its domestic law when it is committed internationally.[15]

In Article 3(1)(b), each state party is required to establish as a criminal offence:

> the conversion or transfer of property knowing that such a property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences, for purposes of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his action. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

Article 3(1)(c) provides that each party render as criminal: 'The acquisition, possession or use of property, knowing at the time of the receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences.'[16] Article 3 creates a framework for criminalization and treating money laundering as a serious offence, and would ease state cooperation in relation to confiscation, mutual legal assistance and extradition of alleged money laundering criminals. The Convention is particularly important because all parties are obliged to establish Article 3(1) offences as criminal offences in their domestic law.

Thus, money laundering involves the following when committed intentionally:

- The conversion and transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his/her action.[17]
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity.
- The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from criminal activity or an act of

15 For this, see Article 3(3), which says that 'knowledge, intent or purpose' required as an element of the offence may be inferred from an objective factual circumstances.

16 Gilmore, *Dirty Money*.

17 This definition derives from Article 3, s. 1(b) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, signed in Vienna (hereinafter the Vienna Convention).

participation in such activity.

- Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing indents.
- Knowledge, intent or purpose required for the commission of the above-mentioned money laundering activities should have been carried out in the territory of another state or in that of a third country.[18]

'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title or interests in such assets.[19]

The element of conversion is central to the study of money laundering offences because it marks the point at which illicit cash is turned into a less suspicious form, so that the true source or ownership is concealed and a legitimate source is created. A shortcoming of the Vienna Convention is that it was specifically limited to the laundering of the proceeds of drug trafficking. Following the Vienna Convention, a number of countries based their anti-money laundering laws on this framework, limiting the definition of this offence to the laundering of drug profits. Subsequently, there has been a move to extend the definition of money laundering to include the proceeds of other serious criminal activities, such as smuggling, fraud, serious financial crimes and the sale of stolen goods.[20] The 1996–1997 survey by the Financial Action Task Force (FATF) on money laundering measures noted that, along with drug trafficking, financial crimes (bank fraud, credit card fraud, investment fraud, advance fee fraud, bankruptcy fraud embezzlement, etc.) were the most mentioned sources of the proceeds of crime.[21] Many countries have now taken action to extend the scope of their money laundering offences to include a wider range of all predicate offences.

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18 This is the United Nations Drug Control Programme (UNDCP) definition of money laundering adopted from its anti-money laundering unit programme paper, 'An Overview of the UN Conventions and International Standards Concerning Anti-Money Laundering Legislation', February 2004.

19 Article 3, s. 1(b) of the Vienna Convention.

20 Rick McDonnell, 'Money Laundering Methodologies: International and Regional Counter-Measures', National Crime Authority, NSW, paper presented at the Australian Institute of Research in Sydney, May 1998.

21 'An Overview of the Global Money Laundering Problem: International Anti-Money Laundering Standards and the Work of the Financial Action Task Force', in Rick McDonnell, above, note 20.

The Extent of the Global Money Laundering Problem

Estimating the amount of money laundered has been recognized as problematic (if not impossible) because of the covert nature of the crime. However, some estimates have been developed which give the rough magnitude of the problem. In 1987, the UN estimated the value of drug trafficking worldwide at US$300 billion, much of which would be laundered. Other estimates[22] have been made which put the amount at between US$300 and US$500 billion of dirty money that is introduced into the global financial system each year, or roughly two per cent of global GDP.

The Outcome of Money Laundering

The definition of money laundering envisages several outcomes:

- The launderer intends to hide the existence of the wealth or its amount, as in the case of a tax evader who wants to shelter his/her wealth.
- He/she could also be intending to hide or disguise the owner of the generated wealth, as in the case of a drug lord who wants to obscure the money trail that might lead to his/her detection by severing the link between him/her and the funds through a shell company or a trust.
- He/she could be intending to hide the way it is put to use, where the money is intended for investment in a criminal or terrorist organization.
- He/she could be intending to disguise the origin of funds by fabricating another legitimate source of wealth.

The outcome of the laundering process depends on the purpose of the launderer himself/herself, as well as on the law and law enforcement in the jurisdiction where the activity is taking place.[23] The money launderer's chief objective is to reinvest the illegal wealth in another illegal enterprise by obscuring the ownership of the money or its trail to the illegal destination. Disguising the source and legitimizing it will be irrelevant when the launderer invests his/her wealth in jurisdictions which operate a lax approach to the illegality of funds.

Avoiding Law Enforcement

Any money laundering operation ultimately aims at circumventing law enforcement and evading the reach of the law. The purpose of the launderer is to

22 Rick McDonell, 'Regulatory Challenges for the 21st Century', paper presented at the Australian Institute of Criminology in Sydney, 7–8 May 1998.

23 B.A.K. Rider, 'Taking the Profits Out of Crime', *Journal of Money Laundering Control* (2001): pp. 2–3.

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