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Profiling Money Laundering in Eastern and Southern Africa

Edited by Charles Goredema

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ABBREVIATIONS AND ACRONYMS

AML	anti-money laundering
BOT	Bank of Tanzania
BWP	Botswana pula
CAG	Controller and Auditor-General
CCU	Commercial Crimes Unit
CFT	combating the financing of terrorism
CHIPS	Clearing House Interbank Payments System
CRDB	Co-operative Rural Development Bank
DRC	Democratic Republic of Congo
ESAAMLC	Eastern and Southern African Anti-money Laundering Group
FATF	Financial Action Task Force on Money Laundering
FEDWIRE	Federal Reserve
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001
FISFC	Financial Institutions Security and Fraud Committee
IFSCs	international financial services companies
IMF	International Monetary Fund
ISS	Institute for Security Studies
MLAC	Money Laundering Advisory Council
MLCO	Money Laundering Control Officer
MVTU	(Namibian Police's) Motor Vehicle Theft Unit
NAMCO	Namibia Minerals Corporation
NAMFISA	Namibia Financial Institutions Supervisory Authority
NDF	(Namibian) National Defence Force
NGO	non-governmental organisation
NOCZIM	National Oil Company of Zimbabwe
NORAD	Norwegian Agency for Development Cooperation
Palermo Convention	The United Nations Convention Against Transnational Organised Crime of 2000NDF

PCB	Prevention of Corruption Bureau
POCA	Prevention of Organised Crime Act 121 of 1998
POCB	Prevention of Organised Crime Bill
RAU	Rand Afrikaans University
SADC	Southern African Development Community
SADC Protocol	Protocol on Combating Illicit Drug Trafficking in the SADC sub-region
SAPS	South African Police Service
SARPCCO	Southern African Regional Police Chiefs' Organisation
SARS	South African Revenue Service
SWIFT	Society for Worldwide Interbank Financial Telecommunications System
TSh	Tanzanian Shillings
URA	Uganda Revenue Authority
ZRB	Zanzibar Revenue Board

ABOUT THE AUTHORS

Prince Bagenda is the Executive Director and research consultant of the NGO African International Group of Political Risk Analysis (PORIS) in Dar es Salaam. He has worked with various NGO structures in Tanzania and has been involved with projects that focus on corruption.

Louis de Koker is the Director of the RAU Centre for the Study of Economic Crime (CenSEC) and Professor of Mercantile Law at RAU University. Since 1998 he has presented various post-graduate programmes in international financial crime at the Levin School of Law of the University of Florida (USA) and Deakin University (Australia). De Koker is the author of the *KPMG money laundering control service* and a co-author of, among others, *Entrepreneurial law* and *Cilliers and Benade corporate law*. He is a member of the Editorial Advisory Committees of the *International Journal of Disclosure and Governance* and the *Journal of Money Laundering Control*, a South African editor of the international *Journal of Financial Crime* and a specialist editor on financial crime of *Amicus Curiae* (the journal of the Society for Advanced Legal Studies of the University of London). He is a fellow of the Society of Advanced Legal Studies (UK), an attorney of the High Court of South Africa and a member of the Money Laundering Advisory Council of South Africa.

Bothwell Fundira holds a B.Accountancy from the University of Zimbabwe as well as an MBA from the University of Warwick. He is a Fellow of the Chartered Institute of Management Accountants. Fundira has more than 21 years experience in the financial and banking sector and is familiar with a wide range of financial products, some of which could be abused for money laundering. He has written several papers on money laundering in Zimbabwe. Fundira serves as the Deputy Chief Executive of a large pension fund in Zimbabwe, where he is responsible for finance, human resources, administration and investments.

Ray Goba received his legal education in Zimbabwe and later in the United States at the University of Minnesota. After a spell as a prosecutor in the various levels of courts in Zimbabwe, Ray was appointed Chief Law Officer and Head of the Serious Economic Crimes Section in the Attorney General's Office in 1991. Between 1993 and 1994, he headed the prosecution, as Acting Director of Public Prosecutions. During that time, he successfully prosecuted the first money laundering case in Zim-

babwe under the Serious Offences (Confiscation of Profits) Act of 1990. He also participated in many investigations into bank and foreign exchange fraud, and sat on boards of inquiry into economic misconduct. Goba has retained a keen interest in money laundering control. In 1998, he moved to the Office of the Prosecutor-General for Namibia as Deputy Prosecutor-General. He prosecuted many major cases in the highest courts of Namibia. Since 2000 he has been the Deputy Government Attorney handling civil matters.

Charles Goredema is a Senior Research Fellow with the Institute for Security Studies in Cape Town where he specialises in research into money laundering, organised crime and corruption in southern Africa. He holds qualifications in law from the Universities of Zimbabwe and London and practiced law as a prosecutor in the Justice Ministry in Zimbabwe in 1983 before embarking on an academic career in 1987. He joined the Institute in August 2000 after teaching criminal justice law at the Universities of Zimbabwe, Cape Town and the Western Cape. He has published extensively in the spheres of criminal justice and human rights law.

George Kegoro is the secretary of the Law Society of Kenya. He graduated from the University of Nairobi with an LL.B in 1992. He then joined the public service in Kenya in the Attorney General's office, where he worked as a research officer in the Kenya Law Reform Commission, before joining the Law Society of Kenya as deputy secretary in 1995. Kegoro has been involved in anti-corruption work as part of the statutory mandate which the Law Society of Kenya has to advise the government and the public in Kenya on all matters relating to or ancillary to the law and the administration of justice. He has also consulted for Transparency International Kenya on wide range of issues relating to the fight against corruption. Kegoro is an advocate of the High Court of Kenya.

EXECUTIVE SUMMARY

No country can consider itself immune to money laundering. The concept has been defined as any process carried out in order to disguise or conceal the nature or source of, or entitlement to, money or property derived from criminal activities.

This monograph seeks to contribute to an appreciation of the dimensions of money laundering in the East and Southern African sub-regions. It was conceived of as part of a project to examine the incidence of money laundering in the countries which comprise the Eastern and Southern African Anti-Money-Laundering Group (ESAAMLG), namely Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Membership of ESAAMLG is formalised by signing a Memorandum of Understanding (MOU). At the time that the project commenced at the end of 2000, only nine of these countries had done so. By the end of August 2003, all countries had signed the MOU. This development can be regarded as an indication that at a political level, governments in the sub-region seriously intend to combat money laundering. The linkage between money laundering and the financing of terrorism has added to the urgency of adopting wide ranging initiatives against the concealment of, on the one hand, money originating from unlawful activity and on the other, money destined to support unlawful activity.

The contributions in this monograph do not purport to be detailed expositions of the entire subject. Furthermore, the chapters do not cover the entire sub-region. Space constraints compelled us to confine ourselves to an overview of the prevailing trends. The monograph thus consists of contributions on Kenya, Namibia, South Africa, Tanzania and Zimbabwe. Contributions on the rest of the sub-region will be published separately, through the web site of the Institute for Security Studies (ISS).

The overview in the following chapters is based on observations recorded during the first six months of 2002, by researchers commissioned by the ISS. The study

was premised on certain assumptions, whose validity is not discussed in detail. The key assumption is that money laundering is of strategic importance to organised crime generally, and to corruption in particular. A second assumption is that organised economic crime of one form or another exists in most of the ESAAMLG countries. Specific forms of organised crime, which have been linked to money laundering, include drug trafficking, armed robbery, tax evasion or customs fraud, exchange control evasion and vehicle theft. A third assumption is that serious corruption plagues virtually every country in the region.

The monograph commences with a profile of the region, presented by the Minister of Finance of Swaziland, Honourable Majozi Sithole, in a keynote address to a seminar on money laundering in the sub-region. He cautions that confronting the menace of money laundering is going to be quite a challenge in the sub-region, with its largely cash-based economies, its less developed and loosely regulated financial, business and intermediary sectors, its underground banking or money remitting services, and the gaps in its legal and law enforcement infrastructures and operational capacities. He advises that money laundering can only be fully addressed by countries collectively, as criminals operate without regard to national boundaries. Any weak links in the anti-money laundering chain will be exploited.

In the chapters that follow, the authors explore the areas of vulnerability in respective countries of ESAAMLG. In each case, the protective measures necessary to develop strategies against money laundering are discussed and existing infrastructure within the country is analysed against that background. A chapter by Interpol operative Jackson Madzima adds a police perspective on the issue of money laundering control. It is, in a sense, a precursor to a monograph currently under preparation discussing the capacity of the responsible sectors to detect money laundering.

Louis de Koker, Ray Goba, Prince Bagenda, Bothwell Fundira and George Kegoro have done a commendable job of bringing into the public arena some of the foremost issues facing the sub-region, and the world today. In the final chapter, Charles Goredema offers a portrait of the threat as it emerges from the various studies, by bringing together some of the findings and suggestions for innovation.

CHAPTER 1

TAKING ACTION AGAINST MONEY LAUNDERING

The Honourable Majozi Sithole

The issues of money laundering and underlying criminal activities, including the financing of terrorism, are real, as they affect our day-to-day socio-economic and political lives across the whole region. In fact, both of these things pose a threat to the quality and substance of our physical, social and economic well-being.

This publication, as part of the fight against money laundering, comes at a time when there are increased demands for review of the economic and commercial relationship between developed and developing countries, as the levels of poverty in the latter continue to worsen. It also comes at a time when there is perceived growth of organised crime, and a noticeable increase in the incidence of terrorist activities.

As we all know, 'money laundering' refers to the processing of criminal proceeds in order to disguise their illegal origin. The problems that stem from money laundering apply regardless of the type of underlying criminality. Money laundering comes in all forms and shapes. You have to recognise it early on. Dirty money is most visible when it is first introduced into the financial system. Once it is already in the system, it is more difficult to identify. An analogy would be the introduction of a drop of ink into a glass full of water.

While it is difficult to be sure exactly how large the problem is in the regional context, all recent estimates suggest that it involves billions of dollars annually. The Financial Action Task Force on Money Laundering (FATF) estimates the extent of global money laundering at two to five percent of world economic output. The interim findings of the ISS research project suggest a significantly large scale of money laundering in the ESAAMLG region (around US\$22 billion in 1998). We have yet to hear the final figures arrived at by the researchers.

I believe it would be in order to briefly recount some of the significant reasons why it is important to effectively fight money laundering and the financing of terrorism.

We all know that 'profit' (or the quick buck) is the prime motive of all serious crime. Money is also an effective tool for all serious organised crime, including terrorism. Failure to prevent money laundering and the financing of terrorism will allow criminals and terrorist organisations to further carry out their activities.

The events of September 11 2001 in the US emphasise, more than ever, the need for all nations to work together to implement effective measures against serious crimes such as money laundering and the financing of terrorism, and to prevent the misuse of the national and international financial system by such criminals. The recent killing of about 200 foreign tourists and the injuring of more than 300 others at the Indonesian resort of Bali should leave no doubt that no place in the world is now safe from terrorists acts.

The proceeds of serious crime have to be traced and prevented from falling into the hands of criminals and terrorists in order to deal a serious blow to the power of the enemies of humanity, thus reducing their ability to act. We must, therefore, stop money laundering and the financing of terrorism if we want to stop serious crime and global terrorism.

Money laundering has serious consequences if allowed to occur without preventive action being taken. The integrity of financial markets depends heavily on both the reality and perception that high legal, professional and ethical standards apply. If the proceeds of crime are laundered through a financial institution, or employees of the institution are corrupt or turn a blind eye to the criminal origin of funds, the reputation of the institution will be seriously damaged. This could affect the willingness of law-abiding customers and other institutions to deal with that institution, and could also affect the market as a whole.

Let me also caution our citizens about another form of money laundering, which can aptly be referred to as willful blindness. This arises when people, aware that a situation should be investigated, do not follow through, for fear of facing reality. For example, a salesperson has a customer who wants to buy a car for E100,000 (about US\$12 000). The customer produces a gym bag with

E100,000 in E20, E50 and E100 bills. Although this is unusual, and the salesperson's suspicion is aroused, the opportunity for a quick sale and hefty commission silences any questions that should be asked. By ignoring the key indicators of money laundering, an individual may have directly participated in such a scheme through willful blindness.

There are potentially serious negative economic consequences for a country and its government if it appears to allow itself to be used by money launderers. Studies conducted by the IMF have shown that money laundering can lead to inexplicable changes in money demand, increased prudential risks to the safety and soundness of the banking sector, a contaminating effect on legal financial transactions, and increased volatility of international capital flows and exchange rates. It can also lead to reduced levels of foreign direct investment if the country's commercial sectors are perceived to be subject to the control and influence of organised criminal syndicates.

There are also significant social costs if efforts are not made to counter money laundering. Money laundering, organised crime and economic crime are often integrally linked, and criminal organisations will use their profits to infiltrate or acquire control of legitimate businesses, and to bribe individuals and even governments. Over time, this can seriously weaken the moral and ethical fabric and standards of society, and damage the principles underlying democracy. One cannot rule out the possibility of criminals installing puppet governments by deploying the proceeds of crime to rig and win elections.

In today's open and global financial world, characterised by rapid mobility of funds and the introduction of new payment technologies, the fight against money laundering needs to be globally coordinated in a comprehensive manner. Money launderers seek the weak links in the chain, and the consequences for developing economies like ours can be extremely detrimental. Confronting the menace of money laundering becomes even more challenging in our region, with its largely cash-based economies, its less developed and loosely regulated financial, business and intermediary sectors, its underground banking or money-remitting services, and the gaps in its legal and law enforcement infrastructures and operational capacities.

Money laundering is something that can only be fully addressed on an international scale. Criminals operating without regard to national boundaries will always try to exploit the weaker links in the anti-money laundering chain.

Thus, countries and institutions which have not yet put into place the necessary protective measures may find themselves attracting the sort of businesses that prudentially regulated financial centres have turned away.

Seriously addressing these gaps to contain the adverse impact of money laundering is no longer an option for us, but a real necessity. We cannot afford to ignore or sideline these daunting issues without suffering the resultant consequences.

I would like to briefly share with you the ground we have been able to cover in the past three years of ESAAMLG's existence and the important tasks and challenges that lie ahead.

Our operating strategy involves a work programme that is reviewed and revised by the Council of Ministers as is deemed necessary. The first tasks of the group were as follows:

- setting up a register of national contact persons responsible for co-ordinating initiatives against money laundering and the financing of terrorism among stakeholders (legal, financial and law enforcement agencies);
- updating information on member countries' anti-money laundering (AML) systems and controls;
- completing self-assessment questionnaires on the 40 FATF recommendations on money laundering and the additional eight special recommendations on combating the financing of terrorism (CFT);
- collecting all national laws of member countries relevant to the AML effort;
- establishing standing subgroups on legal, law enforcement and financial issues;
- developing an internet website to publish information on AML within the group;
- developing links with local universities and research institutions;
- identifying research areas in AML/CFT;
- setting national targets on AML/CFT activities, with time frames; and
- co-ordinating technical assistance for the group.

In August 2002, the Council met and set the following targets for the year ahead:

- Complete the collection of the anti-money laundering laws and regulations for all members of the group and make them available in electronic form; review the laws and regulations to establish any gaps and develop a programme to consolidate them into comprehensive AML regimes for all jurisdictions.
- Complete the self-assessment forms for all members of the group and prepare reports for consideration by the Task Force and Council. The result of the self-assessment will form the input for initiating a process of mutual evaluation.
- Develop a programme of mutual evaluation, including selection and training of mutual evaluators; set the roster for mutual evaluation of all members; complete the mutual evaluation of two volunteer countries and prepare a report for consideration by the Council of Ministers.
- Initiate work of the regional legal, financial and law enforcement standing subgroups; form the subgroups and appoint their members; instruct the groups to hold their first meetings and report to the March 2003 Task Force meeting.
- Complete the signing of the MOU by those countries that have not signed, and collect contributions from all members.
- Launch the ESAAMLG quarterly newsletter in both hard and electronic form.
- Develop a profile of the training and technical assistance needs of member countries.
- Make the combating of financing of terrorism a permanent part of the agenda of the ESAAMLG.

To a very large extent, all the issues in the work programme have been implemented with varying degrees of success. Some of the issues in the programme are recurrent and those that had definite timeframes have been accomplished according to the timetables. The website has finally been launched and can be viewed at www.esaamlg.org. The Secretariat is now on the internet and some of this dialogue information was shared by e-mail. The most interesting development, in our view, was our interaction with the ISS, which is doing research on money laundering in the SADC region. The ISS and the funding agency

NORAD have kindly agreed to include Kenya and Uganda (non-SADC countries) in their research and share the results with us. NORAD has also agreed to fund an additional study on money laundering typologies as part of the same research project, in order to tie in with our mandate, for which we thank both the ISS and NORAD most heartily. The Secretariat is also in touch with the Rand Afrikaans University and has found some of the work done there on money-laundering typologies in South Africa very interesting.

The Secretariat has had very good co-operation from donors, supporters and co-operating nations.

The challenges ahead of us are many but my hope is that we shall be able to resolve all or some of them. The challenges include the following:

- We need to raise awareness on AML/CFT among the politicians, legislators and the broad masses, and not just among the technocrats.
- We need more comprehensive laws on ML/CFT, as part of the same legislation, if possible.
- We need uniform regulations on ML/CFT.
- We have to strengthen the capacity of institutions other than banks that are regulated/designated for AML/CFT purposes.
- Payment systems in the region must be modernised to reduce the role of cash in transactions by developing alternative instruments.
- With enabling legislation we need to establish financial intelligence units to collect information on AML/CFT, analyse it, and pass it on to law enforcement for action.
- There is a need to develop a mechanism for the monitoring and reporting of suspicious transactions.
- Training and capacity building in the areas of law enforcement, finance and justice must be encouraged.
- International co-operation must be enhanced.

I hope I have been able to add my voice to a long and complex agenda of issues in the region. The seminar comes near the end of a study of the nature and scope of money laundering in most of the member countries of the region. The main objective of the seminar is to highlight and discuss the findings.

The study should go further than that. It is easy to identify the problems arising from and connected to money laundering. It is, however, more useful to think of ways of resolving these problems. It is therefore envisaged that out of the study and the seminar will emerge recommendations to assist the relevant functionaries in overcoming the various challenges that have been identified in this address. Our researchers may take up some of the issues and raise some policy and operational issues necessary for protection of our jurisdictions from abuse by money launderers and terrorist financiers, especially those from more advanced countries, where there are better legal and regulatory regimes. My real worry is that criminals will seek to avoid these and come to hide in our unprotected regimes.

CHAPTER 2

MONEY LAUNDERING CONTROL IN NAMIBIA

Ray Goba

This chapter reports on research carried out in Namibia on:

- the nature and extent of money laundering activities occurring in and originating from Namibia;
- the legislative mechanisms that could be used to prevent, detect and control money laundering in Namibia;
- the institutional mechanisms that could be used to prevent, detect and control money laundering in Namibia;
- the strengths and shortcomings of the legal and institutional frameworks in the control of money laundering;
- any current State initiatives; and
- the types of money laundering that occur in Namibia.

In addition, it will recommend legislative and institutional steps that Namibia might take to enhance its ability to combat internal and external money laundering.

At a workshop held in Pretoria on 19 January 2002, a guiding definition of money laundering was adopted for this project. The definition is somewhat broader than the universally accepted one, in that it extends the conceptual context within which money laundering is to be considered.

Money laundering is traditionally understood to be a criminal process of converting or “cleansing” property for the purpose of disguising its origin, knowing that the property is derived from serious crime. In other words, money laundering is more than just knowingly receiving stolen property, which is a common-law crime, or being found in possession of property believed to be stolen and being unable to give a satisfactory account of how it came into one’s possession, which is a statutory offence in Namibia. Those who engage in money laundering knowingly—in the sense of actual or legal intent—and those who engage in it when they ought reasonably to be aware that they are doing so, are ‘money launderers’.

Because money laundering is a new concept, it has to be defined by statute in order for it to be a recognisable criminal offence. Over the years it has become a feature of organised criminal activity. It became increasingly associated with illicit drug trafficking, and this led to its recognition in the United Nations Convention against Illicit Drug Trafficking of 1988, but developments since then have led to an international realisation that it is not confined to drug trafficking but is associated with other crimes, including common-law crimes of fraud, theft, murder, bribery etc. Practices that fit into the definition of money laundering have always been a feature of criminal activity although they have not been recognised as money laundering until recently.

Protocols adopted by the United Nations and other international bodies have recognised this and it is common to find that matters related to drug trafficking, organised crime, corruption and money laundering are addressed at the same time. The 1988 UN Convention mentioned above and the SADC Protocol on Combating Illicit Drug Trafficking are examples of this.

The United Nations Convention Against Transnational Organised Crime of 2000, (the Palermo Convention) is more thorough in its approach, and comprehensively deals with these issues and other issues relevant to the combating of organised crime.

Article 6 of the Palermo Convention requires states to criminalise, through legislation and other measures, the laundering of the proceeds of crime within the context of the fundamental principles of their domestic law. Conduct that must be criminalised when intentional (negligence is not referred to but seems to be contemplated) includes:

- the conversion or transfer of property, while knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his action;
- the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights to property, while knowing that such property is the proceeds of crime
- the acquisition, possession or use of property, while knowing at the time of receipt that the property is the proceeds of crime; and

- participation in, association with or conspiracy to commit such offences, or aiding and abetting, facilitating, or counselling the commission of such offences.

The tragic events of 11 September 2001 have given new impetus to the broadening of the perception of the nature and scope of money laundering and its characterisation. It is now accepted that proceeds of criminal conduct may be laundered and channelled towards the implementation and realisation of other criminal goals, for example, terrorism.

It is because of this that a broader definition of the concept of money laundering may be adopted, namely, the concealment of assets generated by crime or to be used in committing, or facilitating the commission of crime. Put in another way, money laundering comprises all activities intended to disguise or conceal the nature or source of, or entitlement to money or property, or rights to either, being money or property or rights acquired from serious crime, as well as all activities to disguise or conceal money or property that is intended to be used in committing, or facilitating the commission of serious crime.

Types of money laundering in Namibia

Fraud and theft: Use of stolen cheques and identification documents

Money laundering is often associated with the concealment and disguising of the proceeds of fraud and theft. Stolen and forged identification documents may be used to open bank accounts. Cheques, which have also been stolen, are deposited into these accounts, and the funds withdrawn as soon as possible. Alternatively, stolen cheques are cashed in shops, supermarkets and banks. The money thus obtained is spent on clothes, luxury electronic goods like television sets, hi-fi equipment, DVDs, and VCRs, and vehicles. Sometimes the funds are invested in businesses such as driving schools, taxi companies or liquor outlets (*shebeens*), popularly known in Namibia as *cuca* shops. The taxi and *cuca* shop industries are the businesses of choice for many urban Namibians. They are easy to set up and it is fairly easy to obtain licenses to run them.

The taxi industry is predominantly in private hands and most taxis are individually owned. It is the only public transport system available in all the towns and cities. The taxis carry out most of their operations between Windhoek and

the Hosea Kutako International Airport, some 50 kilometres away. Like the *cuca* shops they are money-spinning machines and the owners routinely deposit large sums of notes and coins with the banks. It is relatively easy to mingle the proceeds of criminal activity with earnings from such businesses and introduce them into the legitimate business sector without rousing suspicions.

Cheque scams

In mid-2002, the police uncovered a big scam involving 30 cheques stolen from the Namibian Broadcasting Corporation (NBC) in Windhoek. The cheques were physically transported to centres 800 kilometres from Windhoek and deposited in the accounts of persons resident there. Three people were arrested for handling and negotiating some of the cheques, among them the owner of a well known driving school and a fleet of taxis. He allegedly took part in a transaction involving the receipt and processing of a cheque for N\$63,000 (US\$8 000).

Another suspect owns Limbandungula Lodge, near Ondangwa. She was arrested in April after bank officials thwarted her attempt to negotiate payment of a cheque for N\$163,570. Although many of the attempts to cash the cheques were thwarted some were successful because certain bank officials apparently colluded with the criminals.

As none of the persons arrested was employed by the NBC or associated with it, the conclusion is inescapable that those arrested were connected to the people who stole the cheques in the first instance, who are most probably NBC employees. This crime has all the characteristics of syndicated criminal activity.¹

The use of lodges to launder money is not an entirely new development. Three years ago, a case was brought before the Outjo magisterial district court involving government cheques stolen from Windhoek. These cheques had been laundered through tourist lodges that the government ran at the Etosha Game Park. Cheques made out to certain individuals had been stolen and endorsed to the accused, who used them to pay for staying at various lodges around the country. In each case they received change in cash, which was always substantial.²

In another case, which was pending at the time of writing, 'ghost soldiers' were created in the Ministry of Defence, using false identification particulars. Claims were later made on account of their purported deaths in action in the

Democratic Republic of Congo (DRC) and Angola, and the National Defence Force (NDF) paid out several hundred thousand dollars. A number of senior officers in the NDF have subsequently appeared in court on allegations of fraud.

The use of stolen and false identity documents to open bank accounts through which stolen cheques can be laundered is a common form of fraud, which often succeeds owing to collusion between the criminals and bank employees. Some cheques are simply cashed. The identification particulars and signatures on the back of these cheques turn out to be false. Sometimes a bank teller admits to having processed the cheque but pleads that he satisfied himself that the person who cashed the check was the person whose photograph appeared in the identity document. In some cases the teller claims a loss of memory. It is often difficult to prove that the bank employee has in fact colluded with a suspect.

In some cases the master copies of identity documents have been stolen from the Registrar's Office and used to create genuine-looking identification documents containing the particulars of actual deceased persons but with the photograph of some other person. These are used to open and operate bank accounts. Usually when the fraud is unearthed the perpetrators cannot be found, and the money is gone. Many an investigation has come to a dead end because of this.

The Commercial Crime Unit of the Namibian Police is responsible for investigating all commercial crimes in the country. If money laundering and related activities are criminalised this is the unit that will have to take on the additional responsibility.

Vehicle theft and related activities

Another kind of money laundering scheme mentioned by Chief Inspector Lloyd shows a different but interesting dimension to the use of false identification particulars. It involves vehicles stolen from South Africa and brought into Namibia. They are purportedly sold in Namibia, and payment is made to the criminals in South Africa by transferring funds from the bank accounts of innocent third parties in Namibia. The government has been the major victim in these cases. Payment is effected as follows: specimen signatures of authorised signatories to government accounts are stolen and letters are forged, instructing a banking institution to transfer funds to an account in South Africa. The funds are withdrawn and vanish without trace because the operators of the South African account will also have used forged identity documents. The ef-

fect of such schemes is that the criminals in Namibia receive the vehicles without paying a cent, while their South African counterparts receive payment for the stolen vehicles. Some of these fraudulent transactions go undetected even by the government authorities.

Vehicles stolen in South Africa are smuggled into Namibia and driven on Namibian roads with false or even original South African registration plates. South African-registered vehicles have always been a common sight on Namibian roads, because until 1990 Namibia was a territory of South Africa. The authorities tended to pay little attention to such vehicles. As a result a trend emerged for people to import such vehicles on temporary import permits without paying customs duties and tax and then use them in Namibia for years without changing the registration plates. This created fertile ground for criminal gangs to steal vehicles in South Africa, smuggle them into Namibia and sell them locally.

Some of the vehicles stolen in Botswana, South Africa and Namibia itself are smuggled to Angola through the Oshikango border post. The vehicles of choice are sports cars, luxury 4 x 4 station wagons, and double- and single-cab pickups. Some of these vehicles are exchanged for diamonds or are paid for in cash realised from the illicit sales of diamonds or hard currency like US dollars.

Sometimes owners who are experiencing repayment problems in South Africa bring vehicles into Namibia legally, paying the entry fee and receiving a temporary import permit. Then they sell the vehicles for cash or exchange them for diamonds. On returning to South Africa they falsely report a theft to the South African law-enforcement authorities and insurers in what are premeditated insurance frauds.

Cases have also been experienced where vehicles stolen in Namibia, or stolen in South Africa and smuggled into Namibia, have virtually 'disappeared', only to be found locked away in some garage in Windhoek, pending the opportunity to dispose of them. When cars are reported stolen, the police may set up roadblocks or embark on immediate but futile 'hot pursuit' operations; futile, because while they believe that the vehicle is being driven out of Namibia, it is simply taken to a safe house for storage. According to the police, this is increasingly becoming the preferred method of dealing with stolen vehicles.

Sometimes vehicles are substantially altered or tampered with to disguise their identity during this period before disposal.

Luxury vehicles from Japan

Besides the problem of vehicles stolen in Namibia and the SADC sub-region, vehicles stolen from Japan have surfaced in Namibia. The Namibian Police's Motor Vehicle Theft Unit (MVTU) has been investigating cases of luxury vehicles, notably Toyota Land Cruisers, Prados and Pajeros, imported into Namibia by affluent individuals or sold to them over the last three years.

Since September 2000, the Namibian Police have been aware through intelligence and information received that some second-hand luxury vehicles being imported into Namibia have been stolen in Japan.³ One such case, which prompted the police to undertake investigations, involved a Toyota Prado, which had been purchased by a high-ranking Namibian citizen. The vehicle had been bought from a motor dealer that carries on business at Oshikango in the Ohangwena district. The dealer specialises in importing second-hand vehicles from the Far East, mostly through Dubai. The company is owned and controlled by a Lebanese national who lives in South Africa. He also runs a motor dealership in South Africa. In Namibia, the dealership enjoys export-processing zone status, which means that it can import goods into Namibia at reduced tariffs and re-export them to other countries. Because of this, and because of its location on the border between Namibia and Angola, it imports vehicles in bond for resale in Namibia, subject to normal customs requirements, or for re-export.

The vehicle in question was seized by the Motor Vehicle Theft Unit and physically examined. Its identification particulars were checked with the ASF, or X400 system, an Interpol database system that confirmed that the vehicle had been reported stolen in Japan. As there were other vehicles in the warehouse, it was decided to check the status of these vehicles as well. In all, fifteen luxury vehicles, mostly Toyota Land Cruisers and Prados, were checked through the X400 system. It was confirmed that they had been reported stolen in Japan. All fifteen vehicles were seized by the VTU and kept at Ohangwena police station. The Japanese law-enforcement authorities were contacted through Interpol. However, investigations dragged out, with little progress being made, while the MVTU was put under pressure to return the vehicles to Jupiter Motors. Eventually, a decision was taken to return the vehicles with an indemnity and subject to the condition that they would not be sold

or in any manner removed from Namibia. All the vehicles remain in Namibia to this day.

In 2000 the Southern African Regional Police Chiefs' Organisation (SARPPCO), an umbrella grouping of all police forces within the Southern African Development Community (SADC), set up a special project dubbed 'Project Prado' in response to mounting concerns about the increasing number of vehicles reported stolen in Japan and imported into the sub-region. Intelligence reports indicated that there were criminal syndicates operating in Asia, between Japan and Dubai. These syndicates were involved in the smuggling of stolen vehicles. The 'Project Prado' Committee is composed of representatives from member states and has been engaged in negotiations with Japanese law-enforcement authorities for mutual assistance and cooperation in investigating these matters.

The MVTU has confirmed that many of the luxury Japanese-made vehicles in Namibia are stolen vehicles.

419 scams

The so-called 419 scams (advance fee frauds), which involve international syndicates, especially Nigerian ones, have also hit Namibia. From reports faxed and emailed to the Commercial Crime Unit it is apparent that some people have been conned but they are reluctant to identify themselves. The police also have information that some Namibians have acquired the expertise to generate and dispatch these letters, which was previously the domain of Nigerian syndicates.⁴

Because there is no anti-money laundering legislation, the Commercial Crime Unit can only investigate what would otherwise be money laundering under the traditional headings of fraud, theft etc. There is nothing more it can do. In any event, even when money laundering legislation is promulgated, it is doubtful that the unit will be able to cope, for the reasons given below.

Withholding and externalising foreign currency

Interpol has on occasion called upon the Commercial Crime Unit to carry out money laundering enquiries on behalf of German and South African law-en-

forcement authorities. This has entailed carrying out enquiries concerning banking transactions, property acquisitions etc., by persons under investigation in countries which have anti-money laundering legislation.⁵

One such case is that involving Hans-Juergen Kock, a fugitive German national, whose extradition is being sought by German authorities. It is alleged that he committed multi-million dollar frauds and tax evasion in Germany before moving the proceeds of his crimes and finding a home in Namibia in 1999.⁶

Namibia's strong historical links with Germany and South Africa are manifested by the dominance of the agricultural, commercial, tourism and industrial sector by persons of German descent. Most European visitors to Namibia come from Germany.

Like Kock, fugitives from justice often move their money to Namibia, which has an open investment policy. The money is used to purchase farms on which such commercial activities as game farming and lodging are carried out. It has been shown that in the process tainted money can be brought into Namibia and laundered. Most German tourists and hunters who visit Namibian game farms and lodges hardly bring any foreign currency to Namibia, having paid for their trips in Germany. Foreign currency that should have come into Namibia is withheld, and in this way 'nest eggs' are built up offshore.

Money laundering and diamonds

Namibia is one of the leading producers of gem-quality diamonds in the world. The diamond industry is the single largest contributor to the GDP. A number of diamond companies operate in Namibia. The market leaders are Namdeb Diamond Corporation (Pty) Ltd, a joint venture operation between the Namibian Government and De Beers of South Africa; Namibia Minerals Corporation (NAMCO), until a few weeks ago listed on the NASDAQ stock exchange, in which the Namibian government also holds shares; and NAMCOR. There are numerous other smaller operators holding mining claims and exclusive prospecting licences that authorise them to carry out mining operations.

The larger companies in particular mine a large proportion of diamonds from the Atlantic Ocean seabed. Namdeb mines at Oranjemund in the Orange River basin in Southern Namibia.

In spite of the onerous legislative requirements and harsh criminal penalties imposed on diamond operators, diamonds are still stolen from the mining areas on land and sea.

One of the major problems associated with the enforcement of the diamond law is that the geographical area covered by diamond prospecting and mining operations is huge, extending as it does from the Orange River Basin up to the Skeleton Coast in the north, towards Angola and into the Atlantic Ocean area. Thus the Diamond Act (1999) places a great deal of responsibility on the diamond industry itself, the very people who are supposed to be policed.

Although the Ministry of Mines and Energy employs a large number of diamond inspectors who are equipped with wide powers, they cannot police the whole of Namibia. Thus some of the players in the diamond industry, ranging from mining claim owners to exclusive prospecting-licence owners and employees, are the biggest offenders. Illegal diamond deals are also very difficult to detect because, like bribery and corruption, they are conducted in a very secretive manner by parties who all stand to benefit from non-compliance with the law. Therefore, in order to detect, interdict and prosecute offenders, the law-enforcement agencies have to rely on setting traps and mounting 'sting operations', which can be very dangerous, and have on a number of occasions led to the murder of some of Namibia's best diamond detectives.⁷ Law-enforcement agents invariably depend on informers to crack down on diamond smuggling and illicit diamond deals.

Some operatives in law enforcement believe that money laundering in Namibia is principally associated with illegal diamond deals, including deals involving fake diamonds, illicit drug trafficking, illicit dealings in protected natural resources like rhino horns and elephant tusks, and deals in weapons.

Front companies

A California based outfit with links to the Mafia attempted to establish a business relationship with a Namibian who would set up front companies to launder money through. The proposal was that 30 million US dollars would be shipped to Namibia to be invested in the companies. The Mafia were willing to write off a third of the capital investment; they simply required a guarantee that two thirds of it would be returned to the United States through legitimate business channels.

The reason for targeting Namibian financial channels was the country's open investment policy and its good international reputation. Its financial institutions are of high integrity and could be used to launder money without arousing the suspicion of the United States authorities. Using its own undercover agents, the PRU tried to offer the US syndicate diamonds in return for the cash but the syndicate would have none of this. Instead they proposed that a diamond-mining operation should be set up, through which the money received from them could be laundered back to the United States as the proceeds of legitimate business operations. They were even prepared to help establish several business operations in stable Southern African states for this purpose, but they did not want to buy diamonds.

It would appear that the money, which was to be brought into Namibia in cash, was the proceeds of drug trafficking.

This case demonstrates the methods that can be employed by international criminal syndicates to launder the proceeds of their criminal operations in one country through another country. It shows that money laundering operations can have an international dimension involving the unwitting abuse of the financial services sector of another country.

It is apparent that the Californian syndicate was holding a great amount of cash that it could not use in the legitimate business sector in the United States without attracting the attention of drug-law enforcement authorities and the FBI, owing to that country's stringent reporting requirements.⁸

Police intelligence reports indicate that money is also being laundered through the setting up of diamond cutting and polishing factories offshore. Rough and unpolished diamonds are raw materials. They have to be processed if they are to be marketed for jewellery and other needs. A cutting and polishing factory is therefore a necessity at the end of the line in all dealings involving diamonds. Until recently the only diamond cutting and polishing factory in Namibia was that of Namgem (De Beers), established in 1998. It is a joint venture between De Beers and the government of Namibia. In May 2002 some Russian investors commissioned a diamond cutting and polishing factory at Walvis Bay and at least one other such factory has recently come on stream.

Typically money is brought into Namibia to purchase rough and uncut diamonds on the black market. Because diamonds can be split into small packages and carried out of the country on one's person, a profit is guaranteed on any purchase made on the black market. The price of rough and uncut diamonds purchased on the legitimate market is marked up by 20%. The maximum mark-up which one can add on in order to realise a profit is another 20%. A purchase on the black market, however, is at 20% below the official market rate and one can add on a mark-up of a further 20%, realising a profit of 40% on what should be the original cost. It is therefore more profitable to purchase on the black market.

When it comes to the processing of illegal diamonds, however, it is the owners of the factories who provide the funds for the purchase of rough and uncut diamonds on the black market. They also own the cutting and polishing factories offshore, usually in Europe, South Africa and Middle Eastern countries like Israel. When the returns from their business are examined they appear reasonable, if the formal market prices are used as an indicator. The profits accord with those that would be expected to be realised if the rough and uncut diamonds had been purchased on the legal market. It will not be readily apparent that an additional 20% profit has been made by virtue of the raw material having been purchased on the black market.

The profits realised as a result of these activities are invested outside of Namibia, which is simply used as a tool in the laundering operation. Police intelligence officers indicated during the research that in all cases involving persons known to be engaged in illegal diamond deals and money laundering, even when the money launderers physically reside in Namibia, they do not establish the processing factories in Namibia but rather offshore. They establish nest eggs overseas in countries presumed to be safe investment destinations, with stable economies and currencies. Africa is not renowned for these things.

The cases that have come before the courts indicate that there is a network of illegal diamond activity covering Namibia, Angola, Belgium, South Africa and Israel. In a recent case some Iraqi and Lebanese nationals were arrested in a trap set by the PRU.

In Angola and Namibia the price of diamonds is quoted in United States dollars per carat. Diamonds are readily available in small quantities in Katutura Township and Northern Namibia. They are mostly obtained through thefts by syndicates involving people working in the diamond-mining areas. They are

also available on the Angolan side of the border from formerly UNITA-controlled areas. In cross-border deals diamonds are usually exchanged for United States dollars. Cross-border trading in Northern Namibia is generally conducted in US dollars, which are readily purchased by the banks, with no further questions asked if the seller produces a passport showing either that he or she was out of the country or that he or she is foreign.⁹

There is a sizeable population of Angolans living in Namibia, mostly in the northern towns of Oshikango. Oshakati, Ondangwa, Rundu and Windhoek. They have a reputation for ostentatious wealth and high living. They usually purchase immovable and movable property in cash. They still maintain contacts with their families in Angola, despite the conflict that has been raging for years. Because the vehicle and housing market is dominated by the banks, which normally lend money to companies and individuals with collateral and traceable references, it is difficult if not impossible for people who are not in well-paid formal employment, are foreign nationals or do not own or carry on successful businesses to secure mortgage finance or vehicle loans. Most Angolans are at a disadvantage in this regard. Hence they conduct most of their transactions in cash.¹⁰

It is difficult to explain the source of their wealth, except to assume that it is derived from illicit activities in both Namibia and Angola. The family ties between Oshiwambo-speaking peoples on either side of the border, the fact that the apartheid regime encouraged many Angolans to emigrate to Namibia at the height of its collaboration with UNITA against the ruling MPLA and the Cuban forces, and the conflict situation that has existed in Angola since 1975, which fled to the trafficking of diamonds acquired in UNITA-controlled provinces to boost the war effort against Angolan government forces, have all encouraged illicit diamond dealing and money laundering over the years.

Terrorist links

Some Angolans who have taken refuge in Namibia have been known to support the UNITA-led efforts to topple the Angolan government. In the case of *Ngeve Raphael Sikunda v the Government of the Republic of Namibia*,¹¹ the son of a permanent resident brought an urgent application to prohibit the Minister of Home Affairs from expelling his father, Domingos Sikunda, who had been resident in Namibia since 1976. On a number of occasions Sikunda had publicly held himself out to be the official representative of UNITA in Namibia.

For years Sikunda had been operating a thriving restaurant and lodge business at Rundu on the border with Angola and close to areas then controlled by UNITA.

It was believed that Sikunda, who claimed in newspapers and correspondence sent to the Office of the President that he was the official representative of UNITA in Namibia, was actively involved in the UNITA cause. He was using the proceeds of his business to fund UNITA war efforts, which the international community considered to be acts of terrorism. Sikunda's son had a previous conviction for illegal dealings in protected resources.

Other examples of businesses which were set up to support terrorist activities in Angola are two fuel service stations in the Caprivi, one at Divundu and the other at Kongola on the border with Angola, close to UNITA-controlled territory. These service stations are owned by Portuguese-speaking residents of Namibia, and appear to have been established to provide fuel to rebel UNITA forces.

Furthermore, the criminal investigations into the attempt by Mishake Muyongo's supporters to bring about the secession of the Caprivi Strip, which led to about 130 Namibians being indicted for treason, suggest that there was collaboration between the secessionists and UNITA. Some of the weapons used in the unsuccessful insurrection of 2 August 1999 were obtained from UNITA in exchange for fuel.¹² It appears that UNITA had always obtained its fuel supplies from Namibia, through Namibians residing in the Caprivi. In other words there had been long-standing collaboration in that region between Namibians and UNITA.

The funding for these activities could only have been obtained from illegal dealings.

Partly on account of government overtures Namibia has experienced a rise in the number of oriental businesses since independence. These tend to be small Chinese shops dealing in imported items and trinkets, and offering goods at cheaper prices than many of the more established shops. Some Chinese based companies have been awarded lucrative tenders, especially in public construction. However, it seems that organised criminal groups from Asia have followed Chinese business. Some small Chinese shops may be fronts for criminal operations. A Chinese grocery shop in Windhoek, owned by two brothers was engaged in buying United States dollars on the black market a few years ago. It offered better exchange rates than the banking institutions. Its operations were investigated, and the owners were subsequently prosecuted and convicted for

violating exchange-control regulations. They have subsequently been arrested at the coast for dealing in elephant tusks and rhino horn. The matter was still before the court at the time of writing, but one of the suspects has fled.¹³

The police believe that the Chinese shop, which has been receiving suspicious amounts of money from South Africa, has been receiving the money on behalf of other persons to purchase diamonds on the black market.

Illicit deals in arms and ammunition

Weapons are readily available, owing to the long-running Angolan conflict. They are also exchanged for United States dollars. The information available tends to suggest that this happens on a limited scale. Namibian criminal syndicates are less interested in weapons than in hard cash and diamonds. Weapons are only acquired for sale to those criminal groups that specialise in armed robberies. Weapons are more frequently used to intimidate than to kill during armed robberies, although there have been cases where the victims have been shot.

Registration of front companies and close corporations

Typically companies and close corporations are registered as fronts to facilitate the laundering of money, the registration of properties and the acquisition of government contracts. The preferred method is the registration of close corporations. The requirements for registering and operating such corporations are relatively simple and less onerous than with the requirements for companies. The banks report that, although they take the necessary steps to obtain all relevant information concerning potential customers who apply to open bank accounts, it sometimes happens that seemingly genuine requests are approved only for the accounts to be used to deposit stolen or fraudulently acquired cheques. When the cheques are cleared, and this usually takes place before the fraud is discovered, funds will already have been withdrawn. When false identification particulars have been used to open the accounts, or the bank employees have colluded with the perpetrators, it becomes extremely difficult to hold the perpetrators accountable.

Proceeds of common-law crimes

Apart from fraud the most prevalent common-law crimes are armed robbery, housebreaking and theft. Numerous serious robberies, involving large sums of

money, have been reported. These are usually inside jobs. Invariably cash-in-transit security vehicles are targeted. In two of the major armed heists dealt with by the Namibian Police,¹⁴ the Karibib and Brakwater heists, Namibian nationals teamed up with South Africans to execute the most daring armed robberies in the history of Namibia. In both cases the South African accomplices are known criminals in their home country

In the Brakwater case a cash-in-transit vehicle was ambushed a few kilometres outside Windhoek, in what was apparently an inside job involving one of the Security guards. One security guard was not privy to the scheme and during the ambush one of the robbers was shot and injured. However, N\$5 million was stolen. Some of the perpetrators were arrested in Cape Town in possession of large sums of Namibian dollars and foreign currency, which was later identified as part of the stolen loot. They appeared in court in Cape Town. The Namibians among them were deported to Namibia while formal extradition proceedings were instituted regarding the South African nationals. The extradition request was granted. One of those extradited, one Nangisi, temporarily escaped from custody but was recaptured.

Evidence led during the bail applications reveals that some of the money was laundered by being distributed to friends and relatives. Some of the cash was buried underground, while some was used for pleasure and to buy luxury items, like hi-fi equipment, televisions, VCRs and cell phones. A common feature of cases where large cash sums are stolen in Namibia is that criminals find it difficult to keep such large sums or to introduce them into the legitimate financial system.

Corruption

Although corruption is not the focus of this research it is important to make a few remarks about it. Corruption, like money laundering, is a known feature of organised criminal activity. Measures designed to tackle money laundering must of necessity address the problem of corruption. In order to demonstrate the high incidence of corruption in Namibia it is necessary only to refer to reports which have been dominating the media recently concerning scams involving the University of Namibia, the National Broadcasting Corporation, Air Namibia, the Roads Contractor Company, the Namibian Defence Force and other parastatal institutions.

Money laundering and banking institutions

There is presently no money laundering legislation in force in Namibia. A series of money laundering-related statutes have been drafted and are waiting to be introduced and debated in parliament. These draft statutes are discussed in some detail elsewhere in this chapter.

Notwithstanding this, enquiries have revealed that there is a high level of awareness of the problem of money laundering among law-enforcement agencies and banking institutions. However, in other commercial sectors where money laundering can and does occur, e.g. non-bank financial institutions, the vehicle industry and the property industry, the level of appreciation of what is involved in money laundering and how these sectors can be used in money laundering schemes is low, if not altogether non-existent. This is in large part due to the fact that there is no criminal offence known as money laundering in Namibia. It is generally accepted that there is always a possibility that when commercial transactions are carried out in cash, the cash might be the proceeds of a criminal offence. In the absence of any indication to this effect, business people are entitled to assume that the source of the cash is legitimate.

In Namibia, cash transactions are extremely common, especially among the indigenous people. In northern Namibia on the Angolan border, where according to the Population and Housing Census report published in March 2002, 75% of the country's population lives, commercial transactions are invariably conducted in cash. Furthermore, among the Herero people, who are traditionally cattle ranchers and who have large herds of cattle, commercial transactions are usually conducted on cash basis, even for large purchases, for example, when buying a vehicle.

Enquiries with the banks confirmed these cash practices. It is not unusual for large cash deposits to be made with commercial banks or for large withdrawals to be requested. Most importantly, cash transactions are conducted in the usual and normal course of business, with a deep sense of pride and without fear or suspicion. It transpired from interviews conducted with various banking officials that most customers are not aware of the fact that banks are obliged to report suspicious transactions and transactions involving amounts above certain prescribed limits to the Bank of Namibia. It was reported that this might be one reason why customers feel free to deposit and withdraw large cash amounts. Whether banking patterns would be affected if the public were more aware of the Bank of Namibia's reporting requirements could not be estab-

lished. However, it is possible that there would be changes, especially where money is the proceeds of a crime like armed robbery or theft.

Furthermore, because large cash transactions are not unusual the banks do not generally enquire into the origins of a customer's funds. Consequently, there have been few cases that have roused suspicions and warranted a report to the Central Bank.

In those instances where the bank's suspicions have been aroused, this has largely been due to the fact that a particular transaction or series of transactions during a given period have been noticeably at variance with the usual and known business of the customer and the previous conduct of account, to the extent that they cry out for an explanation or comment.

Banks do call customers in for an explanation if unusual transactions are observed. The customer is usually able to give a satisfactory explanation. However, on occasion a customer is not able to explain to the satisfaction of the bank, and this prompts the closure of the account.

In general, banking institutions in Namibia rely on their branches to obtain all relevant information, check the references of the prospective customer, and also check with the credit bureau before a business relationship is established. After that, account performance is strictly monitored and when any suspicious activity is noticed, as it should be since the branches deal with the customers directly and ought to know them, the bank reports it. All the banks have instituted centralised reporting procedures as a matter of policy to facilitate compliance with the reporting obligations provided for under section 50 of the Banking Institutions Act and the Determinations on Money Laundering and on Economic Crime issued by the governor of the Bank of Namibia.

The institutional response to money laundering

The Bank of Namibia and banking institutions

The Legal Advisor of the Commercial Bank of Namibia explained that at a meeting of the SADC Finance Ministers the ministers were tasked to create Anti-Money Laundering Task Force Groups in their individual countries.¹⁵ A task force drawn from the public and private sectors of Namibia was accordingly set up. The group identified the kind of legal machinery required to com-

bat money laundering. It would include a money laundering law, an anti-corruption law, and provisions for extradition, international cooperation, the prevention of organised crime, and the sharing of financial intelligence. The drafting of these statutes was then outsourced. When the draft Bills were ready the task force reviewed them, made further recommendations, and finally approved them. Only the Anti-Corruption Bill has yet been tabled in parliament.

Ms Gous did, however, point out that the banking industry is deeply aware of the problems of money laundering, and that it is under pressure from international donors and customers to ensure that banks operate in terms of internationally accepted norms. In particular the industry is worried about the prospects of losing international business if it allows itself to be used for money laundering in any manner.

Accordingly, notwithstanding the absence at this stage of comprehensive anti-money laundering legislation, all banks comply with the provisions of the Banking Institutions Act, in particular the requirement to report suspicious transactions in terms of section 50 and the determinations and guidelines issued by the governor of The Bank of Namibia, in particular the determination on money laundering and the “know your customer policy.”

The Commercial Bank also formulated a policy on the matter, following the issuing of that determination in 1998 and a further circular by the Central Bank. In terms of the policy a Money Laundering Control Officer (MLCO) was appointed. All members of staff are enjoined to follow the policy guidelines and to report all suspicious transactions to the MLCO.

The MLCO has a duty to conduct investigations in consultation with the internal audit unit of the bank to establish whether indeed a transaction is suspicious and warrants reporting to the Central Bank. The MLCO decides whether to report to the Central Bank’s banking supervision section. The managing director of the Bank simply ratifies the decision afterwards.

Concerns have been raised about the absence of enforcement mechanisms. There is no anti-money laundering law-enforcement agency in Namibia. The Central Bank’s enforcement capacity is limited. Even when legislation is passed by Parliament, unless an enforcement authority is established at the same time, it may not be possible to enforce the provisions of the legislation effectively.

The impact of the legislative provisions on these institutions and other accountable institutions and supervisory bodies is likely to be overwhelming,

especially the impact of the reporting obligations and the criminal and administrative penalties. It will significantly affect the manner in which they do business. The requirements to train staff, keep records, and identify customers will have far-reaching consequences. Large corporations like Edgars Stores and Pick 'n Pay, which have many customers and routinely receive and pay out large sums of money for goods and services, will find it extremely difficult to detect suspicious transactions involving their clients.

Subsidiary institutions

An important problem that has to be considered in the promulgation of anti-money laundering legislation was highlighted during an interview with Mr V Deitenbach of the Internal Audit and Loss Control Department of the Commercial Bank of Namibia.¹⁶ He is a member of the Financial Institutions Security and Fraud Committee (FISFC,) and its current chairperson.

The problem relates to the reporting obligations of a banking group when it operates in more than one jurisdiction that has reporting requirements. The Commercial Bank of Namibia is concerned about the implications of the reporting obligations, because it is part owned by Nedbank South Africa, which is the major shareholder. Nedbank in South Africa is required to report in terms of South African legislation. Lately, Nedbank has been requiring the Commercial Bank to report suspicious transactions involving Namibian customers. This is in order to enable Nedbank to comply with reporting obligations under South African law. In view of the fact that the Commercial Bank is required to report to the Bank of Namibia, it is a matter of concern that it may be saddled with a dual reporting obligation, although it could not report a Nedbank customer's activities to the Bank of Namibia. In a case in point, Nedbank reported transactions involving a Namibian customer of Commercial Bank to the Commercial Crime Unit in South Africa. It also reported the customer's activities to the Namibian Commercial Crime Unit without the knowledge of Commercial Bank.

One of the Bank of Namibia's functions is to supervise all the other banking institutions.¹⁷ The banking institutions have to comply with the reporting requirement of the Banking Institutions Act as well as the directives of the governor. The directives carry the force of law.

Other institutions, accountable and supervisory, over which the central bank has no supervisory powers and which are going to be affected by the new legislation are not involved at this stage. This means that there is a real possibility that they will not be able to cope once the legislation comes into force.

International legal instruments

The Republic of Namibia is a signatory to the SARPCCO Agreement in respect of Cooperation and Mutual Assistance in the Field of Crime Combating. It has also ratified the Protocol on Combating Illicit Drug Trafficking in the SADC sub-region (the SADC Protocol). However, it has not signed or ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the UN Convention).

These instruments are important. The SADC Protocol enjoins member states to promulgate and adopt domestic legislation to tackle drug trafficking, money laundering and related problems. It advocates the promulgation of legislation that provides effective measures for dealing with the proceeds of illicit drug trafficking including the tracing, freezing, seizure, confiscation and forfeiture of the proceeds and instrumentalities of drug crimes. It further advocates the adoption of laws to provide for mutual assistance regarding investigations into illicit drug trafficking, confiscations and prosecutions, the extradition of offenders, the prevention and detection of laundered proceeds of illicit drug dealings, and controlled delivery of drugs in order to identify the participants in criminal enterprise.

Finally, it obliges member States to curb corruption resulting from illicit drug trafficking, including the establishment of independent anti-corruption agencies, administrative and regulatory mechanisms for the prevention of corruption and abuse of power, the strengthening and harmonisation of criminal laws and anti-corruption procedures, the adoption of procedures for the detection, investigation, prosecution and conviction of corrupt persons and their accomplices and the protection of witnesses, the freezing, forfeiture and confiscation of property and money acquired through corruption, improved banking and financial regulations to prevent capital flight and tax and customs duty evasion, among other things.

The SADC Protocol adopts the objectives of the 1988 UN Convention.

At the level of international cooperation the Convention and the Protocol can be used by other signatory parties to obtain whatever assistance they may require of Namibia within the context of the provisions of the instruments. In other words, in the absence of specific domestic legislation dealing with an issue relevant to the spirit of the respective instruments, Namibia can follow the provisions of the Convention and the Protocol as if they were domestic legislative provisions. Namibia could not fail to comply with a request for assistance from a member state on the ground that there is no domestic statute dealing with a particular issue.

However, these two international instruments are only relevant to the problem of the laundering of funds arising from drug trafficking and not those that arise from other criminal activity. This is in itself a limitation on the extent to which money laundering can be addressed.

Namibia has signed and ratified the United Nations Convention against Transnational Organised Crime 2000, the Palermo Convention. In terms of the Convention, member states are required to criminalise participation in an organised criminal group and the laundering of the proceeds of crime, to institute comprehensive domestic regulatory and supervisory regimes for banks and non-bank financial institutions and other bodies particularly susceptible to money laundering in order to deter and detect all forms of money laundering (with emphasis placed on requirements for customer identification, record-keeping and the reporting of suspicious transactions), to criminalise corruption and to adopt measures to combat it, to freeze, confiscate and forfeit assets, to extradite offenders, to render mutual assistance in transnational criminal matters and to foster international cooperation in law enforcement.

Namibia is a signatory to the International Convention for the Suppression of the Financing of Terrorism (1999). It signed the Convention on 10 November 2001, but has not ratified it. Furthermore, it has not promulgated or adopted any domestic legislation providing for the criminal offences envisaged in articles 2, 4 and 5, or generally dealing with matters with which the Convention is concerned.

Broadly speaking, Article 2 of this Convention contemplates the commission of an offence under two headings:

- terrorist crimes stipulated in specified UN Conventions which, in substance, deal with various types of acts of terrorism and the spheres within which they tend to occur; and

- the killing and injuring of civilians not actively taking part in hostilities in situations of armed conflict when this is done in order to intimidate a population or to compel a government or an international organisation to abstain from carrying out its duties.

There is no legislative mechanism currently in place to address the question of the laundering of the proceeds of crime, whether related to illicit drug trafficking not, for the purpose of furthering the commission of terror crimes.

Domestic legislation

Namibia has not yet promulgated or adopted domestic legislation dealing with money laundering specifically. An examination of legislation currently in force reveals that money laundering is never specifically mentioned or defined. Either it is merely touched upon or some of its features are affected by certain provisions in the process of addressing other criminal matters.

However, the authorities are moving rapidly to address this concern. Practical steps that have been taken include the drafting of a number of Bills that are to be tabled in Parliament in the near future. These include the Prevention of Organised Crime Bill and the Financial Intelligence Centre Bill.

The Prevention of Organised Crime Bill

Modelled on similar lines to the South African Prevention of Organised Crime Act, the Bill seeks to introduce measures to combat organised crime, money laundering, the activities of criminal gangs, and racketeering; to criminalise money laundering and gang-related activities; and to provide for the recovery of the proceeds of criminal activities and the civil forfeiture of criminal assets, be they proceeds of crime or instrumentalities used to commit crimes. The Bill also seeks to establish a Criminal Assets Recovery Account.

The Financial Intelligence Centre Bill

The main aim and object of this Bill is to combat money laundering activities by establishing a Financial Intelligence Centre and a Money Laundering Advisory Council, and imposing certain duties on institutions and other persons who may be used for money laundering.

The measures to be adopted in the Bill complement and give effect to the measures to be adopted in terms of the Prevention of Organised Crime Bill.

THE FINANCIAL INTELLIGENCE CENTRE

The Financial Intelligence Centre, as its name implies, will be an intelligence-gathering and dissemination institution. It will be a juristic person with the capacity to sue and be sued. It will be headed by a director and have its own staff, bank accounts, budget etc.

In terms of combating money laundering its functions will be to:

- collect, receive, process, analyse and interpret information disclosed to it;
- inform, advise and cooperate with investigating authorities and the Namibian Intelligence Service;
- supervise compliance with the provisions of the Bill by accountable institutions;
- give guidance to accountable institutions to combat money laundering; and
- promote the appointment by accountable institutions and supervisory bodies of persons to specialise in measures to detect and counter money laundering.

THE MONEY LAUNDERING ADVISORY COUNCIL

The Bill seeks to establish a Money Laundering Advisory Council to advise the minister on policy matters, on measures to combat money laundering and on his exercise of the powers granted under the Bill, to supervise the operations of the Centre and to act as a consultation forum for stakeholders.

The Council members would be drawn from law-enforcement agencies, the prosecution, the central bank, banking and other financial institutions, trade officials, the Ministry of Finance, associations representing accountable institutions, etc.

APPLICATION OF PROVISIONS: ACCOUNTABLE INSTITUTIONS AND SUPERVISORY BODIES

Furthermore, once its provisions become law, the Bill seeks to make them applicable to accountable institutions and supervisory bodies. Schedule 1 of the Bill lists the accountable institutions contemplated. Legal practitioners are included among such institutions. Schedule 2 lists the supervisory bodies, which include the Bank of Namibia, the Registrar of Companies, the Law Society, the Estate Agents Board, the Public Accountants and Auditors Board, the Namibia Finance Institutions Supervisory Authority, and the Stock Exchange Board. The minister is empowered to add more accountable institutions and supervisory bodies to the lists.

MONEY LAUNDERING CONTROL MEASURES

1. The duty to identify clients

Accountable institutions are required to take reasonable steps to establish the identity of prospective clients, and, in the case of agents, their principals and authority to act. These steps must be taken at the inception of a business relationship or the conclusion of a single transaction.

With regard to established clients, that is, those already in a relationship with the bank at the time of promulgation of the act, an accountable institution is required to establish their identity within six months and in addition to trace all accounts involved in all transactions concluded with it.

If it is unable to achieve this, it may not conclude any further business and must inform the Centre. The Bill further stipulates what is to be done if identity is later established.

2. The duty to keep records

Accountable institutions will be required to keep records which identify who the real client is in every transaction, how his identity was established, the nature of the business relationship, all accounts held by the client, etc. The record must be kept in electronic form for up to five years. In cases where two or more institutions are part of the same business group, the records must be centralised.

The records kept in terms of these provisions are admissible in court as an exception to the hearsay rule; they merely have to be produced. This is advantageous in the event of a criminal trial because it would be cumbersome if the person who drew up the original document or the person who entered the data into the computer were to be required to testify orally in court. In this case admissibility of evidence would not be a problem. Furthermore, it would also be problematic if strict compliance were to be required with the best evidence rule. This provision is further justified by the fact that the authenticity of such records would hardly be disputable, the records having been originated and kept in the ordinary course of business.

The Centre will have the authority to access the records of accountable institutions and supervisory bodies during normal working hours, and to examine and make copies as necessary.

3. Reporting duties

The Bill envisages both a threshold-based and a suspicion-based reporting regime.

Firstly, it proposes that accountable institutions report payments and receipts above a prescribed limit.

Secondly, it proposes that accountable institutions report suspicious transactions involving actual or prospective receipts, or any money laundering activities, whether they have occurred or are about to occur. These reports must be made to the Centre within a period to be prescribed. They are to include the grounds for the suspicions and the particulars of the transactions.

Thirdly, it proposes that accountable institutions report suspicions about any receipts or imminent receipts of the proceeds of unlawful activities (i.e. offences as defined in the POCB), together with the grounds for the suspicions and the particulars of the transactions.

Accountable institutions are required to report when they objectively and subjectively suspect the above.

Furthermore, financial institutions, their employees and all other persons are prohibited from disclosing to any one the fact that a report has been made or is to be made, or the contents of any report, imminent or otherwise, except in certain permitted circumstances stipulated.

Accountable institutions are also required to report electronic receipts and transfers above a prescribed amount, together with the relevant particulars.

Likewise, supervisory institutions are obliged to report any discoveries they make concerning receipt of the proceeds of unlawful activities. They are also required to report it if they have been used wittingly or unwittingly in money laundering. They are expected to retain their own records for at least three months.

It is noteworthy that these provisions do not only apply to the offence of money laundering; they apply to the proceeds of any unlawful activities, e.g. theft and fraud.

It is also worth pointing out that these reporting obligations are likely to generate a considerable amount of work as a result of the routine reporting of suspi-

cions which turn out to be unfounded and the reporting of transactions which involve sums above the prescribed limit but are nevertheless innocent. It is feared that the institutions and supervisory bodies may not have either the staff or the funds to cope. The periods for which the records must be kept are also quite substantial.

When an accountable institution reports an imminent transaction to the Centre, it may proceed with the transaction unless the Centre directs otherwise. This is useful because, as with a controlled delivery when a drug consignment has been intercepted, continuing the activity may assist in the identification and apprehension of the real perpetrators of an offence.

The Centre may also acting on its own initiative intervene to prevent a transaction from being completed temporarily while investigations continue or the police or the prosecutor-general are informed.

Provision is also made allowing a judge in chambers to issue monitoring orders upon application, where a reasonable suspicion exists that a person is using an institution for money laundering or an account or facility is being used for this purpose. The order would direct an institution to report the matters stipulated in the order on any terms or conditions set out in it for up to three months; the period may be extended. This facilitates the monitoring and surveillance of the conduct of an individual or the conduct of an account for the purpose of making an evaluation and taking appropriate action.

This would presumably be done when law enforcement authorities require it. It follows that law enforcement authorities need to be well trained in these provisions. They also need to be trained in the preparation of the affidavits that would be needed to satisfy a judge before he issues such an order, which is necessarily intrusive and violate constitutional freedoms. Although, the provision does not state who will make such applications it seems that this is an investigative tool available to the police and like authorities.

The Bill further provides that no agreement, duty of secrecy or confidentiality, or statutory or common-law restriction on the disclosure of information affect these reporting obligations.

This provision appears to be in conflict with a provision under the Prevention of Organised Crime Bill (POCB) that protects legal professional privilege. It may be asked how a legal body such as a law society is to report if the lawyer

himself is protected and not obligated to report. Would a legal practitioner be able to report information conveyed to him in confidence for the purpose of criminal defence or give advice to the law society under these provisions and still be protected by the provisions of the POCB?

The Bill further seeks to protect persons, including the accountable institutions and supervisory bodies and their directors and employees, who make reports in good faith (whistle-blowers) from criminal or civil responsibility. The good faith requirement, though reasonable, may lead to problems in the event of an allegation of malice. However, it is a necessary check on possible abuses that may tarnish the reputation and dignity of others and which in addition may infringe on guaranteed constitutional rights.

The Bill also provides for restrictions on access to information held by the Centre.

ENFORCEMENT OF THE PROVISIONS

The Bill is progressive and takes cognisance of the matters of concern mentioned in the Palermo Convention, the forty Financial Action Task Force (FATF) recommendations, the Basle Convention Guidelines and the experience of jurisdictions which have a longer history of dealing with international and domestic organised crime. It is not surprising therefore that both administrative and criminal-justice-enforcement measures are provided for.

With regard to administrative measures, it is proposed that the Centre should have powers to impose administrative fines on accountable institutions for omissions or commissions that constitute offences. The offending institution would have to submit itself to an enquiry and to deposit a sum of money with the Centre as security. If the accountable institution submits to the enquiry and abides by any finding or order made against it, it will be exempted from criminal prosecution. However, if an accountable institution refuses to submit itself to an enquiry, the Centre may refer the matter to the prosecutor-general.

Before instituting the enquiry, the Centre must consult with the prosecutor-general, who may direct that a criminal prosecution should be conducted if it is in the interests of justice. In this event, no enquiry will be held.

Administrative fines are not a new phenomenon and have been in use in countries such as Germany or Italy. The advantage of this provision is that in order to protect their reputation and avoid the stigma associated with criminal convic-

tion, accountable institutions are likely to opt to be dealt with in terms of this procedure. The procedure appears to be straightforward and devoid of the complex rules of evidence and procedure which are a feature of criminal proceedings.

The Bill also creates a series of criminal offences applicable to all persons and accountable institutions, offences applicable to accountable institutions only, and offences applicable to supervisory bodies.

The offences applicable to supervisory bodies raise an intriguing question. It is open to speculation whether the Central Bank, or the Stock Exchanges Board would ever be prosecuted under these provisions in view of the fact that the Bill proposes to give the minister blanket powers to indemnify persons, institutions and supervisory bodies for anything done in good faith.

The Banking Institutions Act (Act No. 2 of 1988)

This Act and the Bank of Namibia Act 1997 complement each other. The latter establishes the Central Bank and makes provision for certain offences that might be committed within its purview, such as counterfeiting, forgery, etc.

The Banking Institutions Act provides the regulatory framework within which banking institutions operate. It also defines the powers and authority of the Central Bank in relationship to other banks.

The Act makes provision for the authorisation of persons to conduct business as banking institutions, the control, supervision and regulation of banking institutions and the protection of the interests of depositors, among other things.

The powers of the Bank of Namibia (the Bank) over other banking institutions are set out. These include powers to grant banking licences, and to investigate instances of illegal banking activity.

In the exercise of these powers the Bank can question anyone including auditors, directors, members and partners; it can compel the production of books and documents; it can examine the documents and books and call for explanations; and it can order banking institutions to freeze accounts and retain money, pending further instructions.

The Bank also has power to suspend operations, or, in the event of conviction under the Act for illegal banking activity, to close down the business altogether.

It has wide powers to enter, search and seize evidence, and may call upon the Police for assistance in the enforcement of its powers.

To protect the integrity of the financial sector the Bank has power to inquire into the integrity of any person seeking to acquire or control a banking institution. It will only approve an application if it is satisfied that the person is a fit and proper person. If in its opinion this is not the case, it can prohibit a person from acquiring or exercising control by written notice. Furthermore it has the power to examine the financial affairs of any banking institution to ascertain its liquidity and viability.

It can require banking institutions to report any money transactions that give rise to a suspicion that the person involved in the transaction may be engaged in illegal activity. The reports may be made to the Bank or to any person or authority specified by it.

Concerning bank secrecy and confidentiality, while the business of banking necessarily operates in an environment in which confidentiality and secrecy are very important; the Bank is authorised to disclose information it has acquired to an authority in Namibia or in a foreign State which has supervisory responsibilities over financial institutions. In this respect the bank can be of assistance in the sourcing of evidence.

Although directors or officers of banking institutions are in general bound to secrecy and confidentiality, an exception is recognised: disclosure is permitted for the purpose of instituting criminal proceedings, in the course of such proceedings, or if otherwise permitted in terms of the provisions of the Act or any other law.

Banking institutions are also authorised to disclose information to a police officer investigating an offence under a law. The disclosure of such information is limited to the affairs or accounts of the customer who is a suspect in the investigation.

It is clear that the Act has useful provisions which may be used to combat money laundering in so far as the Bank has authority to carry out supervisory functions, cooperate with domestic and international agencies, disclose information etc. It also has powers to freeze accounts, compel disclosure, impose reporting obligations on banks, etc.

Under section 71(3)(b) of the Banking Institutions Act, the Bank has power to issue general directives on any matter for the proper regulation of the financial sector. Acting on this authority, the Governor of the Bank of Namibia issued a notice on fraud and other economic crimes.¹⁸

The Governor of the Central Bank also issued a determination that specifically addressed the issue of money laundering.¹⁹ In terms of this determination the Bank of Namibia adopted the Statement of Principles enunciated by the Basle Committee on Banking Regulations and Supervisory Practices of December 1988 and instructed banking institutions to conduct their business in accordance with those principles.

The determination set out the three stages of money laundering in general terms. It noted that the Basle statement recommended that financial institutions should implement specific procedures to ensure that all persons conducting business with them are properly identified, all transactions that do not appear legitimate are discouraged, and that there is cooperation with law-enforcement agencies.

It further stated that it was “of the view that the adoption of the Statement of Principles on the Prevention of Criminal Use of the Banking System would be beneficial to the banking industry in Namibia.”

The Bank referred to the requirement in the Banking Institutions Act that suspicious transactions should be reported,²⁰ and the Bank of Namibia Act’s prohibition of disclosure of information acquired in the course of banking business otherwise than in the course of duty or in terms of law,²¹ and concluded that the question of breaching customer confidentiality is well provided for.

In the light of these provisions the Bank determined that the minimum safety measures which banking institutions should adopt to detect and combat money laundering are:

- the development of a ‘know your customer’ policy, incorporating procedures for identifying customers at the time of the establishment of a relationship;
- the keeping of records;
- ‘due diligence’ in the conduct of business with a specific customer in terms of acquiring sufficient knowledge of the customer’s activities in order to recognise unusual business patterns which may raise suspicion;

- the reporting of suspicious transactions;
- internal control procedures; and
- staff awareness and training.

The Bank further directed that transfers of funds, especially international funds, could be used for the layering or concealment of the identity of the original ordering customer or beneficiary. It then set out the minimum requirements and guidelines to achieve the objectives listed above.

One noteworthy flaw in the Banking Institutions Act is the fact that it does not cover other financial institutions that are not banks. An Act to address activities in the non-banking sector has recently been promulgated. It is discussed later in this report.

CONFISCATION AND TRANSFER OF THE PROCEEDS OF CRIME

The Act provides that where a court makes a confiscation order in a criminal matter, it has a discretion, if an application is made to it, to issue a letter of request seeking the assistance of a foreign state in enforcing the order if insufficient money is available in Namibia to satisfy the order and the person against whom the order is made holds property in the foreign state. It is not required that there should be a criminal conviction before the provisions of this particular Act can be invoked. It is apparent from this provision and similar provisions mentioned earlier in regard to the enforcement of fines and compensatory orders that the state must not only investigate and obtain sufficient evidence to prove the crime charged but must also trace assets and proceeds of criminal activity in Namibia and abroad. Only if this were done would these provisions serve any useful purpose.

The provisions are particularly useful in dealing with economic crimes, particularly organised ones that transcend territorial borders, like money laundering, fraud and its kindred offences, and corruption. An important feature of these provisions is that there is no need to prove of a direct link between the crime and the money or property before the order becomes enforceable.

This is a good thing, because in many instances the laundering of money may have been so perfected that such a nexus is difficult to establish.

The provision dealing with this requires that a confiscation order would have been made in criminal proceedings dealing with some other matter, whether it

is a common-law or a statutory crime. Because Namibia has not yet criminalised money laundering, the provisions of such legislation would be useful for confiscating the proceeds of crimes like drug trafficking offences or vehicle theft.

Provision is also made for the clerk of court to receive, process and register foreign confiscation orders. Conviction for a criminal offence is not a necessary precondition.

Once again registration makes the foreign order a civil judgment of a local court, executable in the usual way.

The High Court of Namibia can issue restraining orders. It is also empowered to issue letters of request to foreign states seeking assistance in the enforcement of such orders if the person against whom the orders are issued holds property in the foreign state. Once again it does seem that the property does not have to be linked to a crime. Therefore such a restraint may have the beneficial effect of freezing the assets and thus help prevent them being stripped. This may be done with a view to attaching or confiscating the assets at a later stage. Once again, conviction for a criminal offence is not a necessary precondition.

This provision contemplates that the state to which the request is made would have the legal mechanisms to enforce the order or a bilateral agreement with Namibia; otherwise, Namibia, as the requesting state, would not be in a position to control the process in a foreign state.

Foreign restraint orders can also be accepted in Namibia provided the Permanent Secretary is satisfied that they are final orders not subject to review or appeal. They are forwarded to the Registrar of the High Court, where they are registered. The effect of which is to make them orders of the High Court of Namibia, enforceable in the usual way.

Foreign depositions, affidavits, certificates or records of conviction and orders of court, or copies or sworn translations of these, are admissible in criminal proceedings if they are properly authenticated in the foreign state in a manner in which foreign documents are authenticated for the purpose of production in a Namibian Court or in a manner provided for in an agreement entered into with the foreign state.

For the purposes of this act, the specified countries to which the provisions of the Act apply are listed in schedule 1 to the act. Currently, these are all members of SADC. It seems clear that for the Act to be effective, as with other laws concerned with combating transnational organised crime, complimentary legislation is required in these countries or any other state that enters into an agreement with Namibia.

Finally, although the Act empowers the minister to make regulations for its proper administration, none have so far been made. The Act has not yet come into force, and it is hoped that, at least in the short term, regulations of general application will be forthcoming. In the longer term, the minister may have to make regulations specific to different states, as provision exists to enable him to do so.

The Customs and Excise Act No. 20 of 1988

Money laundering may involve the movement of cash or assets physically from one place to another, and from state to state. It is in this respect that Customs legislation is relevant for combating money laundering activities. The Customs and Excise Act contains a number of provisions that can be used to combat transnational organised crime.

The movement of persons and goods across borders can be a feature of organised criminal activity. For this reason, provision is made in section 14 to deal with smuggling. Persons entering or leaving Namibia are required to "unreservedly declare" all goods in their possession which have been purchased or acquired outside Namibia, or have been remodelled or repaired outside Namibia or which are prohibited, restricted or controlled under any law. On leaving, they are required to do the same with all goods being exported. They are required to comply with any request or instruction from a customs officer, and, where necessary, to pay the relevant duty.

The Controller has power to detain persons suspected of violating the provisions of the Act until their appearance in court. Failure to comply with these provisions is a criminal offence. Severe penalties are stipulated. An offender may be liable to a fine of up to N\$8,000 or an amount three times the value of the goods, whichever is the greater or to imprisonment for up to two years, or both. The goods involved are liable to forfeiture.

In the recent past, a number of arrests have been made of foreign nationals attempting to export illicit drugs, notably methaqualone (mandrax), marijuana and cocaine from Namibia to South Africa. It is obvious that Namibia is not the source of the drugs; therefore they must have been imported into Namibia overland from neighbouring countries for transmission to South Africa, where there is a market for them. Namibian territory has tended to be used more as transit route rather than a final destination for hard drugs. Criminals have tended to take advantage of the fact that Namibia is a vast, sparsely populated country, with overland borders that are not well policed.

The Motor Vehicle Theft Act No. 12 of 1999

Undoubtedly vehicle theft has become one of the most serious crimes in the sub-region. It takes many different forms, ranging from the clandestine to the more bizarre form when people are accosted at gun point and forced to relinquish their vehicles or are killed in the process ('carjacking').

A significant number of stolen vehicles are smuggled across borders; others are broken up for spare parts, while others are simply altered to give them a difference appearance or identity.

The Namibian Legislature passed this law to combat this specific type of theft by creating statutory crimes that complement the common-law crimes of theft and the receipt of stolen property.

The Anti-Corruption Bill

This Bill has already been passed by one house of Parliament, the National Assembly, but has not been passed by the other house, the National Council, which has referred it back to the National Assembly with a string of objections, which include objections on principle and content.

From a money laundering perspective the Bill has provisions that can be used to obtain information on banking accounts, assets and gifts.

In the course of investigating an alleged corrupt practice the proposed Anti-Corruption Commission will be empowered to require by written notice:

- any suspected person to give a written statement enumerating all movable and immovable property owned or possessed by him in Namibia or

elsewhere or held in trust for him, specifying the date of acquisition, the manner of acquisition, any consideration paid and the monetary value of such consideration; and specifying any money or other property acquired within and without Namibia, or sent out on his behalf, etc.;

- any other person with whom the Director of the Commission believes the suspected person had any business or financial dealings to give a written statement as to immovable and immovable assets acquired by him in or outside Namibia;
- any person to furnish information relating to the suspected person's affairs and to produce documents or copies of them;
- the manager or any person in charge of a bank, building society or other financial institution to furnish information relating to the suspected person's affairs and to produce documents and statements of account.

Any person on whom such notice is served must comply, notwithstanding the provisions of any law relating to secrecy or confidentiality. Thus these provisions expressly exclude legal professional privilege. Severe criminal penalties are stipulated for non-compliance.

The Commission is also empowered to require access to and investigate bank accounts, share accounts, purchase accounts, expense accounts or any other accounts, and safety deposit boxes at any bank, building society or other financial institution. Persons in charge or control of such accounts are obliged to comply, subject to heavy penalties for failing to do so.

As corruption is a known feature of money laundering schemes these provisions will be very useful if the Bill is enacted with them intact. However, if the National Assembly decides to pass this Bill against the objections of the National Council it will have to do so by a two-thirds majority. Even if it passes the Bill, it is not clear whether the President will assent to it.

The Drugs Control Bill

A new Drugs Control Bill has also been prepared and is to be tabled before Parliament soon. It deals with the control of licit and illicit drugs, but contains no anti-money laundering provisions. This is because these issues are to be comprehensively and specifically covered in the Money Laundering Act.

Institutions to combat money laundering

The Commercial Crime Unit and the Financial Institutions Security and Fraud Committee

This is an ad hoc committee set up by the banking institutions and the Commercial Crime Unit. Every banking institution is represented on this committee, which meets once every month to discuss crime trends, syndicates, cooperation in police investigations and, in general, outstanding cases and ways to collectively address such issues in the banking sector. It has no legal foundation. However, it has proved to be a useful forum for mutual cooperation in dealing with crime in the banking sector. Only a few members of this Committee have ever undergone any training on money laundering issues.

The Namibia Financial Institutions Supervisory Authority (NAMFISA)

This body was established by the Namibia Financial Institutions Supervisory Authority Act, (Act 3 of 2001). It has a mandate to exercise supervision over the business of financial institutions and over financial services. Financial institutions which are subject to supervision by NAMFISA include public accountants and auditors, who are members of the Institute of Chartered Accountants of Namibia, pension and provident funds, friendly societies, money lenders, unit trust schemes, managers of participation bonds schemes, licensed stock exchanges and brokers, medical aid funds, persons registered as Lloyds intermediaries, insurers and re-insurers, insurance agents and insurance and reinsurance brokers, boards of executors or trust companies and any other persons who render financial services even if they are not registered. The authority does not have a mandate to supervise banks and banking institutions, since they fall under the Bank of Namibia.

In investigating any matter falling within its mandate, the authority has the powers granted by the provisions of the Commissions Act. Witnesses and their evidence are treated as if the authority were a Commission of Enquiry. The authority is empowered to enlist the assistance of any persons it considers necessary to assist in the performance of its functions.

The Commercial Crime Unit of the Namibian Police

The Criminal Investigations Department of the Namibian Police is composed of specialised units that deal with particular types of criminal activity. Thus there is a Serious Crime Unit that investigates murder, robbery, rape, serious assault cases, etc. The Drug Enforcement Unit is responsible for the investiga-

tion of drug-related cases, the Protected Resources Unit investigates crimes involving illegal dealings in diamonds, precious stones, gold, rhino horns, elephant tusks and game products generally, the Motor Vehicle Theft Unit is charged with the responsibility of investigating thefts of vehicles and vehicle parts, while the Commercial Crime Unit is mandated to investigate commercial crimes like fraud and theft. It is this unit that would have responsibility for money laundering offences if they were criminalised in Namibia. In the performance of their duties the different units cooperate with each other and coordinate their operations in so far some features of a particular case may be in the purview of the mandate of more than one unit. A case can be transferred for handling by another unit if the situation warrants it, or, by agreement, the investigation can be continued by the one Unit. Joint investigations are also possible by mutual arrangement on the part of the commanding officers.

The general findings of the research

The research carried out in this project has revealed that money laundering in different forms is definitely taking place in Namibia. However, money laundering per se is not a criminal offence under current laws. The fact that money laundering is not a crime in itself means that conduct which is a feature of money laundering can only be interdicted, investigated, prosecuted and controlled if at the same time it amounts to one of the recognised common-law crimes. In such a situation the predicate offence such as fraud or illegal dealing in drugs or diamonds is what is investigated and prosecuted. The concealment or disguising of the proceeds of the crime would not be separately prosecuted unless it also amounted to a recognised crime such as receiving stolen property while knowing it to be stolen in the case of crimes of dishonesty.

This limits the scope and ambit of conduct of a criminal nature that can be punished and of the participants who can be held accountable. This leads to a situation where persons involved in illegal activity benefit from conduct that would be viewed as criminal and warranting criminal sanction but for the absence of adequate laws to deal with it.

There is awareness within the banking sector of what money laundering entails. However, there is little awareness, if any at all, of the issue in other, non-banking, financial institutions.

There is an awareness of the problem among the law-enforcement agencies, but virtually none within the business sector generally. For example, enquiries

among people in the vehicle industry revealed that there is no real appreciation of the issue or of the implications of proposed legislation for the manner in which they conduct business.

The only available tool to deal with money laundering at the moment are the provisions of the Banking Institutions Act, the determinations issued by the Central Bank and the circulars issued in accordance with these determinations.

In the absence of a comprehensive anti-money laundering regime, these measures are wholly ineffective. In any event, they apply only to the banking sector and not to the entire financial sector. There is no legal mechanism to deal with money laundering in other trading and business activities in which it can occur.

Money laundering in Namibia includes the laundering of the proceeds of illicit deals in diamonds, foreign exchange, drugs, weapons and protected resources.

Furthermore, it occurs as a result of criminal activities involving general fraud, theft and armed robberies. Namibian residents, foreign nationals and foreign nationals and Namibians working in cahoots are involved in organised crime generally and money laundering in particular.

Because money laundering is not a specific crime, the authorities investigate such activities as common-law crimes. This is a limitation of their capacity to combat the activities of other persons who may have done something wrong but who would not have been involved in the predicate crime.

The Commercial Crimes Unit (CCU) is ill equipped to investigate money laundering offences if the relevant laws are enacted. It is too small for the number of cases it handles: if a detective devotes a day to a particular investigation it takes at least two months before he can return to the enquiry. As a result, investigations are delayed for a long time and the submission of dockets to the prosecution authorities is equally delayed. A single investigation can take up to two years to complete before the docket is ready for court.

Due to the complaints received by the CCU, especially those emanating from the banks, banking institutions and the CCC established the Financial Institutions Security and Fraud Committee. The banking institutions, including the central bank, are each represented by two persons on this committee. The committee meets once a month to discuss matters currently under investigation, review progress, determine what further assistance is required by the

investigation officers, and discuss trends in criminal conduct and other matters of mutual concern. These meetings have enhanced awareness that there is a money- laundering problem in Namibia.

Banking institutions have reported several suspicious transactions to the Central Bank. These reports have never been followed through by the Bank of Namibia, which has also never reported back to the banks on the outcomes of the reports. Not surprisingly, the banking institutions are frustrated and view the current set-up as useless.

Significant legislative developments have taken place and some legislation is already in force that would be useful to combat money laundering. Other legislative initiatives are in the pipeline.

However, there has not been enough preparation in terms of raising public awareness, training law-enforcement officers, prosecutors, magistrates, banking staff and employees of non-bank financial institutions. These issues need to be addressed in order to make the new statutes into living documents.

Recommendations

Namibia has made tremendous progress in adopting measures to combat crime since attaining independence from South Africa twelve years ago. This has largely been due to the fact that the government has the political will to institute and implement law-enforcement initiatives to combat criminal activity at the domestic level and, to the extent that it may be required to do so, at the international level. The government has been responsive to international initiatives to deal with organised criminal activity. It has readily acceded to, signed or ratified United Nations Conventions and SADC protocols. It has also moved rapidly where possible to introduce domestic legislation to give effect to those conventions or protocols.

Since ratifying the Palermo Convention the Namibian Government has commissioned work to draft new legislation on organised crime, corruption, mutual cooperation in criminal matters, vehicle theft, money laundering and the establishment of a financial intelligence centre. Some of this legislation, as highlighted elsewhere in this report, is already in force; some has been published and is still in the public discussion arena; while other legislation awaits tabling in Parliament.

In light of the findings of this report, it is imperative that government moves with due haste to complete the outstanding process of passing anti-money laundering and related legislation.

It is also recommended that measures be put in place to train the various officials who will be expected to work with the new legislation such as the police, prosecutors and magistrates. Such measures would include joint training programs for these officials. It may well be that the government might not have the resources. If so, consideration should be given to seeking donor funding and the necessary resource persons.

Furthermore, once the new legislation is in place and operational, banks and financial institutions should similarly implement training schemes for their employees through their respective supervisory authorities, that is the Bank of Namibia and the Namibia Financial Services Supervisory Authority.

Only when there is the law-enforcement authorities are adequately trained regarding the substance of the legislation will the legislation be living documents. For example, the police will be enabled to investigate money laundering as a crime and not only as a by-product of other predicate offences. They would also be able to investigate the assets of suspects, follow up the paper trail in order to account for ill-gotten property, seize the property and ultimately have it confiscated. This would give credence to the goal of taxing the criminal in his pocket, heighten the risk factor in relation to criminal conduct and ensure that crime in the ultimate analysis does not pay.

Notes

- 1 *The Namibian*, 27 May 2002.
- 2 The author of the present report was the prosecutor assigned to peruse the criminal docket and make a decision regarding prosecution.
- 3 Interviews with Chief Inspector Sass of the Motor Vehicle Theft Unit, 6 June 2002.
- 4 Interview with Chief Inspector Lloyd.
- 5 Interview with Chief Inspector Lloyd.
- 6 *The Namibian*, 28 May 2002.
- 7 Interviews with officers of the PRU.
- 8 In the United States all transactions involving sums of over\$10,000 have to be reported. It would be difficult to break down several millions of dollars into packages below ten thousand in order to introduce them into the legal banking sector, without arousing the suspicion of the authorities.
- 9 Interviews with officials of the Drug Enforcement Unit as well as Clarky Mackay.
- 10 Interviews with car dealers and property agents.
- 11 *Sikunda v GRN*, Case No SA 5/2001.
- 12 *State v Mwilima and 128 Others* (pending).
- 13 *The Namibian*, 21 June 2002.
- 14 *State v Engelbrecht & Others*, State v
- 15 Interview
- 16 Telephone interview
- 17 Interview, 8 May 2002.
- 18 General determinations on fraud and other economic crime, Government Notice No 16 of 1999, *Government Gazette*, 15 January 1999.
- 19 This determination was gazetted and published as General Notice No 121, Determinations on Money Laundering and 'Know Your Customer' Policy, *Government Gazette*, 29 June 1998.
- 20 In section 50
- 21 Bank of Namibia Act, 1997.

CHAPTER 3

COMBATING MONEY LAUNDERING IN THE SADC SUB-REGION: THE CASE OF TANZANIA

Prince M. Bagenda

Introduction

Money laundering, for the purposes of this report, is defined as “the manipulation and use of money or property to hide its illegal source or criminal origin by using it in legal or illegal activity”.

Money laundering is a domestic and transnational problem that is engendered by organised crime and illegal acts. Until recently, the definition of money laundering was limited to the disguising of dirty money and property obtained from criminal activities. However, with terrorism being financed with laundered money, the definition has been widened to include legal or illegal funds laundered for terrorist purposes (noting also that terrorism is a form of organised crime). In this context, money laundering is not only the disguise of illegitimate proceeds, but also the use of legitimate funds for illegal purposes.

The SADC sub-region is a low-risk jurisdictional area for organised crime and money laundering, owing to the lack of a legal framework for the effective control of these activities. Except for South Africa, the sub-region has a weak financial sector. It is under-policed, and the law enforcement agencies lack trained capacity and have poor facilities to detect economic crime. The law enforcement agencies in the SADC sub-region are also technologically under-resourced to contend with organised criminal groups. Furthermore, although the problem of organised crime is transnational, until recently most states in the sub-region regarded it as a localised, national problem and treated it under common law, which does not make organised crime and money laundering distinct offences.

In the SADC sub-region six out of the thirteen countries do not treat money laundering as a criminal offence. Another six countries do not treat it as a transnational crime. However, in the past few years the situation has begun to change as a result of international and diplomatic pressure. Many states in the sub-region now see money laundering as both a domestic and a transnational crime.

The SADC sub-region in perspective

The SADC sub-region consists mainly of Southern and Central African states, with Tanzania located in both Eastern and Southern Africa. Except for South Africa and Namibia, the states in the sub-region obtained their independence in the 1960s and 1970s. They were left with all the deficits and diseconomies of soft states and fragile political systems. Under minority rule, South Africa developed advanced communication, financial and transport infrastructures. When minority rule crumbled in 1994, the Southern African countries found themselves with a powerful developed neighbour, which has to a certain extent been afflicted by sophisticated organised crime.

One of the negative developments was the increase in money laundering. It is estimated that US\$22 billion was laundered through the sub-region's financial system from 1999–2001. Of this, US\$15 billion was generated within the sub-region. An estimate US\$7 billion infiltrated the sub-region from other regions, including East Asia (US\$1 billion), North America (US\$5 billion) and Europe (US\$1 billion).¹ No one can tell how much money is laundered in or through Tanzania, because detection methods are poor or entirely lacking, as is record keeping by authoritative institutions in financial matters and law enforcement agencies.

Tanzania

Tanzania is strategically located at the crossroads between Southern, Central, East and south-western Africa. The country is one of the least developed countries in the sub-region. It has weak political, economic, communication and financial sectors. A US State Department Report describes the country as being located along drug trafficking routes from Asia and the Middle East to the United States.² The report goes on to say that, "money laundering happens in Tanzania, but a very weak financial sector and under-trained and under-funded law enforcement make it difficult to tackle and persecute".

Before economic reforms were put in place, the state owned and controlled the major means of production and services. Nearly all banking institutions and non-banking financial institutions were state owned. The significance of the past policies is that the state was a main source and target of commercial and financial crime, with the private sector playing a secondary role. Today, the country has opened up and the economy and commerce, especially, are highly deregulated, making the state and public sectors, and society in general,

both targets and sources of money laundering. The country has become attractive for this because of its weak financial regime. In Tanzania anyone can introduce into the country any amount of money in cash without any questions being asked. On the other hand, corruption in the state and private sectors facilitates capital flight. Tanzania does not have enough trained police personnel to man its extensive borders, nor does it have enough customs officers to stamp out the smuggling of diamonds, gold, tanzanite and other precious stones, and foreign currency. Proceeds from illicit activities form the backbone of internal and external money laundering.

The nature of money laundering in Tanzania

Money laundering in the Tanzanian environment has two dimensions: the national or domestic and the transnational.

The domestic dimension of money laundering is focused on those activities taking place within the national territory that target sectors into which illegal proceeds are channelled or where they are invested.

In the domestic scene, the proceeds of illegal activities are first laundered by injecting them into legal economic activity or transferring them to another country. Tanzania is by and large a cash economy. According to a study by the Bank of Tanzania (BOT),³ 82% of households kept their savings at home, while 20% had savings accounts in banks, in which they held only 12% of their total savings. In addition, 79% of Tanzanian households were willing and able to save if appropriate products and saving mechanisms were in place. About 94% were willing to borrow more if resources and appropriate methodologies were available. What this demonstrates is that lack of sound financial infrastructure forces people to operate outside official markets and even to engage in illegal financial transactions, including money laundering.

The proceeds of illegal activities are directly injected into the regular economy, in small- and medium-scale business operations, for example, commuter transport and real estate.

The following are the major areas from which domestic money laundering profits are derived:

- corruption;
- misappropriation of public funds;

- tax evasion;
- abuse of religious charities;
- misappropriation of foreign-assistance projects;
- *bureaux de change*;
- land speculation;
- stock theft, car theft, drug trafficking, arms and gem smuggling;
- public procurement and public tender; and
- exchange control violations.

In the above problem areas the domestic scenario is the starting point for all activities pertaining to money laundering in the internal typology.

The following are the major areas from which proceeds are derived for external money laundering:

- tax evasion through over-invoicing and under-invoicing of imports and exports;
- debt conversion;
- misappropriation of foreign-assistance projects;
- public debt payment; and
- fraud from the private economy.

Money laundering: A conceptual problem

Money laundering was defined in 1998 by the United Nations Office on Drug Enforcement and Crime Prevention as consisting of an attempt to conceal unlawful origin of funds, “in order to invest them with complete impunity in international economic and financial circuits to transform them into lawful earnings”. It has been suggested that there are three steps in the money laundering process:

- cash is injected into the legal economic activity of the (foreign) country, or, alternatively measures are taken to transfer the money to another country;
- funds are invested offshore; and then
- laundered money is injected back into the regular economy.

Tanzania has a cash economy. Many people keep their cash at home and pay in cash for most, if not all their business transactions. Thus the above three stages refer to situations where the formal economy is dominant. It should also be noted that due to worsening economic conditions, the economy is becoming increasingly informal, and this is minimising the significance of the formal economy.

Because the standard international definition of money laundering is centred on the modern industrial, commercial and financial sectors, policy makers in developing countries have always tended to look at money laundering as simply an external problem, with externally-based criminal groups trying to conceal their ill-gotten gains by using the internal banking and investment institutions of target countries. However, it is possible that money legally obtained could be used to finance illegal activities, just as the proceeds of illegal activities are used to finance legal economic activities. Money laundering is a complex process, especially in developing areas where data and records are not kept, corruption is rife, institutions are fragile and, in many instances, the rule of law is not respected.

Channelling and laundering illegal profits

Money laundering schemes in an underdeveloped economy may include physical movement of cash or property. For example, the gem tanzanite is physically transferred from its source to a destination where it is processed (cut) or sold. In the case of currency transfers, the informal exchange system known as the *hawala* system is often used. In the sending country, the sender pays in local currency into the informal processing organisation and the money is credited or paid in cash to the recipient in a foreign country, without physical cash necessarily being transferred. At the time Tanzania liberalised trade and started on economic reforms, it does not seem to have occurred to policy makers that money launderers could exploit new economic openings and thus pose a danger to economic governance. Tanzania experienced large-scale money laundering in the early 1990s when foreign banks were allowed to open branches in Tanzania. One of the early banks to open a branch in Tanzania was Meridien Biao, owned by an American international money dealer Greek origin, Andrea Sortis Sardanis. In a short time the bank had accumulated huge deposits in Tanzania, many of them from government departments and parastatal companies. Sardanis also bought a British Construction firm, Wade Adams, which also obtained construction tenders from parastatal companies in Tanzania, including the National Insurance Corporation, Tanzania Breweries and Tanzania Hotel Investments.

The amount of money deposited into the bank is estimated at US\$285 million, being deposits from government departments and construction projects. Huge amounts of money deposited were siphoned off outside the country illegally and within a short time the bank was declared insolvent. (See Appendix II: Master of deceit)

Utilisation of laundered money

Using the illegal profits of corruption or organised crime for immediate purchases is the method preferred by most people engaged in primitive accumulation, especially when the profits are generated within the country. Within the country, the money is used for:

- real estate;
- safekeeping in (lawyers) trust accounts;
- bearer's certificates from the local financial institutions;
- external remittances;
- legal businesses like limited companies;
- importing junk machinery;
- buying luxury cars;
- sending children to overseas schools;
- making contributions to political campaigns;
- opening businesses in the name of a wife or children; or
- buying shares in privatised companies or going into joint ventures with a foreign company.

Types of money laundering in Tanzania

Policy makers need to have knowledge of the ways in which money laundering is carried out and the extent to which it occurs. This section looks at different types of money laundering. The prevailing economic and operational processes, and the environmental system in which the different types of laundering occur, are complex. The main reason for the complexity is related to the internal and external environments and their distributional impact on the problem of money laundering. There are two main types of money laundering: money laundering in the internal environment and money laundering in the external environment.

Internal laundering

In internal laundering, a particular country is the base for money laundering activities. The main actors are internally based and the process of money laundering is within the domestic jurisdiction. However, the process and proceeds also have an external dimension, for example when illegal funds are externalised. The main actors include government officials and their allies outside the state system. Their prominence in money laundering stems from the fact that they control the major means of production in the state sector, which also includes the parastatal sector. The bureaucrats controlling and managing the public economy are the main actors in money laundering through bureaucratic and political corruption.

To determine the extent of bureaucratic and political corruption it is useful to refer to the Controller and Auditor-General's (CAG) Annual Reports, which show the pattern of public pilferage and fraud.

State actors collude and collaborate with their allies outside the state system. The basis for these collaborations is that the government is a source of lucrative contract work to private operators and suppliers. Those who enjoy the collaboration operate on the basis of political patronage. Internal organised crime yields proceeds that are laundered internally.

The internal jurisdiction presents criminals with low risk environment because the institutions for monitoring compliance, detecting crime and implementing the law, and the methods and process of doing so, are ineffective. The system leaks from within and this allows the laundering of the proceeds of organised crime within the country to flourish. The external dimensions of money laundering compound the problem when linkages between criminal groups are established.

It is possible to construct a typology of internal money laundering by analysing the areas in which the proceeds of crime are invested. For example, an analysis of the properties and businesses of suspected government officials would show that they conceal illicit funds in the accounts of legal businesses that are likely to produce a heavy flow of cash, such as wholesale businesses, laundrettes, commuter transport, beach hotels and boutiques. On the whole, the trend in Tanzania is that the service sector attracts most investment from bureaucrats in the government.

External laundering

In the second, external typology, the actors are externally based and use the receiving country as an investment location or a transit location (for example, when funds are channelled into resident banks, laundered through the accounts of shell companies and then sent on to offshore banks). Illegal profits and the proceeds of transnational organised crime move from one country to another according to the logic of global development. The developing areas, because they are low risk jurisdictions, have a high capacity for absorbing illicit proceeds.

The most usual method of transference is to send the money to an offshore centre, where legal constraints are less stringent and policing and judicial co-operation are virtually non-existent. Transnational crimes, which give rise to most transnational money laundering, are drug trafficking and international corruption.

Table 1: The two typologies in terms of environment, qualities and variables		
Environment type	Qualities	Independent variable (typology)
Internal environment	<ul style="list-style-type: none"> • Actors are internally based • Cash economy • Low-risk jurisdiction • Fragile political, legal and economic systems • Direct investments in small- and medium-scale businesses • No effective control structures 	<ul style="list-style-type: none"> • Domestic and cross-border corruption • Misappropriation of public funds • Tax exemptions • Foreign exchange control • Use of religious trusts and foundations • Misappropriation of donors' funds • <i>Bureaux de change</i> • Proceeds of organised crime • Public debt repayment • Sale of landed property • Tax evasion
External environment	<ul style="list-style-type: none"> • Actors externally based • High-risk jurisdiction • High returns; actors seek new avenues for money laundering 	<ul style="list-style-type: none"> • Debt conversion • Banks receiving funds in order to remit them to offshore banks • Tourist industry: package tours

In the case of Tanzania, to measure the extent of external money laundering each typology must be constructed as an independent variable, whereby the actors and transactions in each typology are distinct from other typologies.

It is possible to measure the extent of money laundering in each typology, especially in those involving the public economy sectors. It is more difficult to measure the extent of money laundering which takes place in the private sector. International organised crime groups have huge amounts of cash, which they have been known to use to fund their activities and legal business as a means of concealing ill-gotten funds.

International trading companies and multinationals bribe government officials to award them contracts, especially for projects in developing areas. They usually do this by paying 'commission'. A news correspondent, Peter Reeves, states the following: "Bribery and corruption lead to a society where economic and political decisions become twisted. They slow social progress, hamper economic development and drive up prices for products and services".⁴

Examples of internal money laundering in Tanzania

Corruption

In 2000 Transparency International listed Tanzania as the ninth most corrupt country in the world. The state sector was singled out as the most corrupt sector, with law enforcement agencies, especially the police, the judiciary, the Revenue Authority and Public Procurement topping the list of the most corrupt departments in the state system. Ministers, permanent secretaries and senior civil servants build mansions, form business partnerships with foreign companies, and send their children abroad to study at expensive schools. The wealth they accumulate is far above what they officially earn. At the time of writing, only one former minister and a few senior civil servants from the Ministry of Communication had been charged with corruption. A number of senior government officials have accounts with foreign banks. Some have bought flats and mansions abroad.

Misappropriation of public funds

Every year the Controller and Auditor-General (CAG) issues the Annual Audit Report of Expenditure of Government Finances. Her reports for 1998/1999 and 1999/2000 show a trend of increased unauthorised expenditure. Payments were made from project accounts earmarked for special objectives as loans or advances and the money was used for purposes other than those

originally intended. The funds were never repaid into the relevant creditor accounts. In other words, public funds were diverted from legitimate use.

The reports also mention the unaccounted for and unauthorised expenditure of tens of billions of Tanzanian Shillings (TSh) specifically in public procurement. This lack of accountability and control has caused the government loss of huge amounts of public and donor funds. According to the CAG, Blandina Nyoni, “payment documents submitted by the Ministries and departments for goods, services and utilities amounted to US\$106.2 million but after verification the figure dropped to \$88 million”.⁵ The amounts involved might appear small, but they are not negligible in Tanzania’s underdeveloped economy.

Government departments have been occasionally defrauded, such as by the use of ghost workers. In the 1998/1999 financial year it was discovered that 20 000 ghost workers had cost the government up to US\$2.4 million annually since 1990. This immense loss of public resources is the work of organised criminal groups within the state sector.

The most recent public procurement case involves the awarding of a tender for importing maize for food security (Ref. No. MA 116 of 31 March 2000). The Parliamentary Public Accounts Committee, which scrutinised the accounts of the Ministry of Agriculture and Cooperatives, discovered that there had been a conflict between the Ministry of Agriculture and Cooperatives and the Central Tender Board concerning the awarding of the tender. The conflict came into the open when both institutions placed advertisements in the newspapers at different times calling for open public tenders for the importation of white maize. The conflict and confusion that ensued necessitated cancellation of the contract that had been awarded to M/S Southern Atlantic Grains Agents (Pty) Ltd of South Africa. The company eventually brought a civil case against the government for breach of contract. The case was heard in the High Court of Tanzania (Case No. 12 of 1999).

**Table 2: Unauthorised expenditure in government departments
1999–2000⁶ (in million \$)**

Prime Minister’s Office (disaster relief)	12.1
Agriculture	606.0
Lands	34.0
Local government (roads fund)	1.0

The Public Accounts Committee also discovered that the government had unilaterally decided not to allow competitive bidding. Rather, it had chosen to shortlist companies with a proven record, integrity and a sound financial base, which could import maize within a two-week period.

Table 3: Companies contracted to import maize

Company	Quantity	Value (US\$)
EEO Traders (UK)	25,000 tons	4,187,500
SKY Coach Ltd (DSM)	25,000 tons	3,275,000
Mbutano Investment (DSM)	25,000 tons	3,646,750
André & CIE S.A. (Switzerland)	100,000 tons	19,075,000
Total	175,000 tons	30,275,250

CAG's Annual Report 1999–2000

Observations from the report of the CAG show the following:

- The exercise of selecting companies to import and sell maize to the government did not adhere to laid down regulations concerning public procurement. *It does not show that the government decision to import maize was prompted by a disaster.*
- The sale of the contract to the third party was dubious, which is how Tanzania Packages Manufacturers (1998) Ltd came into the picture when M/S EEO Traders reneged on the contract. The discovery that the contract sale was dubiously done between the parties meant that the government had to forego over US\$29,000, its commission for opening Letters of Credit with the National Bank of Commerce in favour of M/S EEO Traders.
- There was a shortfall in the loads of maize imported into the country of 1,662,985 tons. The government did not bother to recover the shortfall.
- Two private companies had been contracted to bring maize worth US\$6 million into the country. The government lost over US\$83,000 in opening Letters of Credit, because of their cancellation due to changing of company in which the letters of credit had been designated.
- Over US\$1,113,788,942 was paid to Tanzania Package Manufacturers (1998), a company owned by a Member of Parliament. The auditors could not verify whether any contract existed between the government and this

company, or whether the maize paid for had actually been imported into the country.

Tax exemptions

In the first half of the 1990s, tax exemptions and uncollected taxes were estimated to be 70% of the total revenue for the financial year (1994). In 1994, the then Minister of Finance admitted to Parliament that donors had cut off aid because of tax exemptions. He admitted that exemptions had occasioned the loss of TSh80.4 billion in revenue between April and September 1994. TSh30.33 billions of this was due to exemptions, TSh31.48 billions was due to uncollected taxed, and another TSh18 billion had been lost for other reasons. It appears that those who have the power to grant tax exemptions are liable to receive payoffs from those who receive them, and then launder the kickbacks through foreign banks in London, Zurich and Luxembourg.

Foreign exchange control

In 1988, Capt. Aziz, a pilot with the Zanzibar Air Charter Company, was caught red-handed with thousands of US dollars that he was intending to smuggle out of the country for an unnamed person. He could not account for the origin of such a huge amount of foreign currency. The money was seized because it contravened foreign exchange control regulations. In court, Capt. Aziz pleaded guilty and the money was forfeited. He received a prison sentence of twenty years.

Use of religious donations and informal lending organisations

Tanzania has a large number of citizens of Indian origin. They have kept their faiths and traditions, which they practise exclusively within their own sects. There have been claims from members of some sects, for example the Bohras, Ithnasheris and Ismailis, that they are forced to make contributions to the sects, ultimately to be handed over to religious leaders on their annual or biennial visits. The money collected is advanced to leading businessmen with foreign accounts, from which an equivalent sum in foreign currency is credited to the benefactor, the Religious Supreme Leader or Authority. No physical transfer of Tanzanian currency is involved, but the money collected by the religious institutions is presented as gift to the visiting titular head. Since the money cannot be sent abroad, it is advanced to businessmen of the same religion who have external accounts abroad and are obliged to pay the supreme leader of their religion.

This category is believed to include certain trusts and foundations, for example Islamic, Christian and Indian sub-types that have international connections or are dependent on donations from abroad. Since the Iranian Revolution of 1979, there has been an enormous increase in the number of religious trusts and foundations. Their activities do not seem to be monitored, especially their access to external financial resources and accountability.

In April 2002 the BOT circulated an internal memo to local banks instructing them to monitor and scrutinise forty-eight bank accounts belonging to various individuals and companies. This measure was prompted by accusations by the United States government that certain individuals and religious bodies were involved in funding international terrorism. An article in the *East African* claimed that "One director of a firm opened a bank account with \$100, a week later deposited \$2.58 million".⁶ A commercial bank in which the money was deposited alerted the BOT, which immediately froze the account. Up to the time of writing, four accounts belonging to Islamic trusts and foundations have been frozen. The identities of the individuals, trusts, foundations and companies that are under investigation could not be verified with the BOT. Furthermore, it is difficult for investigators to track exactly who has received money and from whom, because the transactions are usually conducted in unmarked cash. However, it is clear that the banks in Tanzania report some suspicious deposits and transactions to the BOT.

Informal financial organisations operate in the same way as the hawala system found among the Indian and Arab communities of Tanzania. Like the system employed by some religious bodies, hawala involves the movement of value from one location to another without any money being physically moved. The informal or alternative remittance system operates on the same principles. Money is deposited in a particular currency with an agent in a particular location. A token or special receipt is issued, which is then sent to the place to which the money launderer wants to transfer the money. The token is presented to another agent and exchanged for the amount of money in the required currency indicated on the token. This amount will be equal to the amount originally deposited, less fees and charges.⁷ In Tanzania there are thousands of Indians, Pakistanis, and Shirazi of Iranian origin, who still acknowledge their roots in their home countries. It is common for them to follow the financial and business traditions of their countries of origin.

Those who control informal organisations are businessmen involved in import/export operations, who accumulate money abroad by over-invoicing and under-invoicing the goods they import and export. The currencies involved are Tanzanian shillings, paid at source, and Indian rupees or US dollars, paid to the intended person or credited to his or her account in an overseas bank.

Misappropriation of donor funds

Donor funds are sometimes misappropriated, especially in projects that are implemented at district level, for example, health projects. Tanzania has been decentralising its administration by making the district the strategic focus for public health service delivery and public medicare. Thus, in the 1990s and at the beginning of the 21st century, districts became responsible for receiving resources, distributing them equitably to meet local needs and ensuring accountability to local communities. Donors select districts that have critical development problems and provide funds to implement projects, specifically the healthcare project through the District Council.

Funds for countrywide campaigns underwritten by donors, for example the anti-polio campaign, are transferred to the District Councils to meet the financial requirements of the public health campaign.

The Irish-assisted project in Kilosa District came under the spotlight in 2001. The administrators of the project, the District Council officials, had misappropriated project funds to the tune of TSh25–50 million by over-invoicing on local purchase orders. This is but a small example. As Tanzania is one a major recipients of donor funds, misappropriation of funds is rampant and money laundering is rife in this sector.

Another case involved the Ministry of Health headquarters, where foreign donor funds earmarked for the districts and already advanced to them were recalled so that they could be used for purposes for which they had not been intended. The amount involved is estimated to be in the tens of millions of Tanzanian shillings. Donors threatened to call off the anti-polio campaign in 1999. This would have embarrassed the government nationally and internationally. The Principal Secretary in the Ministry of Health was forced to resign. The government departments that used to receive huge amounts of donor funds faced the problem of accountability. These include the departments of Transport and Works, Health, Education and Agriculture.

The Warioba Report on construction projects

A large proportion of the funds used in the public works sector come from donors. The public construction sector is a goldmine for fraudsters and money launderers. The 1996 Presidential Commission of Enquiry on Corruption, headed by Judge Warioba, observed that it would be prudent to have one technical centre to receive and analyse data from different sources. There is no institutional capacity for detection, data analysis or research.

Project costs have been increasing from between 50% to almost 200% for various reasons.⁸ In the report, Judge Warioba observed the following about 27 road and bridge construction projects, signed between 1992 and 1995:

Of these, 24 projects were either completed or the estimated costs up to completion are known. The total costs of the 24 projects as reflected in the contracts at the time they were concluded was TSh61,427,083,819.73. These costs have increased to reach TSh97,499,392,388.19, a difference of TSh36,072,308,568.46 which is equivalent to an increase of 58.7% over the original contract costs. Twelve projects have recorded an increase of 150% above the original contract prices. The increase of TSh36.1 billion could have built 278 kilometres of bitumen roads if the average costs of TSh129.9m/kilometre which was envisaged in a road construction contract signed in 1994 was maintained.

The programme for the rehabilitation of the Dar es Salaam roads, which alone involved seven of the 24 contracts mentioned in the preceding paragraph, cost the government a total of TSh8,910,543,233.60. The estimates in the original contracts came to TSh3,036,234.80. This is an increase of TSh5,874,309,073.80, which is 193.5% more than the original contract costs. The lowest increase is 101% for one project; for the remaining six, the increase is over 150%.

The reasons given for these heavy cost increases include the following:

- increases in the price of goods and services;
- increases in the scope of work due to changes in specifications and design standards;
- increases in the scope of work due to extra tasks which were not included in the original contract (for example construction of culverts and changes in the width of the road or the thickness of the gravel or bitumen layer);

- additional road deterioration between the time of design and the start of construction;
- increase in project duration; and
- penalties for delays in paying contractors for completed and certified works.

The case of Francesco Tramontano

Francesco Tramontano, an Italian national, is alleged to have organised a group of people to defraud the Belgian Development Office of funds amounting to US\$1.8 million. The funds were earmarked for development aid to Tanzania. It is alleged that Tramontano and his associates swindled the Development Office out of the funds by using falsified documents. Efforts to extradite him to Belgium have proved futile. Tanzanian courts of law have ruled that he cannot be extradited because the Belgian papers seeking his extradition referred to him as 'the suspect' and not as 'the accused', as required by the conditions of the extradition Treaty between Tanzania and Belgium.

Bureaux de change

When trade liberalisation and financial deregulation were instituted, bureaux de change became the main instruments for siphoning out the proceeds of illegal activities. In 1992 the Act establishing the *bureaux de change* was passed by Parliament. Over 100 bureaux were registered between 1990 and 1995. They were allowed to receive and make remittances to and from foreign countries for things such as imports, educational services, and medical treatment. However, this was stopped in 1997 because it was discovered that bureaux had become the main conduits of capital flight. Today bureaux de change still informally remit money (through a *hawala* type system) and they can also be used for laundering illicit funds.

The commonest abuse of the system is concerned with the travel allowance. A person travelling outside Tanzania can purchase hard currency equivalent to US\$10,000. But most travellers do not have enough money to use up their entire entitlement. This allows syndicates and couriers to prey on travellers. They find genuine travellers prepared to co-operate and pay them a commission of one or two hundred dollars. In return the travellers undertake to apply for the maximum allowance of US\$10,000, and to turn it over to the benefactors. The extra money is thereafter taken out of the country for laundering.

Dubai used to be the main centre in which Tanzanian businessmen used to

launder money. The laundering was made easy because of the existence of Indian and Pakistani criminal groups, knowledgeable in the business of money laundering. These groups establish links with similar groups in Dubai and other Gulf States. Usually, they exchange goods. Since the 11 September terrorist attacks, the laundering route has shifted to India, Jakarta and Hong Kong, countries in which cash transactions apparently raise few suspicions.

In Southern Africa, Malawi is the location preferred by Tanzanian money launderers, because in that country it is relatively easy to use the electronic banking system to send foreign currency to any part of the world. Foreign currency, preferably US dollars, is physically transferred illegally from Tanzania to Malawi. The total amount that has been laundered in this way has not yet been determined, but it could be in hundreds of thousands or millions of US dollars.

Another way in which money has been laundered is as follows: a *bureau de change* will sometimes not deposit the proceeds of its daily or weekly transactions with the Central Bank; instead, the owner disappears with millions in foreign exchange. Although the money belongs to the owners of the *bureau de change*, not depositing the foreign currency and physically transferring it without BOT authorisation amounts to money laundering. The case of the Expresso *bureau de change*, whose owner disappeared in 1999 with millions of US dollars, is a case in point.

Assets sale as form of money laundering

Some industrialists in Tanzania declare their business insolvent and sell them to foreign buyers, who pay them through foreign banks.

Proceeds of organised crime: Car theft, drug trafficking, arms smuggling and gem smuggling

The proceeds of organised crime (such as car theft, drug trafficking, arms smuggling and gem smuggling) are used to repeat and consolidate illegal activities.

Organised criminal groups have been known to use the proceeds of illegal activities to buy gems and gold, which they smuggle out of the country and sell to obtain foreign currency, which they then remit abroad. Money launderers use the ingenious device of welding bars of gold onto the bumpers of their cars. They drive these cars to neighbouring countries, where they remove the gold and sell it. Then, through the banks, they remit hard currency abroad.

Sophisticated drug syndicates that deal in narcotics are also involved in crimes like money laundering, vehicle theft, diamond smuggling, or prostitution.

As mentioned earlier, money laundering within the country is very difficult to trace because of the largely cash-based economy. It is very easy to launder illegal proceeds by undervaluing assets or by making the proceeds over to relatives. The businesses which are preferred for the investment of illegal proceeds within the domestic economy are those in which cash is generated daily, for example, laundries, wholesale businesses and transport businesses, such as commuter transport in urban areas.

Tanzania is losing a substantial amount of revenue because of gem smuggling. Take the case of tanzanite, a blue gemstone found only in a tiny patch of graphite rock in Tanzania. Over the years, tanzanite has grown in popularity among US consumers, who now account for about 80% of its sales. There is evidence of under-declarations of exports and smuggling. In 1999–2000, the US recorded imports of \$328 million worth of tanzanite, but Tanzanian official figures show only US\$31 million worth of exports. Export figures recorded in 2002 reflected a decline, to US\$4 million. Yet India, to which most of the rough tanzanite was exported, showed exports to the value of US\$28 million for that year.⁹ Much of the difference between the export and import figures passes through the parallel economy and is eventually laundered.

Sale of land or landed property

In its report, the Warioba Commission observed that:

The Government has been disregarding its own laws by allocating plots for the construction of tourist hotels to rich people on areas which were specifically reserved for community services and in violation of Master Plans-particularly on the coastal belt.¹⁰

According to land regulations issued by the Minister of Lands in May 2001, local governments are to inform the Commissioner for Lands about urban land identified for private development. A notice is to be published in daily newspapers in both official languages (Swahili and English). After 21 days, the identified and advertised plot is ready for development, and the development is to be supervised by a licensed estate agent. In most cases this procedure has not been followed. According to Tanzanian Land Law, land belongs to the state. This stipulation has effectively put all land, including prime land, in the hands

of the land officers, senior government officials and the president. These officials acquire land and dispose of it at will to companies and rich individuals wishing to possess prime land, especially in urban areas.

Since trade liberalisation was set in motion and foreign investors began to take advantage and rush to invest, houses in the country and land have attained premium prices. Unscrupulous businessmen also took advantage of the situation. Private sale arrangements are made where a nominal amount is quoted as the value of land or landed property. The real market price amount is paid into an overseas bank account. Foreign companies that invest in the hotel and tourism industry are involved in this type of 'capital flight' scheme. The White Sands Hotel and the Sea Cliff Hotels, owned by Indian and South African companies, were built on land not sold under competitive tender. Rather, it was bought from people in high office and the money was paid into their overseas accounts, without the taxes and other revenues being paid.

Tax evasion

At the time of writing, there are only five major import/export companies in Tanzania, all of them based in Dar es Salaam. They account for over 60% of all consumable imports. These companies survived the difficult period when the state controlled the major means of production and service. They have established internal and external business networks, to benefit from the experience garnered under Tanzania's old dispensation. They can take on the system at will, either by manipulating the official channels on the mainland or by going through Zanzibar, where very little monitoring of import and customs regulations occurs, partly because of the collusion of customs officers and government officials benefiting from non-compliance with regulations. During the period when the donor community isolated Zanzibar (1995–2000), there were voices raised against official and bureaucratic corruption.

These companies import consumables, stationery, oil and oil products from neighbouring countries and further afield. The goods are declared as transit goods, but are diverted to the domestic market and sold for less than similar goods on which taxes have been levied or else they are sold at a price that includes the levy, but the tax is never actually paid.

In other instances there is collusion between manufacturers and importers. The Warioba report states:

The foreign companies which undertake pre-shipment inspection inspect the goods in the factories to satisfy themselves with the quality, quantity and price of the relevant goods. Some importers have been colluding with the manufacturers and have imported goods of a different quality from those originally inspected by the companies.¹¹

Other forms of tax evasion include under-invoicing and over-invoicing. The following tables give an idea of the pattern and extent of these practices in the importing and export of goods between Tanzania and the United Kingdom.

Maliyamkono and Bagachwa estimate that Tanzanian imports from Britain were under-invoiced by 18.7% in 1985 and over-invoiced by 8.1% in 1986. They

Table 4: Over-invoicing of imports into Tanzania from the UK¹²

Year	Recorded imports: Value in millions of Tanzanian shillings	Data discrepancy %	Value discrepancy in millions of Tanzanian shillings
1987	8,518	-34.70	-2,955.00
1988	1,468	-20.30	-298.0
1989	23,912	-9.30	-2,234.00
1990	34,104	+4.7	1,603
1991	68,002	-62.60	3,884

Table 5: Under-invoicing of exports from Tanzania to the UK¹³

Year	Recorded exports in millions of Tanzanian shillings	Data discrepancy %	Value discrepancy in millions of Tanzanian shillings
1987	1,978.00	-29.20	-577.60
1988	3,421.00	-14.10	-482.40
1989	6,267.00	+23.5	1,472
1990	8,578.00	+2.1	180
1991	20,244.00	-17.70	+593

put the extent of under-invoicing at TSh2,471 million (about US\$65 million).¹⁴ What this means is that those requesting foreign exchange for imports from the Treasury often over-invoice as a way of obtaining more foreign exchange from the Central Bank, while those who import goods using their own funds under-invoice as a tax evasion strategy.

Terrorism

Tanzania is a peaceful country and has enjoyed political stability since independence in 1961. However, after 1979, when the Iranian Revolution broke out and the first Islamic state was declared, Tanzania, with a large number of Muslims among its population, started to receive visits from foreign Muslim preachers from Iran, Pakistan, the Gulf States and Sudan. These preachers began to form Islamic cells for proselytising. Foundations and trusts were formed by persons outside Tanzania to undertake Islamic projects, which included building mosques, schools and hospitals, and also extending some assistance for the alleviation of poverty. This marked the beginning of an inflow of foreign capital. Tanzania has traditional economic and commercial links with the Gulf States. Many former Tanzanian citizens of Arabic origin who fled in the wake of the Zanzibar Revolution took up residence in the Gulf States, especially in the United Arab Emirates. Furthermore, Indian merchants in Tanzania use Dubai as a centre for their financial and business transactions. Thus the social ties between Tanzania and the greater Muslim community are strong, and the economic potential of Tanzania is well known among religious, business and other interest groups in the Arab and Islamic world.

In the wake of 11 September 2001, *The Wall Street Journal* reported that Osama bin Laden loyalists were buying tanzanite in Tanzania, smuggling it out and selling it to finance the Al-Qaeda organisation. Al Qaeda has been linked to terrorist acts in various parts of the world, including Tanzania. A US State Department spokesman observed that there was no evidence at the time that any terrorist organisation was using tanzanite to finance terrorism. But he said that Al-Qaeda had undoubtedly previously sold tanzanite to finance its operations.

Reference to tanzanite trading emerged in the 1998 trial of Wadih El Hage, a Lebanese-born resident of Arlington near Dallas. Prosecution authorities described him as Bin Laden's personal secretary. He was sentenced to life imprisonment after being convicted of conspiracy in the 1998 bombings of the US

embassies in Kenya and Tanzania. According to the journal he kept, he travelled to Europe and the United States in the mid-1990s, trying to sell tanzanite. Given the fact that about 90% of tanzanite is sold through the parallel markets, it is no wonder that many different people and groups, including smugglers and terrorists, have attempted to exploit the situation. Since tanzanite was suspended from sale in the main US jewellery markets, the government of Tanzania, miners and dealers have made frantic efforts to ensure that the gem will never again fall into the hands of terrorists. They have developed a joint strategy for identifying the source of the gem, to keep unidentified gems out of the open market.

Participants in internal money laundering

The following categories of individuals and organisations participate in internal money laundering:

- local and foreign organised crime groups (proceeds of crime);
- businessmen (money gained from tax evasion);
- politicians (contributions to political campaigns);
- hotels (money paid to and through tour companies);
- advocates (clients' accounts); and
- government officials (bribes).

Examples of external money laundering

Debt conversion

An American citizen, V. Chavda, came into Tanzania and obtained eight sisal plantations under the Debt Conversion Scheme. Debt swapping means acquiring unpaid debt at a discounted rate, paid by the prospective buyer. The local bank, Co-operative Rural Development Bank (CRDB) advanced him over TSh915 million to develop the farms. However, Chavda did nothing to develop the farms and eventually he was declared *persona non grata*. As the money could not be traced, the only explanation is that the investor diverted the funds and remitted them overseas as foreign exchange.

Banks

Banks, by the nature of their transactions and the rapid globalisation of financial systems the world over, are the preferred instruments for quick movement of financial resources, mainly through electronic transfer. Because there is no legislation concerning money laundering, and because staff in the financial sector and in law enforcement agencies lack capacity and know-how, detecting and preventing money laundering is proving a difficult undertaking. A relevant example is that of the Meridian Biao Bank, which was founded with the purpose of taking advantage of Tanzania's lack of experience of international banking at the time of economic and financial deregulation. The bank had a friendly customer service and attracted a good many moneyed people and state companies as clients; huge deposits were made. Eventually the bank lost over US\$30 million of depositors' money. It was claimed that this was because it had been over-exposed on foreign exchange markets. However, the money found its way to offshore banks in the Bahamas.¹⁵

Organised criminal groups from Dubai, India, Hong Kong, Lebanon, Belgium, South Africa and Russia target Tanzania because of its fragile financial system and the prevalence of corruption among its law enforcement officers. They transfer money through Tanzania to offshore banks in Mauritius, the Caribbean and South-East Asia. In Tanzania itself, Zanzibar is a popular location for money laundering activities, which include construction of beach hotels and the transfer of financial resources.

In the past, banks in Tanzania were not concerned with the sources of their clients' funds. Until recently, they were allowed to keep cash safe for people who were not their regular clients, under the bearer's certificate. Depositors could withdraw money as they willed without any questions being asked, subject to paying commission. However, this practice was stopped in 2000. The BOT issued a circular on money laundering control to Tanzanian banks and financial institutions (attached as appendix).¹⁶ The circular includes proposals for self-regulation and the reporting of suspicious transactions. However, it is not backed up by legislation that deals specifically with money laundering, although Tanzania is a signatory to the Palermo Convention, which contains specific provisions against money laundering.

Self-regulation can only be effective when there is an integrated and co-ordinated system of control. Banks find it difficult to comply with the self-

regulation measures because there is no central agency to receive data, analyse it and take prompt action. Furthermore, the 'know your customer' rule has practical implications and costs for the banks concerned.

The tourist industry

At a press conference in July 2001 the Minister of Finance stated that money laundering was a problem in Tanzania because it was not effectively covered by the 1991 Proceeds of Crime Act, hence the government's decision to introduce a Bill on money laundering. He said that money was laundered through investments in real estate, hotel developments and tourist facilities. For example, foreign businessmen had recently built a number of exclusive tourist beach hotels in Dar es Salaam and Zanzibar. The value of these assets was bigger than what was declared at the time of applying for investment approval by the Tanzania Investment Centre. There is a big possibility that money could be laundered through such investments.

It is estimated that the government loses 20% of the revenue from the hotel industry annually because hotel owners evade tax by failing to record the actual number of tourists who occupy rooms. Likewise, tour operators do not reveal the details of payments for their tour packages, i.e. how much is paid abroad and how much is actually paid to hotels in Zanzibar or Tanzania. In an exclusive interview with the press, senior officials of the Zanzibar Ministry of Trade, Industry, Marketing and Tourism and the Zanzibar Revenue Board (ZRB) stated that most tour operators were cheating the Zanzibar government.

Currently, package tour firms pay just a fraction of anticipated revenues because of gross under-quotes. Prime beach establishments to date earn between 1.2bn/- (US\$1.2 million) and 1.8bn/- (US\$1.8 million) every year when they should be logging at least 20bn/- (US\$20 million) to 25bn/- (US\$25 million), according to industry sources.

According to the ZRB Commissioner, Mr Nassor K Pandu, brochures distributed in Italy quote the price of a room at US\$100 or more for prime beachfront facilities, which tourists pay though most actually owe a mere US\$35–\$40 per head. This practice should be regarded as illegal because the money is legally paid but government revenue that would accrue on the basis of its quantum is cleverly claimed by agents. They defraud the government, hotel owners and

tourists. Mr Pandu did not say what could be done to rectify the anomaly. He further stated that the package tours that target four- and five-star beach resorts scattered along Zanzibar's rural beachfronts seem mainly to benefit the tour operators rather than the government, owing to tax evasion.

Participants in external money laundering

- offshore banks (in the case of Tanzania, it is not the last destination but a transit point to Seychelles, Mauritius, South Africa and the Gulf States offshore banking centres) ;
- foreign investors (it is possible to physically bring in large volumes of cash in foreign currency or use the banks to periodically remit limited amounts of cash into private account(s) in different banks or using proxies or shell companies which purport to have exported goods);
- foreign contractors; and
- government procurement agencies.

Extent

The extent of laundered financial resources is very difficult to measure. However, by identifying the areas in which laundered money is invested and by whom, it is possible to measure the extent of money laundering in the private economy and public economy in Tanzania.

- In 1984, the Tanzanian government liberalised trade and declared that people with foreign currency were free to import goods into the country. They would not be asked where and how they got their funds. Since then, large volumes of imported goods worth hundreds of millions of US dollars have been coming into the country, far surpassing goods imported through foreign currencies released by the BOT.
- A huge amount of capital has been invested in real estate and hotels. Msasani-Mikocheni Mbezi low-density corridor is a showpiece of upmarket houses in Dar es Salaam. The houses belong to government officials and parastatal executives, not all of whom can name lawful sources for their money. Many houses built in these areas remain unoccupied because most people cannot afford the high rent. Thus billions of Tanzanian shillings used to construct such houses are tied up as idle capital, not serving any development purpose.

- The amount expended in buying diamonds and gold for smuggling out of the country to exchange for hard currency is colossal and runs to millions of US dollars, as the case of tanzanite shows.
- The type of businesses run by government officials, mainly in the service sector, shows some huge investments, for which capital must have been laundered through political and bureaucratic corruption.
- Foreign exchange is used to open boutiques and launderettes for the newly rich class. The goods sold in these shops are expensive imports, which are bought with foreign exchange and cater for the rich.
- Shares are bought in privatised companies or joint ventures are engaged in with foreign companies.
- Huge amounts of money obtained from kickbacks and political corruption are deposited in foreign banks.
- Huge amounts of money are expended on buying luxury cars.
- The new rich class take their holidays abroad and spend huge amounts of money on sending their children to school outside Tanzania.
- Businesses are opened in the name of spouses and/or siblings.

Legislative mechanisms for preventing, detecting and controlling money laundering

Tanzania has taken a number of measures and passed a series of Bills to fight corruption, organised crime and money laundering. These include:

- the establishment of the Permanent Commission of Inquiry, or Ombudsman, 1966;
- the Foreign Exchange Control Act 1966;
- the Anti-Corruption Act 1971;
- the establishment of an anti-corruption squad in 1975;
- the Economic Sabotage Act 1983;
- the Economic and Organised Crime Act 1984;
- the Proceeds of Crime Act 1991;
- the Leadership Code (Declaration of Assets) Act 1995;

- the appointment of the Presidential Commission of Inquiry into Corruption, 1996;
- the BOT Circular to Banking and Non-banking Financial Institutions, No. 8 of 2000, on Money Laundering. A Bill on money laundering is forthcoming;
- the Drugs and Illicit Traffic of Drugs Act 1995;
- the Arms and Ammunition Act 1991;
- the Mutual Assistance in Criminal Matters Act 1991; and
- the Tanzania Intelligence and Security Act 1998.

In one way or another these Acts and regulations directly or indirectly target the proceeds of corruption and organised crime, and money laundering. Their focus is on corruption. Earlier concerns were with corruption within the state sector, corruption on the part of public officials, and abuse of power by officials. Concerns with organised crime, the proceeds of crime and money laundering were a later development. The Prevention of Corruption Act (1971) covered a good deal of ground. It provides for preventive detection, requires persons under investigation to give an account of their properties and allow investigation of their bank accounts, prohibits transfer of advantage or property corruptly acquired, and it provides for forfeiture of assets.

During the period when the Prevention of Corruption Act was passed and afterwards, the government focused on the domestic scene, believing that it could control corruption and organised crime from within. Over the years, corruption has become endemic because cross-border corruption defies national laws and because under the common law it is very difficult to establish that corruption has occurred in the first place.

The Foreign Exchange Control Act was passed to stave off the capital flight that is common in transitional societies which experience economic and social stresses, especially when the state exercises too much control, as happened in Tanzania when socialism was an immediate objective. Tanzania started to experience economic stresses and decline from the mid-seventies. The unavailability of foreign exchange and the failure of the import substitution strategy, made economic conditions precarious. Businessmen, mainly those with external connections, were buying foreign currency and smuggling it out of the country for depositing in foreign banks. It was a criminal offence under the Foreign Exchange Control Act to do this. Smuggling money out and channel-

ling it into foreign banks constituted money laundering beyond the immediate national jurisdiction. This practice was mainly done by the real physical transfer of foreign currency, mainly US dollars.

The passing of the Proceeds of Crime Act (1991) was prompted by an increasing number of incidents of drug trafficking and corruption, in which a good many people seem to have suddenly made fortunes and become rich.

The Mutual Assistance in Criminal Matters Act (1991) is aimed at providing for mutual assistance between Tanzania, Commonwealth countries and other foreign countries in fighting crime. The Act provides for assistance with evidence, the identification of witnesses and the forfeiture of property, and underscores the nature and extent of transnational crime. A complementary Act is the Fugitive Offenders Act (1969). This Act seeks to enable the police of neighbouring countries to operate in Tanzania, for example, to arrest fugitives and prepare for their extradition to the country where the offence was committed.¹⁷

Internal and external factors have caused the government to review the existing legislation on money laundering, in order to address critical social, economic and political problems. The government wants to be credible and to support the rule of law. International acceptability requires that there must be congruence between governance at national and international levels. The existing problems of organised crime and money laundering have an internal and external dimension, hence SADC countries should harmonise their laws and initiate cross-border strategies.

Tanzania is not a member of the Financial Action Task Force (FATF), but it has acceded to the 1998 UN Drug Convention. It is also a signatory to the SADC Protocol on Drug Control, which lists money laundering as a criminal offence, and a founder member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), whose main responsibility now is to prepare "the necessary legislative framework to incorporate anti-money laundering measures". The new Bill on money laundering that the Tanzanian government is preparing is guided by the need to harmonise anti-money laundering laws in the SADC sub-region.

Institutional mechanisms

Existing institutional mechanisms for countering money laundering include the National Anti-Corruption Strategy and Action Plan, the Prevention of Corrup-

tion Bureau, banking and non-banking institutions, *bureaux de change*, civil society organisations, and the media. Each of these is discussed below.

The National Anti-Corruption Strategy and Action Plan

The Tanzanian Government has developed a National Anti-Corruption Strategy and Action Plan. This initiative is aimed at rooting out corruption in both the government itself and in society at large. The government is collaborating with the civil sector to implement this plan, each shouldering responsibilities in its area of competence. The strategy has two aspects, an analytical one and a proactive one. The analytical aspect emphasises institutional reforms. The proactive aspect focuses on raising public awareness. The important thing about this strategy is that it is participatory and action-oriented and facilitates civil society involvement in combating corruption. The government, as a source and target of corruption and money laundering, is centrally placed to play an important role in combating them. However, due to the fact that politicians are directly involved in business and the law is not strong enough, there is a danger that a lack of political will on the part of government to confront on corruption and money laundering may stand in the way.

The Prevention of Corruption Bureau

The Prevention of Corruption Bureau (PCB) is a law enforcement agency. Its function is to detect and confiscate illegal proceeds, and carry out prosecutions. It is also intended to be an instrument for preventive action and for raising public awareness about corruption. It has to prepare an annual report on the state of corruption in Tanzania.

There have been calls from academics and Members of Parliament for the Bureau to be an autonomous institution, rather than falling under the ambit of the President's Office. Further, it should have the power to prosecute cases, rather than having to seek the permission of the Attorney-General to do so. Up to now, the Bureau still works under the supervision of the President's Office. Due to the fact that political and campaign financing is unregulated, political corruption, considered a major form of corruption, continues unabated.

Banking and non-banking institutions

Banks and other financial institutions are expected to regulate themselves to an extent. Such self-regulation would include:

- keeping records on all clients, whether they are account-holders or not;
- keeping a register of all transactions;
- investigation suspicious money flows and withdrawals;
- maintaining a transactions profile and keeping a list of suspicious transactions;
- training employees to be aware of suspicious transactions;
- not warning customers who are under investigation; and
- administrative sanctions for non-compliance: this applies to commercial merchant and investment banks in the country, which show laxity and allow acts of illegality to happen within their banks.

Bureaux de change

Bureaux de change should require clients to declare the sources of the funds that are exchanged.

Civil society organisations

Sectoral civil society organisations have been mobilised in the Integrity Programme in the National Anti-Corruption Strategy and Action Plan, to fight corruption at the grassroots level and in policy debate and formulation.

There are quite a number of non-governmental organisations (NGOs) involved in policy debate and advocacy against corruption in Tanzania. Transparency International is an international NGO that carries out research and produces annual reports on the state of global corruption, ranking countries on their level of corruption. It has consistently ranked Tanzania as one of the most corrupt countries in the world...

The media

The role of the media is to expose grand-scale corruption and money laundering at national level and in the sub-region through investigative journalism. In case of Tanzania journalists seem not to be conversant with the subject of money laundering and therefore not much has been written about this problem.

Strengths and shortcomings of the legal and institutional framework in the control of money laundering: A brief outline

Legal framework

Strengths

- Existing Acts cover the major areas but indirectly on money laundering.
- There is a positive perception that money laundering is transnational. There is a move towards harmonisation of money laundering law in the sub-region.

Shortcomings

- The main shortcoming is that the Acts focus on corruption and drug trafficking, but money laundering is not given priority.
- There is lack of political will on the part of the political leadership and political establishment.
- The Proceeds of Crime Act 1991 was based on common law. Establishing whether a predicate crime has been committed is a problem that makes prosecution difficult or impossible.
- Law enforcement agencies are given little incentive to go into an area or to investigate a politician unless they have the permission of the Chief Executive.

Institutional framework

Strengths

- The Prevention of Corruption Bureau plays a dual role as a law enforcement agency and as a creator of public awareness.
- Financial institutions have been given guidelines on reporting, detection and customer profiling, and what to do about suspicious transactions.

Shortcomings

- Political figures reported by PCB are known to have not been prosecuted after intervention by the Attorney-General on the behest of the President.
- Many corruption cases are quashed or dismissed because of the ambiguity of the Prevention of Corruption Bureau Establishment Act.

- There is no single centre to co-ordinate matters relating to money laundering. It would be helpful to have one technical centre that receives and analyses data from different sources.
- There is no institutional capacity for detection, data analysis and research.

Notes

- 1 Professor SU Jing Xiang, US—Financial war on terrorism vs international financial system, *Journal of Contemporary Chinese International Relations*, China Institute of Contemporary International Studies, Beijing, July 2002 p 21.
- 2 US Department of State, *Africa and the Middle East, Country Report* p 32.
- 3 Bank of Tanzania *Quarterly Report* 2002.
- 4 P Reeves, Tougher laws to tackle international corruption, *Guardian*, 30 May 2002.
- 5 Statement by Blandina Nyoni, Controller and Auditor General, *Guardian*, 4 July 2002.
- 6 The East African, Bank of Tanzania orders bank account frozen 1—7 April 2002. Tanzania is listed as a country in which some terrorist operatives are transiting or operating. There is increased activity by Police and FBI to try to uncover terrorist cells or operatives, mainly people of Middle East origin involved in irregular activities.
- 7 Tanzania has a big community of Indians and Pakistanis who use the *hawala* and *hundi* system to send money to their countries of origin. A good many people who are involved in these transactions are honest and prefer the system because it is cheap, simple and expeditious. However, organised criminal groups exploit the system to engage in money laundering and probably support terrorist group networks.
- 8 Report of The President on Corruption, December 1996.
- 9 *The Guardian*, 11 July 2003, quoting mining official reports.
- 10 Report of The President on Corruption December 1996.
- 11 Ibid.
- 12 Economic Research Foundation (ESRF), *Discussion Paper No. 11* October 1997.
- 13 Nyangetera, 1995 research on discrepancy concerning under-invoicing of exports to UK, as quoted in ESRF *Discussion Paper No. 11*, 1997, on parallel economy.

- 14 Bank of Tanzania data on discrepancy concerning over-invoicing of imports from UK into Tanzania, as quoted in ESRF *Discussion Paper No. 11*, 1997, on parallel economy.
- 15 *Business Times*, July 1996.
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CHAPTER 4

MONEY LAUNDERING IN SOUTH AFRICA

Louis de Koker

Introduction

In the past decade South Africa enacted various laws aimed at combating money laundering. The mainly criminal legislation was recently supplemented by the Financial Intelligence Centre Act 38 of 2001 (FICA), which creates the administrative framework for money laundering control. In this chapter the main laundering offences under the Prevention of Organised Crime Act 121 of 1998 (POCA) are discussed, as well as the main money laundering trends in South Africa. The chapter also analyses key provisions of FICA and concludes with a brief discussion of the institutional capacity that South Africa currently has to implement its money laundering laws.¹

The money laundering concept in South African law

The term ‘money laundering’ in South African criminal law refers to a number of different offences that can be committed in terms of POCA.² The concept also overlaps with certain common law (for instance, fraud, forgery and uttering) and statutory offences (for instance, corruption).

Although intentional launderers have been prosecuted successfully in terms of South African common law as accessories after the fact,³ South Africa supplemented its law in this regard with statutory provisions in the Drugs and Drug Trafficking Act 140 of 1992. This Act criminalised, *inter alia*, the laundering of the proceeds of specific drug-related offences and required the reporting of suspicious transactions involving the proceeds of drug-related offences. The Proceeds of Crime Act 76 of 1996 broadened the scope of the statutory laundering provisions to all types of offences. In 1999, the Proceeds of Crime Act, as well as the laundering provisions of the Drugs and Drug Trafficking Act, were repealed when POCA came into effect. POCA:

1. criminalises racketeering and creates offences relating to activities of criminal gangs;

2. criminalises money laundering in general and also creates a number of serious offences in respect of laundering and racketeering;
3. contains a general reporting obligation for businesses coming into possession of suspicious property;⁴ and
4. contains mechanisms for criminal confiscation of the proceeds of crime and for civil forfeiture of the proceeds and instrumentalities of offences.

POCA creates two sets of money laundering offences:⁵

1. offences involving proceeds of all forms of crime; and
2. offences involving proceeds of a pattern of racketeering.

These offences are discussed below.

General money laundering offences

The general money laundering offences are committed when certain acts are performed in respect of the “proceeds of unlawful activities”. These are defined in section 1 of POCA as any property or any service, advantage, benefit or reward which was derived, received or retained in connection with, or as a result of, any unlawful activity carried on by any person. In addition, the definition makes it clear that the proceeds could have been derived, directly or indirectly, in South Africa or elsewhere, at any time before or after the commencement of POCA⁶ and that it includes any property representing such property.

‘Property’ is defined broadly as money or any other movable, immovable, corporeal or incorporeal thing. It also includes any rights, privileges, claims, securities and any interest in, and all proceeds of, such property.⁷ ‘Unlawful activity’ is any conduct which constitutes a crime or which contravenes any law irrespective of whether or not such conduct occurred before or after the commencement of POCA and whether it occurred in South Africa or elsewhere.⁸

POCA creates three main general money laundering offences:

Firstly, a person who knows, or ought reasonably to have known, that property is or forms part of the proceeds of unlawful activities, commits an offence in terms of section 4 if he enters into any agreement, arrangement or transaction (whether legally enforceable or not) in connection with the property; or per-

forms any other act in connection with the property, which has the effect or is likely to have the effect:

1. of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of the property or any interest in the property; or
2. of enabling or assisting any person who committed an offence to avoid prosecution or to remove or diminish any property acquired as a result of an offence.

Secondly, a person commits an offence in terms of section 5 if he knows, or ought reasonably to have known, that another person has obtained the proceeds of unlawful activities and enters into any transaction, agreement or arrangement in terms of which:

1. the retention or control by or on behalf of that other person of the proceeds of unlawful activity is facilitated; or
2. the proceeds are used to make funds available to that person, to acquire property on his behalf, or to benefit him in any other way.

Thirdly, a person who acquires, uses or possesses property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, commits an offence under section 6.

The offences under sections 4, 5 and 6 can only be committed by a person who knows, or ought reasonably to have known, that the property concerned constituted the proceeds of unlawful activities. For purposes of POCA, a person had knowledge of a fact if he actually knew that fact, or if the court is satisfied that he believed there was a reasonable possibility of the existence of that fact and then failed to obtain information to confirm or disprove the fact.⁹ A person acted negligently ("ought reasonably to have known") if he failed to recognise or suspect a fact which a person with the general knowledge, skill, training and experience that may reasonably be expected of a person in the position of the particular person as well as the general knowledge, skill, training and experience that he in fact has, would have recognised or suspected.¹⁰

Defence and penalties

A person who is charged with negligently committing an offence under sections 2(1)(a) or (b) or 4, 5, or 6 may raise the fact that he reported a suspicion under section 7 of POCA as a defence.¹¹

A person who is convicted of a money laundering offence under sections 4, 5 or 6 is liable to a maximum fine of R100 million (US\$ 10 million) or to imprisonment for a period not exceeding 30 years.¹²

Money laundering and racketeering

The racketeering provisions of POCA are contained in chapter 2 of the Act. This chapter creates, *inter alia*, a number of offences in connection with the receipt, use or investment of proceeds of a 'pattern of racketeering activity'.

POCA does not define 'racketeering' but does provide a definition of a 'pattern of racketeering activity'. This phrase refers to the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 of POCA. Schedule 1 contains a list of offences such as murder, rape, corruption, fraud, perjury, theft and robbery, as well as any offence punishable with imprisonment of more than one year without the option of a fine. In terms of the definition, a pattern is established when at least two of these listed offences were committed, if:

1. the latter of the two occurred within 10 years after the commission of the prior offence (excluding any period of imprisonment); and
2. at least one of the offences was committed after the commencement of the Act.

The laundering offences in terms of chapter 2 are committed when the proceeds of a pattern of racketeering activity are invested in or on behalf of an 'enterprise'. 'Enterprise' is defined as including any individual, partnership, corporation, association or other juristic person or legal entity and any union or group of individuals associated in fact, although not a juristic person or legal entity.¹³

The following acts in connection with property constitute offences if the person knows or ought reasonably to have known¹⁴ that the property is derived, directly or indirectly, from a pattern of racketeering activity. These offences are committed irrespective of whether or not the acts occur in South Africa or elsewhere.

Firstly, an offence is committed in terms of section 2(1)(a) if such property is received or retained and any part of it is used or invested, directly or indirectly, to acquire any interest in an enterprise, to establish or operate an enterprise or to fund any activities of an enterprise.

Secondly, an offence is committed in terms of section 2(1)(b) if a person receives or retains any such property, directly or indirectly, on behalf of an enterprise.

Thirdly, an offence is committed under section 2(1)(c) if a person uses or invests any such property, directly or indirectly, on behalf of any enterprise, to acquire an interest in an enterprise, to establish or operate an enterprise or to fund the activities of an enterprise.

The offences in section 2(1)(c) are very similar to the offences in terms of section 2(1)(a). However, section 2(1)(c) does not explicitly require that the offender received or retained any tainted property before an offence can be committed.¹⁵

Any person who conspires or attempts to commit any of the section 2(1) offences commits an offence in terms of section 2(1)(g).

A person convicted of a racketeering offence in terms of section 2(1) is liable to a fine not exceeding R1000 million (US\$ 1000 million) or to imprisonment for a maximum term of life imprisonment.

Reporting of suspicious transactions

General reporting obligations in respect of suspicious transactions are created by section 7 of POCA. (This section will be repealed by FICA and replaced with a new and broader provision relating to suspicious and unusual transactions.)

A person who carries on a business, is in charge of a business undertaking, manages a business undertaking, or is employed by a business undertaking, and who has reason to suspect:

1. that any property which comes into his possession or the possession of the business undertaking is or forms part of the proceeds of unlawful activities; or
2. that a transaction to which he or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities,

must report this suspicion as well as all information concerning the grounds for the suspicion to the Commander of the Commercial Crime Investigations Subcomponent of the South African Police Service (SAPS) within a reasonable time.¹⁶

A person who is party to a transaction in respect of which he forms a suspicion and which, in his opinion, should be reported under section 7, may continue with that transaction but must ensure that all records relating to such transaction are kept and that all reasonable steps are taken to discharge the reporting obligation.¹⁷

In general, no obligation as to secrecy or any other restriction on the disclosure of information in respect of the affairs or business of another, whether imposed by any law, the common law or any agreement, affects this duty to report or to permit access to any register, record or other document.¹⁸ The reporter is explicitly exonerated from liability for any breach of secrecy that occurs as a result of the disclosure of information in compliance with this reporting obligation.¹⁹

Section 7 recognises only one exemption from the general reporting obligation, namely the attorney-client privilege in a criminal defence context. Section 7(5)(a) stipulates that the reporting duty may not be construed so as to infringe upon the common law right to professional privilege between an attorney and his client in respect of information communicated to the attorney to enable him to provide advice, defend or render other legal assistance to the client in connection with an offence under any law:

1. of which the client is charged;
2. for which he has been arrested or summoned to appear in court; or
3. in respect of which an investigation is being conducted against him with a view to instituting criminal proceedings.²⁰

Failure to comply with the reporting obligation constitutes an offence for which a person is liable to a fine or to imprisonment for a period not exceeding 15 years. A person who lodged a report may raise that fact as a defence if he or she is charged with negligently committing a money laundering offence under sections 2(1)(a) or (b) or 4, 5 or 6.²¹

Once a report has been made under section 7, care should be taken that information prejudicial to an investigation does not leak. A person who knows or ought reasonably to have known that information has been disclosed in terms of section 7, or that an investigation is being or may be conducted as a result of such a disclosure, commits an offence under section 75(1) if he directly or indirectly alerts another person, or brings information to the attention

of another person, which will or is likely to prejudice such an investigation. The penalty for this offence is a fine or imprisonment for a period not exceeding 15 years.

Reporting statistics

According to the reporting statistics released by the Commercial Branch of the SAPS, 2 999 reports were filed since June 1997 until April 2002 (See Annexure A). A number of these reports have resulted in convictions and/or asset forfeiture.

Money laundering trends and typologies

In March 2002 Rand Afrikaans University's (RAU's) Centre for the Study of Economic Crime released a report on laundering trends.²² This report was based on the perceptions of a group of expert investigators of economic crime who attended workshop on money laundering trends at RAU in December 2001. The following broad themes were identified in the report:

1. purchase of goods and properties;
2. abuse of businesses and business entities;
3. use of cash and currency;
4. abuse of financial institutions;
5. abuse of the informal sector of the economy; and
6. use of professional assistance.

Purchase of goods and properties

South African criminals often display their illegally acquired wealth. Money is spent on expensive clothes, personal effects, vehicles, property and furniture. In coastal areas boats, jet skis and yachts are also purchased by some criminals and in rural areas livestock and farm implements are bought. According to the report these purchases are not necessarily made with the intention to launder money. In the majority of cases criminals merely want to enjoy the proceeds of their crimes and improve their lifestyles. However, in view of the broad definition of laundering in South African law, such transactions would still constitute laundering offences under POCA.²³

Vehicles and real estate are often registered in the names of the criminals, but sophisticated criminals who are concerned about the risks of confiscation and forfeiture of their assets ensure that these assets are registered in the name of a front company, a family member or a close friend.²⁴ These criminals would often register real estate in the name of a family trust or business trust, which is ultimately controlled by the criminal.

Real estate transactions are also abused in another way to launder money: Proceeds of crime are paid into the trust account²⁵ of an attorney or an estate agent by a new client who instructs the attorney or agent to assist him in acquiring a property. A few days later the client cancels the instructions and requests the repayment of the money. The money is often repaid by means of a cheque drawn by the attorney or the estate agent. In these cases the criminal uses the ruse of a transaction to launder a sizable amount of money through the trust account of the attorney or estate agent.

Although vehicles are often bought for cash and real estate transactions are sometimes settled in cash, cases have also been encountered where the criminal obtained financing for the transaction from a financial institution. The proceeds of crime are then used to settle the hire purchase obligations or to pay off the bond in a short period. In certain cases, the payments continue after all the obligations to the financial institution were met. As a result a surplus amount builds up in the particular account. Such amounts can escape detection by law enforcement authorities.

Abuse of businesses and business entities

Criminals often use business activities and business enterprises to launder money. Such business activities are conducted in the formal and informal sectors of the South African economy. These business enterprises can be unincorporated (for instance sole proprietorships, business trusts and partnerships) or incorporated (for instance close corporations and companies).

Shell corporations are sometimes used to open and operate bank accounts. These entities will not actually be trading and their main purposes would be to provide the criminal with a corporate cloak under which he could hide his identity and launder money. The shareholders, directors or members of these shell corporations are often family members or other third parties who will act according to the instructions of the ultimate controller of the corporation. The corporations could be registered personally or through an agent, such as an

auditor or attorney, or be bought as pre-registered (so-called shelf companies). Shelf companies are advertised for as little as R650 and corporations for only R450.

Front businesses often feature in laundering schemes. Unlike shell corporations, these businesses are trading actively. The proceeds of crime are used to fund the business activities of the enterprise and/or are simply co-mingled with the legitimate proceeds of the business itself and deposited into the bank account of the business as the proceeds of the business. If the criminal launders cash, the front business will normally be cash-based to facilitate the process. Examples of such businesses that have been encountered in South Africa include bars, restaurants, *shebeens*, cash loans businesses and cell phone shops.

Use of cash and currency

Criminals who commit offences that generate cash proceeds, for instance cash heists or drug trafficking, are often able to transfer or spend substantial amounts without using the formal financial system.

There are indications that substantial amounts are transferred physically to and from destinations in South Africa, whether by the criminals themselves or by third parties who act as couriers. Cash can be transferred physically in many ways, but during the RAU workshop²⁶ specific examples were cited where cash was strapped to bodies of passengers in motor vehicles and aircraft or hidden in their luggage.²⁷ Similar methods are used to convey cash across the borders of South Africa. While it is legitimate to convey cash physically within South African borders, substantial cash amounts can only be transferred across South Africa's borders legally if the exchange control requirements have been met.

Criminals launder illicit cash in many ways. As outlined earlier, luxury goods, vehicles and real estate may be bought. Trust accounts of professionals such as attorneys and estate agents are sometimes used to place the cash amounts in the financial system.²⁸ Automatic teller machines and automatic vending machines selling cell phone products have also been used to place cash amounts. Laundering of cash also takes place in legal as well as illegal gambling institutions. In these cases, criminals or their assistants would often buy gambling chips or credits in cash. After a short period of gambling, the gambler would return and exchange the chips or credits for a cheque issued by the gaming institution.²⁹ Slot machines in casinos have also proved vulnerable for abuse

by launderers who used them successfully to launder bank notes that were stained by dye during cash heists. There is also evidence of laundering of cash at racecourses in South Africa. In some instances, the launderer would buy a winning ticket from a punter for a cash amount, which constitutes a premium on seller's actual winnings.

Abuse of financial institutions

South Africa has a well-developed financial system.³⁰ Products on offer vary from internet banking facilities³¹ and offshore unit trust investments to small savings accounts for a target audience comprising people who have not previously had a bank account or are under-banked. Exchange controls have deterred the large-scale abuse of the financial system by international launderers. However, South African criminals are abusing the system in many different ways to launder and invest their ill-gotten gains.

According to the report, a sizable amount of dirty money is still deposited into bank accounts. Criminals sometimes deposit money into their own bank accounts, but more sophisticated criminals often open accounts with false identification documentation or open these in the names of front companies or trusts. There is also a trend of using legitimate bank accounts of family members or third parties. An arrangement is made with a family member who allows the criminal to deposit and withdraw money from his or her account. In subsequent investigations, the family member invariably pleads ignorance of the true nature of the funds that were deposited. The first two convictions that were handed down for statutory money laundering in South Africa were based on such arrangements.³²

There is also evidence that more sophisticated criminals are using credit and debit card facilities to launder money and especially to move proceeds of crime across the borders of South Africa. Automatic teller machines are also used to deposit and withdraw money. Automatic teller machines that offer the facility to generate bank cheques have featured in particular laundering schemes. Bearer documents such as Negotiable Certificates of Deposit have also been employed in sophisticated schemes.

During the RAU workshop cases were also cited of insurance products being used to launder money. Single premium policies are bought with the proceeds of crime or the proceeds are used to pay monthly premiums. In some cases, the launderer makes an overpayment and then asks for a repayment of the

excess amount. When the company repays the excess amount, the launderer represents the money as a payment in terms of an insurance product. In other cases, the launderer buys and surrenders policies. There is a substantial market in second-hand policies in South Africa and this market is also vulnerable to abuse by launderers.

Abuse of the informal sector of the economy

The prevalence of informal business enterprises in South Africa, coupled with the general absence of formal financial and other business records, allow for the abuse of such enterprises by launderers.³³ They serve as convenient front businesses because it is difficult to dispute the business's alleged turnover in relation to its actual turnover. In fact, it is often impractical for formal sector businesses to attempt to verify business information furnished to them by informal sector businesses.

Sizable amounts of cash are also deposited into community-based rotating credit schemes that operate general savings schemes (for instance *stokvels*), or dedicated savings schemes (for instance burial societies).³⁴ In the majority of these cases, all the members are known to one another. Every member regularly deposits an agreed sum of money into a fund that is given, in whole or in part, to each member in rotation. Although the majority of schemes cannot be penetrated by a launderer,³⁵ a launderer could operate a sham *stokvel* as a front to launder money.³⁶

Underground banking systems in the form of *hawala/hundi* systems are operating in South Africa within specific ethnic communities. These systems have apparently been used for many years to evade exchange control restrictions and expensive foreign exchange transaction fees.

There are a number of other organisations, which operate on the outer fringes of the regulatory systems, that are also vulnerable to abuse as front businesses by launderers. These include NGOs, charitable institutions and churches.

The abuse of the informal sector by launderers is a cause for concern. The laundering laws primarily regulate the formal sector of the economy. The extent of laundering in the informal economy cannot be estimated with any degree of certainty, but it is probably substantial. Arguments that laundered proceeds in the informal economy will be detected at the stage when such funds enter the formal sector of the economy do not sufficiently discount the

nature of the informal sector of the economy. Proceeds can be placed, layered and integrated in the informal sector without entering the formal sector of the economy. If a launderer requires the proceeds to enter the formal sector, he can ensure that they do so at a stage when they have been laundered sufficiently and cannot be linked to unlawful activity any more.

Professional assistance

Many laundering schemes are too complicated to be planned and executed by the criminals themselves. There is clear evidence that knowledgeable persons do assist criminals to launder money. These persons often have legal, banking or tax expertise or general business acumen. For example, in the first case in which a conviction was handed down for statutory money laundering, *S v Dustigar*,³⁷ an attorney and a police officer played key roles in planning and operating different laundering schemes.

Prosecutions and convictions

Convictions for money laundering offences have already been recorded in at least three cases.

S v Dustigar

In *S v Dustigar* (Case no. CC6/2000, Durban and Coast Local Division, unreported) 19 persons were convicted for their involvement in the biggest armed robbery in South Africa's history. Seven of the accused were convicted as accessories after the fact on the strength of their involvement in the laundering of the proceeds and an eighth accused (Neethie Naidoo) was convicted on a count of statutory laundering under the Proceeds of Crime Act 76 of 1996. Many of the accused were family members or third parties who allowed the abuse of their bank accounts to launder the money. In some cases, they also allowed new accounts to be opened and fixed deposits to be made in their names to launder the money.

Accused No. 9 (Nugalen Gopal Pillay) was a practicing attorney. A robber who turned state witness testified that the accused approached him at the court. After confirming confidentially that the witness participated in the robbery, the accused said that he "must (then) have a lot of money". Some time later he approached the witness and offered him an investment opportunity in a night-club. The attorney then brokered the deal between the sellers and the witness.

He drafted a sales agreement in which the name of the purchaser was left blank. He handed R500 000 in cash to the sellers at his office as a deposit in terms of the agreement. He drafted another sham agreement in the name of another purchaser and also manipulated his trust account records to hide the identity of the purchaser and the actual amounts that were paid.

Accused No. 9 was sentenced to five years imprisonment. The sentence can be converted into community service after at least one sixth has been served.

Accused No. 13 (Balasoorain Naidoo) was a police captain who had served for 18 years in the SAPS. He created the laundering scheme that involved seven of the other accused. In the judgment the judge described him as a highly intelligent person with business acumen:

Of all the accused who have been convicted as accessories, accused No. 13's role was undoubtedly by far the most serious. He took upon himself the task of organising the so-called money laundering. He did so spontaneously and apparently with considerable vigour. He did so, furthermore, in enormous proportions. His ingenuity was limitless. In doing what he did he over-reached and manipulated not only police colleagues but also the women in his life who were under his influence, being accused Nos 15, 16 and 19.

Accused No. 13 was sentenced to 15 years' imprisonment.

S v Van Zyl

In *S v Van Zyl* (Case no 27/180/98, Regional Court, Cape Town) the accused pleaded guilty to a charge of negligent laundering under section 28 of the Proceeds of Crime Act 76 of 1996.

Van Zyl's sister-in-law stole R8.9 million from her employer. Van Zyl allowed her to make 79 transfers of money totalling R7.6 million from the account of her employer into his personal bank account. Money was channelled, on instructions by his sister-in-law, to her by means of cheques made out either to her or to people nominated by her. Some withdrawals were also made at ATMs. According to the accused, he was led to believe that the money was the result of successful business ventures of, and investments by, his sister-in-law. He acknowledged that his beliefs were unreasonable. He was sentenced to a fine of R10 000 and to imprisonment for ten years, suspended for five years.³⁸

S v Gayadin

The accused in *S v Gayadin* (Case no 41/900/01, Regional Court, Durban) operated several illegal casinos. He admitted to laundering the proceeds of his illegal gambling businesses by entering into arrangements with certain people to hide the money in offshore bank accounts on the Isle of Man and Jersey. More than R11 million was transferred to accounts in these jurisdictions. He was convicted of money laundering under POCA on 12 April 2002. Sentence had not yet been handed down when this chapter was finalised.³⁹

Money laundering control

Although important successes have been obtained by the criminal justice system in the fight against money laundering, the effectiveness of the legislation has been undermined by the fact that the general money laundering control legislation took a number of years to be finalised. As a consequence, the offences had to be investigated and prosecuted although South Africa did not have a financial intelligence unit and while it lacked general legislation that required financial institutions to identify their clients and to maintain anti-laundering compliance and training programmes. The long-awaited FICA closes these important gaps and will ensure that the criminal provisions can be applied more effectively.

Current money laundering compliance systems

Although South Africa lacked a general money laundering control framework before the adoption of FICA, important building blocks of a compliance system have been in place for some time.

For instance, South Africa has a strict exchange control regime.⁴⁰ The financial community is therefore accustomed to paying particular attention to international transactions with a view to determining their compliance with exchange control regulations. This system has certainly made South Africa a less attractive destination for foreign criminals.

The gambling industry provides an example of an industry that is subject to a number of money laundering control obligations. Provincial gaming laws, for instance, prohibit certain cash transactions by casinos, require casinos to report gaming transactions that involve amounts in excess of threshold amounts

to the provincial gaming boards and compel casinos to identify certain clients.⁴¹ The rules of the JSE Securities Exchange also create relevant obligations for exchange participants. For instance, stockbrokers are required to identify their clients, to verify prescribed particulars and to maintain compliance functions.⁴² The Exchange also maintains a surveillance department that monitors compliance with its rules.

However, the sector that has the most building blocks of a compliance system in place, is the banking sector. Banks have a common law duty to identify and verify prospective clients who want to open bank accounts.⁴³ Furthermore, the regulations under the Banks Act 94 of 1990 compel a bank to appoint a compliance officer with senior executive status in the bank and to maintain an independent and adequately resourced compliance function. Regulation 48 requires banks to implement and maintain policies and procedures to guard against the bank being used for purposes of market abuse and financial fraud, including insider trading, market manipulation and money laundering. At a minimum these policies and procedures must be adequate to ensure compliance with relevant legislation, to facilitate co-operation with law enforcement agencies, to identify customers (in particular, to recognise suspicious customers and transactions), to provide adequate training and guidance to relevant staff and to report suspicious transactions. Any money laundering activity in which a bank was involved and which was not identified and reported in good time, must be reported to the Registrar of Banks, in terms of Regulation 46.

Many other non-banking financial institutions in South Africa, for instance the main insurance companies and foreign exchange dealers, also have money laundering compliance programmes. These programmes have mainly been developed by internal audit, legal or compliance divisions who often relied on the support of organisations such as the Money Laundering Forum⁴⁴ and the Compliance Institute of South Africa.⁴⁵

The Financial Intelligence Centre Act 38 of 2001 (FICA)

The origins of FICA can be traced back to August 1996 when the South African Law Commission published a Money Laundering Control Bill as part of a report entitled *Money laundering and related matters*.⁴⁶ The Bill provided for regulatory structures and mechanisms to combat money laundering. However, the government did not take immediate action on the legislation.⁴⁷ In 1998, the Department of Finance appointed a task team to advise it on the appropriateness of the Bill.⁴⁸ The Department of Finance produced a new

Financial Intelligence Centre Bill based on the recommendations of the Task Team.⁴⁹ Further consultation, especially with other government departments, took place before the Bill was finally approved by Cabinet and submitted to parliament in 2001.⁵⁰ After much deliberation, public comment and extensive amendment the legislation was passed and the President signed it on 28 November 2001. However, its provisions will enter into effect on dates determined by the President by proclamation. The first such proclamation was published in January 2002. As a consequence, the provisions regarding the establishment of the Financial Intelligence Centre (FIC) and the Money Laundering Advisory Council (MLAC), as well as provisions that enable the writing of the FICA regulations, came into effect on 1 February 2002.

Apart from providing for the establishment and operation of the FIC and the MLAC, FICA creates money laundering control obligations and regulates access to information.⁵¹ The obligations are primarily applicable to accountable institutions although some extend to reporting institutions, to all persons involved in businesses and to international travellers. Accountable institutions include institutions and persons such as attorneys, estate agents, banks, long-term insurers, foreign exchange dealers, investments advisers and money remitters.⁵² Only two reporting institutions are listed in FICA, namely persons dealing in motor vehicles as well as persons dealing in Kruger Rands.⁵³

Although the reach of FICA appears clear at first glance, it may prove quite difficult to ascertain whether a particular person or business qualifies as an accountable institution and, if so, the extent to which an individual should comply with the Act. For instance, the list of accountable institutions in Schedule 1 to FICA lists as such an "attorney as defined in the Attorneys Act, 1979 (Act No 53 of 1979)." Section 1 of the Attorneys Act defines an attorney as "any person duly admitted to practise as an attorney in any part of the Republic." As a result, attorneys who are not currently practising but who are academics or legal advisers are also brought within the ambit of FICA.⁵⁴ They are therefore saddled with the onerous compliance obligations that are created by FICA, such as the appointment of a compliance officer and the drafting of internal compliance rules. The definition also fails to make adequate provision for attorneys who practise in firms or in companies. Such compliance obligations should attach to the firm or company rather than to each individual attorney in the firm or company.

The definition of accountable institution also includes any person "that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act No 57 of 1988)." This

Act regulates specific aspects of the conduct of trustees. The consequence of this definition is that every trustee of a trust created in a will is also saddled with the onerous compliance duties.

It is improbable that such unfortunate consequences as those outlined above were intended by the legislature. They will hopefully be addressed by means of amendments or softened by means of the system of exceptions envisaged in FICA.

The Financial Intelligence Centre (FIC)

The principal objective of the FIC is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities. Other objectives of the FIC include:⁵⁵

- a. making information collected by it available to investigating authorities, the intelligence services and the South African Revenue Service (SARS) to facilitate the administration and enforcement of the laws of South Africa; and
- b. exchanging information with similar financial intelligence units in other countries regarding money laundering activities.

The FIC will collect, retain, compile and analyse all information disclosed to it and obtained by it in terms of the Act. It will not investigate criminal activity, but will provide information to, advise and co-operate with intelligence services, investigating authorities and the SARS who will carry out such investigations.⁵⁶

Although the FIC must monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance of their duties and their compliance with FICA,⁵⁷ the Act does not empower the FIC to supervise the accountable institutions. The relevant supervisory bodies listed in Schedule 2 to FICA will perform the supervisory functions.⁵⁸ The list includes the Financial Services Board, the Reserve Bank, the Registrar of Companies, the Estate Agency Affairs Board, the Public Accountants and Auditors Board, the National Gambling Board, the JSE Securities Exchange and the Law Society of South Africa.

The supervisory model that was fashioned by FICA is awkward. It requires the FIC to provide some guidance to accountable institutions and to monitor them, while entrusting the supervisory powers to the supervisory bodies.⁵⁹ The model creates potential for territorial disputes between the FIC and the supervisory

bodies and also among some of the bodies themselves. Whether the model will prove effective in practice will depend on the quality of the working relationships that can be formed between the different parties. Consideration will also have to be given to the current powers and capacities of the supervisory bodies to ensure that they have the ability to perform the functions envisaged in FICA. It will also be important to ensure the regulation or supervision of those accountable and reporting institutions do not fall within the current ambit of any of the listed supervisory bodies. Appropriate supervisory bodies for these institutions will have to be identified or created and designated as such, or the FIC will have to be given the necessary powers to supervise anti-laundering compliance by those institutions.

FICA furthermore creates a special relationship between the FIC and the SARS. The FIC data will assist SARS to combat tax evasion and to collect taxes more effectively. In fact, section 29 (suspicious and unusual transactions) explicitly requires all businesses to report any transactions that may be relevant to the investigation of any evasion or attempted evasion of a duty to pay a tax, levy or duty under any legislation that is administered by the SARS.⁶⁰ The SARS, in turn, is required by FICA to divulge certain information relating to the possible abuse of an accountable institution for laundering, or its possible involvement therein, to the FIC.⁶¹ However, section 36(2) of FICA allows the SARS to make reasonable procedural arrangements and to impose reasonable safeguards to maintain the confidentiality of the information that is disclosed in terms of FICA.

The Money Laundering Advisory Council (MLAC)

The MLAC will advise the Minister of Finance on policies and best practices regarding the combating of money laundering activities as well as the exercise by the Minister of his powers under FICA. It will also advise the FIC concerning the performance of its functions and act as a forum in which the FIC, associations representing categories of accountable institutions, organs of state and supervisory bodies can consult one another.⁶² The MLAC is one of the parties that must be consulted before the Minister of Finance may make, repeal or amend regulations under FICA, amend the lists of accountable institutions, supervisory bodies or reporting institutions or exempt anyone from compliance with provisions of FICA.⁶³

The MLAC will primarily consist of various government representatives and representatives of categories of accountable institutions and supervisory bodies.⁶⁴

Money laundering control obligations

FICA imposes money laundering control obligations on primarily accountable institutions. These obligations include a duty to identify clients; a duty to keep records of business relationships and single transactions; a duty to report certain transactions; a duty to appoint a compliance officer; and a duty to train employees in their money laundering control obligations.

These obligations are primarily imposed on accountable institutions although some reporting obligations also extend to reporting institutions, persons involved in businesses and international travellers in general.

Duty to identify clients and to keep records

Section 21(1) of FICA requires an accountable institution to establish and verify the identity of a prospective client before establishing a business relationship or concluding a single transaction with that client.

Accountable institutions are also required to establish similar facts in relation to clients that are parties to business relationships that were established before FICA took effect. In addition, the institution must trace all accounts at the institution that are involved in transactions concluded in the course of that relationship.⁶⁵ In terms of section 82(2)(1) this duty in respect of existing clients will only take effect one year after the general identification duty in section 21(1) takes effect. Accountable institutions are therefore allowed a year to identify their existing clients who still have active business relationships with the institution.⁶⁶ It seems that the large banks and insurance companies will find it very difficult to comply with this obligation in such a relatively short period of time. Calls have therefore been made for an amendment to the legislation that will provide the larger accountable institutions with a more realistic timeframe within which this obligation could be met or, alternatively, for their complete or partial exemption from this obligation in the regulations.⁶⁷

FICA compels accountable institutions to establish the identity of their clients. Accountable institutions are not explicitly required to probe further and to establish their clients' sources of funds, occupation, business, or net worth etc. The Basel Committee on Banking Supervision is currently considering whether such information should be regarded as essential for customer identification in the banking industry.⁶⁸ However, if an institution has only the client's bare details, it will lack information that could be used to profile that specific client

and to correctly identify any suspicious and unusual transactions that the client may conclude.⁶⁹

Accountable institutions are required to keep records of specific details regarding clients, agents and principals as well as their transactions⁷⁰ for a period of at least five years.⁷¹ The FIC may have access to the records kept by or on behalf of the accountable institution. If the records are not by nature public records, access may be obtained by virtue of a warrant issued in chambers.⁷²

Reporting duties

FICA creates a number of reporting duties relating to transactions involving cash amounts in excess of a prescribed amount, suspicious and unusual transactions, the conveyance of cash across the borders of South Africa and electronic transfers of money by accountable institutions. These threshold amounts are to be prescribed by regulation and these regulations are currently being drafted.

• **CASH TRANSACTIONS**

Prescribed particulars of every transaction to which an accountable institution or a reporting institution is party and which involves the payment or receipt by the institution of an amount of cash exceeding a prescribed amount, must be furnished to the FIC within a prescribed period.⁷³ 'Cash' is defined in section 1 as coin and paper money of South Africa (or of another country if it is designated as legal tender, circulates as, and is customarily used and accepted as a medium of exchange in that country) and travellers' cheques.

A transaction is defined in section 1 as "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution". A transaction with a reporting institution does not constitute a transaction as defined in section 1 because the definition limits the meaning of 'transaction' to transactions with accountable institutions. If 'transaction' in section 28 is defined in terms of the definition in section 1, reporting institutions will not have any reporting obligations in terms of that section. The same argument applies in respect of non-accountable institutions and the obligation to report suspicious transactions under section 29 of FICA. Such a result is clearly contrary to the intention of the legislature as expressed in FICA. It is therefore submitted that the definition of 'transaction' should not be applied to sections 28 and 29. However, the interpretation should preferably be clarified by means of an appropriate amendment of the definition.

CONVEYANCE OF CASH TO AND FROM SOUTH AFRICA

A person intending to convey an amount of cash in excess of a prescribed amount to or from South Africa must report prescribed particulars concerning that conveyance to a person designated by the Minister, before the cash is conveyed. The designated person is then required to send a copy of the report to the FIC without delay.⁷⁴

ELECTRONIC TRANSFERS OF MONEY TO AND FROM SOUTH AFRICA

If an accountable institution sends money in excess of a prescribed amount through electronic transfer across the borders of South Africa, or receives such a sum from abroad, on behalf of or on the instructions of another person, it must report prescribed particulars of that transfer to the FIC within a prescribed period after the transfer.⁷⁵

SUSPICIOUS AND UNUSUAL TRANSACTIONS

FICA will repeal section 7 of POCA, which currently regulates the reporting of suspicious transactions.⁷⁶ It will also substitute the text of section 7A of POCA with a different text.⁷⁷ Section 7A provides that a person who is charged with negligently committing a laundering offence under POCA may validly raise as a defence the fact that he or she reported the transaction as suspicious in terms of section 7. After these amendments are made, the duty to report suspicious transactions will be regulated by section 29 of FICA.⁷⁸

FICA creates a very broad category of suspicious or unusual transactions that must be reported and also applies this duty to a broad spectrum of persons.

Any person who carries on a business, who manages or is in charge of a business or who is employed by a business and who knows or suspects certain facts must report the grounds for the knowledge or suspicion and prescribed particulars regarding the transaction to the FIC within a prescribed period after he acquired the knowledge or formed the suspicion.⁷⁹ The facts may relate to the following:⁸⁰

- a. That the business has received or is about to receive the proceeds of unlawful activities;
- b. That a transaction or series of transactions to which the business is a party:
 1. facilitated or is likely to facilitate the transfer of proceeds of unlawful activities;
 2. has no apparent business or lawful purpose;

3. is conducted to avoid giving rise to a reporting duty under FICA;
4. may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner of SARS; or
- c. That the business has been used or is about to be used in any way for money laundering purposes.⁸¹

Section 69 of FICA provides a special defence to a charge based on the failure to report an unusual or suspicious transaction to the FIC. If a person who is an employee, director or trustee of, or a partner in, an accountable institution is charged with committing an offence under section 52, that person may raise as a defence the fact that he or she has:

- a. complied with the applicable obligations in terms of the internal rules relating to the reporting of information of the accountable institution;
- b. reported the matter to the person charged with the responsibility of ensuring compliance by the accountable institution with its duties under this Act; or
- c. reported the matter to his or her superior, if any, if:
 1. the accountable institution had not appointed such a person or established such rules; or
 2. the accountable institution had not complied with its obligations in section 42(3) in respect of that person (copy of the rules were not made available by the institution to that person); or
 3. the internal rules did not apply to that person.

In essence, section 69 allows persons not to report a transaction directly to the FIC but to comply with the internal rules of their business, which may allow them to report the section 29 transactions internally to a person or unit who will consider the information, and will lodge a report with the FIC if it is warranted. In certain cases an employee may simply report the matter to a superior and, if that can be proved, the person will have a valid defence if he or she is charged with not reporting the transaction to the FIC directly. The defence is limited to persons who are employees, directors or trustees of, or partners in, accountable institutions. An important omission from this list appears to be members of close corporations. However, many such members are also employees of the close corporation and may avail themselves of the defence in that capacity.

If a person is obliged to file a report in terms of section 29, this will often be because he is involved in a possible laundering transaction. Apart from a defence to a charge under section 29, the person who files the report therefore also requires a valid defence against a charge based on a contravention of the relevant provisions of POCA. FICA will amend section 7A of POCA to provide such a defence.⁸² When this amendment comes into operation, section 7A will allow a person to raise as a defence the fact that he or she had reported a knowledge or suspicion in terms of section 29 of FICA if he or she is charged with committing an offence under section 2(1)(a) or (b), 4, 5 or 6 of POCA. In addition, a defence that is similar to the section 69 internal reporting defence will be inserted by FICA into section 7A of POCA. However, this defence relating to internal reporting will only be available to employees of accountable institutions. As a result employees of non-accountable institutions will not be able to defend themselves against a charge of money laundering under the specific sections of POCA, by proving that they followed internal procedures or that that they reported the transaction to their superiors. They will only have such a defence if they reported the transaction directly to the FIC in terms of section 29 of FICA.

The limited ambit of the new internal reporting defence in section 7A may also expose some role players in accountable institutions to liability. The section 69 internal reporting defence to a charge of non-reporting (section 52) is available to persons who are employees, directors or trustees of, or partners in, accountable institutions. However, the section 7A internal reporting defence to a charge of money laundering under specific sections of POCA is only available to employees of accountable institutions. Directors and trustees of, or partners in, accountable institutions who are not also employees of accountable institutions are therefore afforded a defence against a charge of non-reporting if they report internally, but are not shielded from criminal liability for money laundering under POCA. This result is unfortunate and it is to be hoped that the matter will be addressed by means of an appropriate amendment to the legislation. In the meantime, it is advisable to ensure that persons associated with accountable institutions who are not employees of the institutions report directly to the FIC, so that they enjoy sufficient protection against criminal liability in this respect.

SUSPENSION AND FURTHER INFORMATION

A person who reports a transaction in terms of section 28 (transaction involving cash in excess of a prescribed amount) or section 29 (unusual and suspicious transactions) may continue and carry out the transaction unless the FIC directs its suspension.⁸³ The FIC may issue such a directive in writing after

consultation with the institution or person concerned, if it has reasonable grounds to suspect that the transaction is indeed unusual or suspicious as set out in section 29. The directive may require the institution or person not to proceed with the transaction or any other transaction in respect of funds affected by the particular transaction for a period not exceeding five days, to allow the FIC to make inquiries about the transaction or to inform and advise an investigating authority.⁸⁴ Such a directive cannot be issued in respect of transactions that are carried out on a regulated financial market.⁸⁵

It is doubtful whether this power will be exercised often. The international experience of such powers is not very positive. The following comments were made in the FATF report entitled *Review of FATF-anti money laundering systems and mutual evaluation procedures 1992-1999*:⁸⁶

A number of other issues were commented upon in several reports. One was the power ... to suspend transactions that were the subject of an STR. Where a formal power exists to order such a suspension, the length of time of the suspension varies between 24 hours and five days, and in many countries it seems to have been very rarely used. Despite this, Swiss law provides that all transactions are automatically suspended for a five-day period, and it was felt that (this) period is sufficient to gather the evidence needed to commence proceedings. However, the practical experience in other members indicates that the power may be occasionally helpful, but is not likely to be a significant tool (particularly when institutions will often co-operate with law enforcement voluntarily to increase the time it takes to process a transaction).

A person who reports a threshold transaction (excluding a report relating to a conveyance of cash to or from South Africa) or an unusual or suspicious transaction may be requested by the FIC or other specified authorities and officials to furnish them with additional information concerning the report and the grounds for the report as may reasonably be required to perform their functions. If such information is available, it must then be furnished to the FIC without delay.⁸⁷

CONFIDENTIALITY AND PRIVILEGE

FICA overrides most of the secrecy and confidentiality obligations in South African law. No duty of secrecy or confidentiality or any other statutory or common law restriction on the disclosure of information affects any duty of an institution, person or the SARS to report or to allow access to information in

terms of Chapter 3 Part 3 (reporting duties and access to information) of FICA (section 37(1)). However, this provision does not apply to the common law right to legal professional privilege as between an attorney and an attorney's client in respect of communications made in confidence between:

- a. the attorney and the attorney's client for purposes of legal advice or litigation which is pending or contemplated or which has commenced; or
- b. a third party and an attorney for purposes of litigation which is pending or contemplated or has commenced (section 37(2)).

The protection enjoyed under section 37(2) is wider than the current protection in terms of section 7(5) of POCA, which restricts the legal professional privilege to information communicated to the attorney to enable him to provide advice, to defend the client or to render other assistance to the client in connection with an offence:

- a. of which the client is charged;
- b. in respect of which he has been arrested or summoned to appear in Court; or
- c. in respect of which an investigation is being conducted against him or her with a view to institute criminal proceedings.

PROTECTION OF REPORTERS, INFORMATION AND EVIDENCE

No criminal or civil action can be instituted against an institution, a person or the SARS that has complied in good faith with the obligations in terms of Chapter 3 Part 3 (reporting duties and access to information) of FICA or against any person acting on their behalf.⁸⁸ A person who made, initiated or contributed to a report that was submitted in terms of section 28 (transaction involving cash in excess of a prescribed amount), section 29 (unusual and suspicious transactions) or section 31 (electronic transfer of money across the border) or who has furnished additional information concerning such a report or the grounds for the report in terms of FICA enjoys protection under section 38. Such a person can give evidence in criminal proceedings arising from the report, but cannot be compelled to do so.⁸⁹

Section 39 provides that an official of the FIC may issue a certificate certifying that information specified in the certificate was reported or sent to the FIC in terms of the provisions of FICA requiring reports to be made. That certificate is, subject to the exclusions in section 38, admissible as evidence before a

court of any fact contained in it, if direct oral evidence of the fact would be admissible.⁹⁰

Access to information

A number of provisions of FICA regulate the access to information held by the FIC as well as the FIC's access to information.

Important provisions allowing the FIC access to information include the following:

- a. An authorised representative of the FIC may, by virtue of a warrant issued in chambers by a magistrate, judge or regional magistrate, examine and make extracts from or copies of records kept under section 22.⁹¹ These records contain details regarding the identification of the clients, business relationships and single transactions. The warrant is only required if the records are not public records. It may only be issued if there are reasonable grounds to believe that the records may assist the FIC to identify the proceeds of unlawful activities or to combat money laundering activities.
- b. The FIC may require an accountable institution to advise whether a particular person is or was a client, represented a client or was represented by a client.⁹²
- c. Reporters of transactions may be required to furnish the FIC with additional information regarding the report and the grounds for the report.⁹³
- d. The FIC may apply to a judge for a monitoring order requiring an accountable institution to furnish information to the FIC regarding transactions concluded with the institution by a specified person or transactions conducted in respect of a specified account or facility at the institution. No notice of the application or hearing is given to the person involved in the suspected money laundering activity.⁹⁴ The order may be issued if there are reasonable grounds to believe that the person has engaged or may engage in an unusual or suspicious transaction or that the account has been or may be used for such purposes. The order will lapse after three months unless it is extended.⁹⁵
- e. If a supervisory body or the SARS knows or suspects that an accountable institution is wittingly or unwittingly involved in an unusual or suspicious transaction, it must inform the FIC and furnish the FIC with any records regarding that knowledge or suspicion which the Centre may reasonably require to achieve its objectives.⁹⁶ If the FIC believes that a supervisory body or the SARS has such information, it may request the body or SARS to confirm or rebut that belief. If the belief is confirmed, certain information

must be provided to the FIC.⁹⁷ These bodies may make reasonable procedural arrangements and impose reasonable safeguards to maintain the confidentiality of any information.⁹⁸

Section 40 is the main provision that regulates access to the information held by the FIC. In essence, investigating authorities, the SARS and intelligence services may be provided with information on request or at the initiative of the FIC. Information may be provided to foreign entities performing functions similar to those of the FIC, pursuant to a formal, written agreement between the FIC and that entity or its authority.⁹⁹ The FIC may decide to provide information to an accountable or reporting institution or person regarding steps taken by the FIC in connection with transactions that it reported to the FIC, unless it would be inappropriate to disclose such information. Information may also be supplied to a supervisory body to enable it to exercise its powers and perform its functions in relation to an accountable institution. In addition, information may be supplied in terms of a court order or in terms of other national legislation.¹⁰⁰ The most important general legislation regulating access to information is the Promotion of Access to Information Act 2 of 2000. This Act gives effect to the constitutional right of access to records held by the state and to records held by another person if it is required for the protection or exercise of any right. The right of access to information is not absolute and the Act provides for specific grounds upon which access to records could be refused.

Measures to promote compliance by accountable institutions

FICA creates the normal compliance obligations that are associated with money laundering control systems.¹⁰¹ It requires every accountable institution to formulate and implement internal rules concerning:¹⁰²

- a. the establishment and verification of the identity of persons which it must identify in terms of FICA;
- b. the information of which record must be kept in terms of FICA;
- c. how and where those records must be kept;
- d. the steps to be taken to determine when a transaction is reportable to ensure that the institution complies with its reporting duties under FICA; and
- e. other matters as may be prescribed by regulation.

An accountable institution must provide training to its employees to enable them to comply with FICA and the relevant internal rules.¹⁰³ Furthermore, it

must appoint a person whose responsibility it is to ensure that the employees of the institution comply with FICA and the internal rules as well as compliance by the accountable institution with its obligations under FICA.¹⁰⁴

FICA imposes a heavy burden on the person who is given this responsibility. In general, the responsibility to ensure compliance in a business resides with the management of the business as well as with every employee who has to comply. Compliance officers assist management and the employees to discharge this duty by designing and operating appropriate systems.¹⁰⁵ However, the person appointed under FICA will have the responsibility of ensuring that the business as well as the employees comply with FICA. Compliance officers have already indicated an unwillingness to accept this appointment. They are reluctant to shoulder this burden unless they are given all the powers and resources that will be required to enable them to ensure compliance. It is probable therefore that the managing directors of many companies will be appointed as the responsible officers. Their companies' compliance officers will then assist them to ensure compliance with FICA.

Offences

FICA gives rise to a large number of offences. The majority carry a penalty of imprisonment for up to 15 years or a fine of up to R10 million.¹⁰⁶

In addition to the offence that generally relate to non-compliance with FICA, FICA also creates an additional money laundering offence in section 64. Any person who conducts, or causes to be conducted, two or more transactions with the purpose, in whole or in part, of avoiding giving rise to a reporting duty under FICA is guilty of an offence. Among other things, this offence addresses 'smurfing'. Smurfing takes place where a transaction involving cash in excess of the threshold amount is structured and divided into smaller transactions to keep the value of each transaction below the threshold and thereby avoid being reported. However, the provision also overlaps with many of the money laundering offences in terms of POCA, for instance the offences that can be committed where persons structure transactions to hide or disguise the true nature of ill-gotten gains. They normally attempt to structure the transactions in such a way as to avoid detection and reporting. Such persons can be prosecuted under the relevant provisions of POCA or, if the transactions meet the requirements, under section 64 of FICA.

Search, seizure and forfeiture

Although POCA regulates general criminal confiscation of proceeds of crime as well as civil forfeiture of such proceeds and instrumentalities, cash that is transported across South Africa's borders may be forfeited under FICA if the necessary report has not been filed.

FICA provides for the seizure of any cash which is transported or is about to be transported across the borders of South Africa if the cash exceeds the prescribed limit and there are reasonable grounds to suspect that an offence under section 54 (intentional failure to report conveyance of cash in excess of prescribed amount across border) has been or is about to be committed. If a person is convicted of the offence, the court must, in addition to any punishment that may be imposed, declare the cash amount that should have been reported, to be forfeited to the state.¹⁰⁷ A similar duty is imposed on the court if a person is convicted under section 64 (conducting transactions to avoid giving rise to a reporting duty under FICA). The forfeiture may not affect any innocent party's interests in the cash or property. To qualify for this protection, a person must prove:

- a. that he or she acquired the interest in that cash or property in good faith; and
- b. that he or she did not know that the cash or property in question was:
 1. conveyed as contemplated in section 30(1) or that he or she could not prevent such cash from being so conveyed; or
 2. used in the transactions contemplated in section 64 or that he or she could not prevent the property from being so used,

as the case may be.¹⁰⁸

FICA also provides that innocent parties who meet the above criteria may approach the court within three years of the forfeiture order in order to retrieve their property or interests or to receive compensation. Although FICA provides protection for the rights and interests of innocent third parties, it is important to note that the protection does not extend to interested parties who were merely unaware of the intention to commit an offence. It is limited to parties who can prove that they did not know that the cash or property was to be conveyed across the borders of South Africa or used in transactions contemplated in section 64.

Amendments and exemptions

FICA provides procedures in terms of which the Minister of Finance may make amendments to the lists of accountable institutions (Schedule 1), supervisory bodies (Schedule 2) and reporting institutions (Schedule 3).¹⁰⁹ The procedures allow for consultation and any additions to or deletions from the list require parliamentary approval.

The Minister may also, after consulting the MLAC and the FIC and on conditions and for a period that he determines, exempt a person, an accountable institution or a category of persons or accountable institutions from compliance with a provision of FICA. Such an exemption may also be granted for categories of transactions. Proposed exemptions must be tabled in parliament before publication in the *Gazette*. An exemption may be withdrawn or amended by the minister after consultation with the MLAC and the FIC.

Funding of terrorism

The new democratic South Africa inherited a comprehensive set of anti-terrorism legislation from the previous regime. Schönteich identifies more than 30 different laws that were enacted in the past to combat terrorism and related acts.¹¹⁰ However, many provisions of these laws are unconstitutional and outdated. They reflect the apartheid regime's pre-occupation with its own safety and security and are inadequate to meet the current international standards.

This brief discussion focuses on one aspect only, namely the ability of the current South African law to address the funding of terrorism in terms of international standards laid down in instruments such as the 1999 United Nations International Convention on the Suppression of the Financing of Terrorism or in the United Nations Security Council Resolution 1373 and the Eight Special Recommendations on Terrorist Financing of the Financial Action Task Force.¹¹¹ The latter requires, for instance, that:

1. countries should take immediate steps to ratify and implement the relevant Convention and the relevant United Nations resolutions;
2. countries should criminalise the financing of terrorism and associated money laundering;
3. countries should implement measures to freeze funds and other assets of terrorists;

4. financial institutions should be required to promptly report transactions if they have reasonable grounds to suspect that they are linked to terrorism;
5. countries should render mutual legal assistance to one another in this respect;
6. countries should regulate alternative remittance systems;
7. financial institutions should identify the originators of transfers, should ensure that the information remains with the transfer and should scrutinize transfers which do not contain complete originator information; and
8. countries should review the adequacy of their laws and regulations that relate to entities that can be abused for the financing of terrorism, in particular non-profit organisations.

Two South African organisations, Qibla and People Against Gangsterism and Drugs (Pagad),¹¹² have been classified by the US State Department as terrorist groups.¹¹³ Despite the fact that criminal prosecutions have been instituted against many members of these organisations, the organisations are not banned in South Africa. Although not much is generally known about their funding it seems as if they rely heavily upon their members and supporters for contributions. Pagad, for instance, obtains its funds through fundraising projects. Money is also often collected at Pagad meetings and rallies.¹¹⁴ However, the South African law does not adequately address the contribution of funds such as these to terrorist organisations.

An example of the limitations of the current law is afforded by section 54 of the Internal Security Act 74 of 1982. This Act was one of the cornerstone laws of the regime's security framework. Section 54(1) provides as follows:

Any person who with intent to -

- (a) overthrow or endanger the State authority in the Republic;
- (b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic; or
- (c) induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint;

in the Republic or elsewhere -

- (i) commits an act of violence or threatens or attempts to do so;
- (ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;

- (iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or
- (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

Although it may be argued that a person who provides funds to a terrorist organisation incites, aids or encourages the commission of a terrorist act as set out above, the Internal Security Act is clearly limited to such acts aimed at the South African government or the dispensation in South Africa.¹¹⁵ The wording is not wide enough to criminalise the funding of acts of terror against other states. The Act furthermore requires the proof of the required intent, before the offence can be proved. Many of the other laws as well as possible common law offences have similar or other limitations. POCA and FICA, for instance, do not provide assistance either because they are aimed at the application of proceeds of crime. If the funds that are channelled to a terrorist organisation constitutes legitimate or 'clean' money, the current South Africa money laundering legislation does not find application.

The South African Law Commission is currently drafting an anti-terrorism bill. A draft was published for comment in July 2000.¹¹⁶ Comment was received and the work is continuing. The Law Commission is also giving attention to the international requirements regarding funding of terrorism and it is expected that the bill that they aim to produce by the mid-2002 will contain provisions dealing with the issue.¹¹⁷

Although the law is not currently adequate to prohibit the funding of terrorism against other states, financial institutions are taking steps to protect themselves against abuse by parties who may wish to fund such activity. Financial institutions realise that any association with such parties may have a disastrous impact on their reputations and will impact negatively on their global business contacts and their businesses in general. Since 11 September 2001 many compliance officers and risk managers of financial institutions have therefore implemented programmes to protect the integrity of their systems. The South

African Reserve Bank also circulated the names of persons associated with terrorism by the United Nations to banks to enable them to identify any problematic business relationships.

Institutional framework

Relevant institutions

The money laundering control framework that was created by the laundering laws envisages specific roles for a large number of institutions, which can be clustered into four groups for purposes of the following discussion.

The FIC and the MLAC can be clustered together as institutions because of their unique roles in the money laundering control. These roles and some of the challenges that these two institutions will have to meet were outlined above.¹¹⁸

A second group of institutions comprises those that will use the information that the FIC collects. They include the National Intelligence Agency, the South African Secret Service, the SARS and all authorities that can investigate crime in South Africa in terms of national legislation. The latter includes the SAPS and units and directorates in the office of the National Director of Public Prosecutions, in particular the Asset Forfeiture Unit and the Directorate of Special Operations (the 'Scorpions'). The Scorpions now also include the former Investigating Directorate for Serious Economic Offences and the Investigating Directorate for Organised Crime and Public Safety. Foreign financial intelligence units with formal information-sharing agreements with the FIC can also be classified as part of this group.

The third group of institutions overlaps with the second. It comprises institutions that will enforce or oversee compliance with money laundering laws. The supervisory bodies are part of this group but, in addition, the group includes the SAPS and the investigating units and the Directorate mentioned above as well as the National Prosecuting Authority. Judges and magistrates can also be classified as part of this group.

The fourth group of institutions comprises those that must comply with the money laundering control obligations, namely the accountable institutions which must comply with the full complement of duties under FICA, and those who have more limited duties under FICA, such as reporting institutions, businesses in general, persons involved in such businesses and international travellers.¹¹⁹

All other institutions and individuals who must refrain from committing a laundering offence under POCA can also be included in this group.

These institutions will all require a certain capacity as well as resources to ensure their effective participation in the system. In addition, they will have to develop a dynamic relationship to enable the system to operate effectively. Elements of these two aspects are explored below.

Capacity and resources

In general, all the institutions except the FIC and the MLAC have a measure of general capacity and resources. The FIC and the MLAC are the only new bodies that will have to be constructed from scratch.

FIC and MLAC

In essence, the MLAC will be a committee that meets occasionally. Proposed resolutions may also be circulated and adopted after written comment and discussion if it is not feasible to call a meeting.¹²⁰

The FIC will provide it with the necessary administrative and secretarial support as well as financial resources to enable it to function effectively. The MLAC will therefore only require the necessary expertise to enable it to provide sound advice to the Minister of Finance and the FIC.

Apart from *ex officio* members that represent certain government departments and functions, the Minister may also request supervisory bodies, categories of accountable institutions and other persons or bodies to nominate representatives to serve on the MLAC. Not all members of the MLAC will necessarily have expertise in money laundering control but the required level of expertise of the MLAC can be assured by means of specialised orientation and continuing information programmes for the members. Such programmes are also necessitated by the dynamic and sophisticated development of the international money laundering control system and by the complexity of the legal and practical problems that will need to be addressed as the South African system is implemented.

The Minister may also ensure the required level of expertise by requesting specialised expert bodies to nominate money laundering control specialists to serve on the MLAC. FICA also allows sub-committees of the MLAC to co-opt experts to assist them to deal with specific issues.

The structuring of the FIC will pose greater challenges. The FIC will not necessarily require a large permanent staff complement because its functions are fairly limited. It will obviously require management and administrative staff, but most of its important functions will probably be performed by financial intelligence analysts and by liaison officers who will have to ensure communication and cooperation between the FIC and the data users (the institutions in the second category above). Staff members of the data users may be seconded to the FIC to assist in the performance of these functions and, if this proves effective in practice, will assist in keeping the permanent staff complement of the FIC small. Specialised training for financial analysts will be required and assistance in this regard will probably be offered by other international financial intelligence units, whether individually by some national units or through the Egmont Group.

The biggest challenge in respect of its own office will probably be the creation of the specialised information systems and very powerful computer programmes that will enable the data to be collected, stored and analysed. The FIC will need to create a system that will allow accountable institutions to report threshold transactions electronically and as speedily and cheaply as possible. These systems, as well as the expertise to design and implement them, could be very expensive, but international assistance may be forthcoming in this regard.

In the 2002–2003 budget, R35 million was allocated for the establishment of the FIC. Whether this amount will be sufficient for this purpose will depend largely on the extent of international assistance that will be rendered in connection with the FIC's information system.

The majority of the other institutions have an existing capacity that will have to be expanded to enable it to address money laundering effectively. A capacity to address laundering already exists to some extent in the SAPS, SARS and the Asset Forfeiture Unit. This capacity is discussed below.

*South African Police Service (SAPS)*¹²¹

The Detective Service of the SAPS has an existing capacity to investigate suspicious transaction reports and money laundering. This capacity will have to be expanded and improved to enable it to investigate all the reports that the FIC will channel to it.

The Detective Service consists of the Commercial Branch, the Organised Crime Branch and the Serious and Violent Offences Branch. The investigation com-

ponents are supported by the Crime Intelligence Division, which is responsible for intelligence gathering.

Suspicious transaction reports that are made in terms of POCA are filed with the Commercial Branch Head Office in Pretoria.¹²² However, this measure was viewed from the start as an interim arrangement because it was anticipated that the reports would be channelled to the FIC once FICA was promulgated and the FIC was operational. It was also thought that the FIC would have investigators to investigate such reports. As a result, not many resources were invested in the development of an extensive capacity for the SAPS to investigate suspicious transaction reports. However, core staff members at the Head Office of the Commercial Crime Branch did receive training in money laundering control.

When it became clear that the FIC would not have its own investigators, the SAPS took steps to develop a long-term investigative capacity in respect of suspicious reports. A Proceeds of Crime Investigation Desk (the Desk) was established at the Commercial Branch Head Office on 1 January 2002. The Desk will receive, evaluate, analyse and distribute the suspicious transactions reports and other relevant information sent to the Commercial Branch. The Desk will also assist in keeping statistics on the use of information derived from suspicious transaction reports. Investigators will also receive training on POCA as part of the formal training programme of the Commercial Branch.

The SAPS is also contributing to relevant police training and awareness programmes in Southern Africa. Training programmes on money laundering control have been offered to investigators of police forces in the Southern African sub-region for a number of years. Such programmes were offered in conjunction with Interpol, the SAPS Detective Academy and institutions such as the RAU Centre for the Study of Economic Crime. A recent example is the First Southern African Regional Conference on Money Laundering, which the SAPS presented in February 2002 in conjunction with the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) and the Embassy of France in South Africa. The conference was attended by police representatives from all SARPCCO countries and also by representatives of financial institutions and other relevant agencies.

Other public institutions

The SARS and the Asset Forfeiture Unit of the National Director of Public Prosecutions have also established a capacity to investigate money laundering. Each institution obviously has its own unique focus on laundering: the SARS

focuses on money laundering linked to tax evasion and the Asset Forfeiture Unit on the confiscation and forfeiture of proceeds and instrumentalities of crime. However, their investigations will often overlap with investigations into money laundering or will reveal money laundering. Both institutions have therefore been sensitizing their investigators to money laundering and a core group of investigators of SARS has also been trained in money laundering control.

Some successes have therefore been attained in establishing a core capacity to investigate money laundering offences. However, much still has to be done to properly equip prosecutors and to enable them to successfully prosecute cases involving money laundering. The law and the legal mechanisms that are created are also new and money laundering control should also be covered in programmes aimed at presiding officers.

Although all prosecutors should be enabled to prosecute these offences, an initial programme could be aimed at the prosecutors of the Special Commercial Crime Court in Pretoria. This court was established as a pilot project to test the efficacy of a multi-disciplinary team approach to the investigation and prosecution of economic crime.¹²³ It has proved successful, and a further court is to be established in Johannesburg. The majority of cases that are prosecuted in these courts will involve money laundering and it seems therefore sensible to target these specialised prosecutors for the first training in the prosecution of money laundering.

Financial institutions and civil bodies

The success of money laundering control will depend largely on the willing cooperation by financial institutions, businesses in general and by individuals. The South African government can simply not afford to channel sufficient resources to supervisors and the criminal justice system to enable them to enforce compliance in this regard.¹²⁴

Although it will take many years to gain the cooperation of all businesses, the leading financial institutions have embraced the concept of money laundering control. Financial institutions that are operating internationally have been compelled by international standards and their international counterparts to adopt money laundering control policies and to take active steps to protect their businesses against abuse by launderers. Some of the measures that are currently in place have been discussed above. The compliant institutions have been calling on government for a number of years to adopt the necessary legislation to enable effective money laundering control compliance and also

to create a level playing field. Representative bodies, such as the Banking Council of South Africa and the Life Offices' Association of South Africa, played leading roles in this regard.

Apart from representative business associations, others have also contributed to the formation of a money laundering control framework for South Africa. Two bodies that have been very instrumental in the creation of the current money laundering compliance programmes are the Money Laundering Forum (the Forum) and the Compliance Institute of South Africa.

The Forum is a non-governmental, non-profit organisation, which assists its members to develop a thorough understanding of money laundering control, to network, to exchange information and to share experiences. Individuals who were concerned about money laundering control in South Africa founded the Forum in 1995. The Forum has assisted many of its members to establish money laundering control functions in their respective industries and to give input into the drafting of the relevant legislation. The Forum has been chaired since its formation by Ursula M'Crystal and currently has a membership (individual and corporate) of about 300 individuals and institutions from South and Southern Africa.

The Compliance Institute of South Africa is an association for compliance professionals.¹²⁵ It has taken the lead in formulating industry standards relating to money laundering control and has also supported the development of relevant training courses.

South African institutions have also been developing a capacity to research money laundering as well as money laundering laws. Bodies such as the Unit for Economic Crime Studies of the Free State University,¹²⁶ the Centre for the Study of Economic Crime of the Rand Afrikaans University¹²⁷ and the Institute for Security Studies¹²⁸ have produced research that aids the understanding of money laundering and money laundering control in South and Southern Africa. They have stimulated debate about money laundering control in South Africa and their courses, workshops and conferences on these topics have contributed to the current level of public awareness and expertise in this field.

The level of current expertise and commitment to money laundering control in civil society in South Africa is encouraging and bodes well for the successful implementation of the money laundering control system by the South African government.

Conclusion

South Africa has a comprehensive framework for money laundering control. The challenge that it now faces is to implement the system. If done correctly, the system could contribute to the development of the South African economy as well as the combating of crime in the country. It is clear that South Africa will be able to rely on the available international expertise in money laundering control in this process. However, South Africa faces many challenges that are foreign to developed economies, for instance those in respect of the abuse of its informal economy by launderers. South Africa will have to formulate its own answers and strategies in this regard. Greater cooperation between the countries in the sub-region will enable South Africa and the other countries to pool their expertise and resources and to develop systems that will effectively address money laundering as it is manifested in their economies.

Annexure A

The following information was released by the South African Police Service:¹²⁹

Suspicious transactions reported to the SAPS 1997–2001					
Month	1997	1998	1999	2000	2001
January		55	8	88	71
February		19	10	36	56
March		10	22	66	44
April		4	12	33	37
May		8	11	36	69
June	13	14	23	41	77
July	24	7	41	40	91
August	19	10	36	86	119
September	15	22	27	62	82
October	23	10	23	75	118
November	11	18	99	53	175
December	35	14	35	66	65
Total	140	191	347	682	1004
Grand total					2364

The reporting statistics for 2002 are as follows: January: 108; February: 113; March: 174 and April: 240.

The total number of reports that were filed since 1997 is 2 999.

Notes

- 1 This chapter combines new research with research that has been published by the RAU Centre for the Study of Economic Crime, *inter alia* on its website at http://general.rau.ac.za/law/English/CenSec_2.htm and research that has been accepted for publication in the *Journal of Money Laundering Control* (Henry Stewart Publications, UK). It reflects the law and the status quo as at 24 May 2002.
- 2 FICA defines money laundering as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds and includes any activity which constitutes an offence in terms of section 64 of that Act (conducting transactions to avoid reporting duties under the Act) or under section 4 (money laundering), 5 (assisting another to benefit from the proceeds of crime) or 6 (acquisition, possession or use of proceeds of unlawful activities) of POCA. The concept will broaden once the new criminal provisions of FICA come into effect. FICA creates an additional offence, namely conducting transactions to avoid being reported. See p 110.
- 3 See, for instance, *S v Dustigar* in 4.1 below.
- 4 See in general L de Koker, *KPMG Money laundering control service*, Butterworths, Durban, 1999. This reporting provision in POCA will be repealed when the relevant provisions of FICA come into effect. The duty to report suspicious and unusual transactions will then be regulated by section 29 of FICA. See p 103.
- 5 See in general De Koker, *op cit*.
- 6 POCA came into effect on 21 January 1999.
- 7 Section 1 of POCA.
- 8 *Ibid*.
- 9 Section 1(2) of POCA. Therefore, if a person had a strong suspicion that the property might be tainted and, nevertheless, proceeded with the transaction without making reasonable inquiries, the court may find that he acted with full knowledge of the true nature of the property.
- 10 Section 1(3) of POCA.
- 11 See p 103 for a discussion of the reporting duty.
- 12 See in general J Swanepoel, An investigator's perspective on the proposed anti-laundering legislation, in L de Koker & JJ Henning, *Money laundering control in South Africa* 30 Transactions of the Centre for Business Law, University of the Orange Free State, 1998, 24.

- 13 Section 1 of POCA.
- 14 See the discussion of these forms of knowledge on pp 84–85.
- 15 In addition to the three racketeering-based money laundering offences, POCA also criminalises, *inter alia*, the acquisition or maintenance of an interest in or control of any enterprise through a pattern of racketeering activity and conducting the affairs of an enterprise through a pattern of racketeering activity. See section 2(1) of POCA.
- 16 Section 7 of POCA (as amended); Prevention of Organised Crime Regulations, 1999, issued in terms of Government Notice R 416 of 1 April 1999 (as amended). See in general De Koker *op cit*. A transaction to which such a person or the business undertaking is a party, must be reported even if it is discontinued, if it may have brought the proceeds of unlawful activities into the possession of the person or business undertaking or may have facilitated the transfer of the proceeds of unlawful activities, had the transaction been concluded. The Commander of the Commercial Crime Investigations Subcomponent may, in writing, require the reporter to provide him with particulars or further particulars of any matter concerning the suspicion and the grounds on which it rests as well as copies of all available documentation concerning such particulars. If the person has the necessary information or documentation, he must comply with the request within a reasonable time (sections 7(3) and 7(4) of POCA).
- 17 Section 7(6) of POCA.
- 18 Section 7(5)(a) of POCA.
- 19 Section 7(5)(b) of POCA.
- 20 This exemption is clearly limited to a criminal defence context. Information gleaned while undertaking ordinary civil work (for instance while forming companies and trusts or doing estate planning for a client) does not fall within the ambit of the exemption.
- 21 See pp 84–86.
- 22 See L de Koker, Money laundering trends in South Africa, 2002, http://general.rau.ac.za/law/English/CenSec_2.htm. Much of the following discussion is taken from that report.
- 23 See pp 82–88.
- 24 See the judgments discussed on pages 94 and 95.
- 25 Such a deposit is sometimes made to process a stolen cheque. See, for instance, *Government of the Republic of South Africa v Van Hulsteyns Attorneys* [1999] 2 All SA 29 (T) and *Van Hulsteyns Attorneys v Government of South*

Africa Case no 506/1999 (SCA) where the trust account of an attorney was abused for this purpose.

- 26 South African Money Laundering Typologies Workshop, RAU, 5 December 2001.
- 27 During a ten-week period in 2001, flights that left Cape Town for other South African destinations were monitored. Nearly R10 million was transported by passengers in sizable cash amounts ranging from R50 000 to R5 million. See H Jansen van Vuren Financial investigations, unpublished research paper, 2001.
- 28 See L Davids, Examples of typical money laundering trends in DSO matters, unpublished paper presented at the South African Money Laundering Typologies Workshop, 5 December 2001.
- 29 Casinos have been changing their practices in this respect. They will now often refuse to issue a cheque when the chips were bought for cash and will simply repay the gambler in cash. Although this method stymies the attempt by a criminal to place the dirty money and exchange the cash for a negotiable instrument, it still assists the criminal to rid himself of the particular bank notes. This is of particular benefit to a criminal where the particular bank notes may have been marked in some way or other.
- 30 L Claasen, Industry salient points, in KPMG, *KPMG banking survey—Africa 2001*, KPMG, Johannesburg, pp 20–21, provides the following interesting perspectives on the South African banking industry: “Total banking assets grew by 5.7% to R790 billion in the third quarter of 2000...The banking sector remains dominated by the Big Six banks whose combined assets account for approximately 86% of the market...Deposits increased to R577.6 billion...Foreign funding has grown from R37.8 billion a year before to R54 billion as at September 2000. However, this shows that South African banks do not have large foreign currency exposures (9% of total advances).”
- 31 A Hartdegen, Industry overview—South Africa, in KPMG, *KPMG banking survey—Africa 2001*, KPMG, Johannesburg, p 26: “The large banks all rolled out e-commerce initiatives. These ranged from Nedcor’s ‘convergence strategy’ and commercialisation of its technology and operations divisions, to FirstRand’s innovative E-Bucks initiative, Stanbic launching bluebean and tradestandard, BOE’s icanonline joint venture with M-Web, and ABSA offering free internet access.”
- 32 The cases, *S v Dustigar* (Case no CC6/2000, Durban and Coast Local Division, unreported) and *S v Van Zyl* (Case no 27/180/98, Regional Court, Cape Town) are discussed on pp 94 and 95.
- 33 Concern has been expressed before about the lack of research about laundering and the informal sector. See De Koker, Preface, in De Koker and Henning *op cit*, pp ii–iii: “It is submitted that multi-disciplinary research in respect of all

aspects of money laundering is urgently required in South Africa to assist the development of effective money laundering laws. Research is, for instance, required about the phenomenon of money laundering. Little is known about the extent of the problem and about the main methods employed by money launderers. The information that is available is mainly anecdotal. It seems as if the informal business sector is often abused for money laundering. If substantial laundering occurs in the informal sector, research will be required on the most effective methods of regulation of that sector. Research on the possible impact of general money laundering legislation on the South African economy is also required. There is probably a substantial pool of criminal funds in the formal South African economy. Money laundering legislation may induce money launderers to divert criminal profits from the regulated formal business sector to the less-regulated informal business sector. Such a diversion of funds will impact negatively on the formal business sector and on the collection of taxes by the State. It may also lead to an increase in organised crime activity in the informal sector and expose the already vulnerable businesses in that sector to increased levels of crime."

- 34 See, in general, DHC van der Merwe, *Die stokvel—'n Ondernemingsregtelike studie* 26 Tran CBL, 1996; WG Schulze, *Legal aspects of the insurance premium*, LLD thesis, UNISA, 1996, and Republic of South Africa, Government Notice 2173 of 1994, *Government Gazette* 16167, 14 December 1994.
- 35 For perspectives in this regard, see WG Schulze, *Stokvels and the proposed Money Laundering Control Bill—Some preliminary thoughts*, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 1997, p 509.
- 36 *Ibid*, p 516: "My research has revealed that contributions in a stokvel with 20–25 members, and which has a pooling of funds once a week, may be as high as R500 per member per week. This means that the pool in such a stokvel amounts to R10 000 a week. It would appear that although the pools of most stokvels are not as big as R10 000, there are a number of stokvels, especially in metropolitan areas, where the pool equals or even exceeds an amount of R10 000."
- 37 The case is discussed on p94.
- 38 W Wiehart, *An investigator's analysis of the Caswell prosecution*, unpublished paper, Certificate in Money Laundering Control Programme, CenSEC, 2001.
- 39 This information was supplied by the prosecutor, Adv Anton Steynberg, Deputy Director of Public Prosecutions, Directorate of Special Operations, KwaZulu-Natal. Adv Steynberg also prosecuted the laundering charges in *S v Dustigar*.
- 40 The relevant rules are set out in the regulations under the Currency and Exchanges Act 9 of 1933. The exchange control system is administered by the Exchange Control Department of the South African Reserve Bank. Although the controls have been relaxed in the past years, they are still fairly strict.

- 41 Cf. for example, KwaZulu-Natal Gambling Regulations 98–102. Provisions similar to regulations 98–102 can, for instance, be found in the Mpumalanga Gaming Regulations (58–62) and the Western Cape Gambling and Racing Regulations (46–48).
- 42 See Rule 5.15 (Client acceptance and maintenance procedures) of the JSE Securities Exchange Rules.
- 43 See, for instance, *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D); *Powell v ABSA Bank Ltd (t/a Volkskas Bank)* 1998 2 SA 807 (SEC); *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd* 2001 (3) SA 132 (W) and *Columbus Joint Venture v ABSA Bank Ltd* 2002 1 SA 90 (SCA).
- 44 See p 119.
- 45 *Ibid.*
- 46 South African Law Commission, *Money laundering and related matters*, Project 104, 1996. This report, in turn, stemmed from Project 98 by the Law Commission that addressed international co-operation in criminal matters. See P Smit, Proposed measures to control money laundering, in De Koker & Henning *op cit.*
- 47 Since 1996 the government has come under increasing pressure from especially the business community to move faster on the legislation. See, for instance, D Rodney, Money-laundering law delayed, *The Star*, 31 July 1997, p 8; T Cohen, Squabble over control of money laundering body delays its creation, *Business Day*, 22 September 1997, p 1; J van Tonder, Regering sloer met wetgewing oor geldwassery, *Sake Rapport*, 29 March 1998, p 1; R Stovin-Bradford, SA risks flood of dirty money, *Business Times*, 17 September 2000, p 1.
- 48 H Swart, Kapitaalhongers SA maklike prooi van sindikate, *Die Volksblad*, 17 June 1998, p 10. The task team submitted a first draft of its report to the Minister of Finance at the end of 1998 and the final report on 4 June 1999. See Task Team on the Money Laundering Control Bill, *Final report*, 1999.
- 49 P Smit, *Clean money, suspect source—turning organised crime against itself*, ISS, Pretoria, 2001, p 59.
- 50 Financial Intelligence Centre Bill B1–2001. See, in general, L de Koker, Corporate law and economic crime—selected aspects, 2001 RAU *Annual Banking Law Update*, 25 April 2001, p 62–70; I van Jaarsveld, The end of bank secrecy? Some thoughts on the Financial Intelligence Centre Bill, 2001 SA *Merc LJ* p 580.
- 51 For a discussion of FICA, see L de Koker *op cit.* (second service issue) and A Itzikowitz, Financial institutions, 2002 RAU *Annual Banking Law Update*, 24 April 2002, 22–28.

- 52 Section 1 read with Schedule 1 to FICA.
- 53 Section 1 read with Schedule 3 to FICA.
- 54 The Attorneys Act 53 of 1979 uses the terms ‘practice’, ‘practitioner’ and even ‘practicing practitioner’ (section 78(1)) to refer to admitted and enrolled attorneys who are practicing.
- 55 Section 3.
- 56 Section 44.
- 57 Section 4.
- 58 Sections 44 and 45.
- 59 Section 45(1) stipulates that each supervisory body will be responsible for supervising compliance with the provisions of FICA by the accountable institutions regulated or supervised by it. Section 72 affirms that FICA does not detract from any of the existing powers and duties of supervisory bodies in respect of the accountable institutions that they supervise. If the FIC refers a suspected offence by an accountable institution to a supervisory body, it must investigate the matter and may, after consultation with the FIC, take such steps as it considers appropriate. If a supervisory body fails to take adequate steps to ensure that a suspected contravention ceases or that the suspected failure is rectified, the FIC may, after appropriate consultation, take steps within the scope of its powers to remedy the matter. However, FICA does not provide the FIC with a set of appropriate supervisory powers that may be exercised under those circumstances. In general, the FIC may institute and defend legal actions in its own name and engage in any lawful activity, whether alone or together with any other organisation in South Africa or elsewhere, aimed at promoting its objectives (section 4). Such powers will have to be employed creatively to remedy the matters that supervisory bodies fail to address.
- 60 See p 103.
- 61 Section 36. The SARS may also follow the new procedure outlined in section 19 of the Second Revenue Laws Amendment Act 60 of 2001 and apply *ex parte* to a judge in chambers for permission to disclose information relating to money laundering or any other serious offence to the police or to the National Director of Public Prosecutions. Sections 36 and 19 allow the SARS to disclose information that was previously protected by its secrecy and confidentiality obligations.
- 62 Section 18.
- 63 See p 112.
- 64 Section 19. The MLAC will have to be representative in order to be an effective consultative forum. However, some of the accountable institutions do not have

clearly defined representative bodies or are fractured and have a number of representative bodies. The MLAC will have to be steered between the dangers of under-representation and over-representation. In addition, membership will have to be carefully controlled to ensure that it can still act effectively as an advisory body.

65 Section 21(2).

66 Section 46 and 68.

67 Mr Stuart Grobler of The Banking Council of South Africa confirmed that they have proposed a blanket exemption or, alternatively, an exemption of all accounts and transactions involving less than R1 million as well as a 24-month period before the obligation must be met.

68 Basel Committee on Banking Supervision, *Customer due diligence for banks*, October 2001, par 27, read with par 22 and Annex 1 of the Basel Committee on Banking Supervision, *Customer due diligence for banks* (Consultative Document), January 2001.

69 See section 29 and p 103.

70 Section 22(1). These records may be kept in electronic form (section 22(2)). Accountable institutions are allowed to outsource the duty to keep these records, but are liable for any failure by the third party to comply with the requirements of the Act (section 24). If an accountable institution appoints a third party to perform such duties it must provide the FIC forthwith with prescribed information regarding the third party (section 24(3)).

71 Records relating to the establishment of a business relationship must be kept for at least five years from the date on which the business relationship is terminated while records relating to a transaction must be kept for at least five years from the date on which the transaction is concluded (see s 23).

72 Section 26.

73 Section 28. See also sections 51 and 68.

74 Section 30(2). Any person who wilfully fails to report the conveyance of cash into or out of South Africa in accordance with section 30(1) commits an offence (section 54). It is important to note that this offence can only be committed by a person who wilfully fails to report the conveyance. This offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (section 68). If the person referred to in section 30(2) fails to send a report regarding the conveyance of cash to the FIC in accordance with that section, he commits an offence under section 55. This offence carries a penalty of imprisonment for a period not exceeding five years or a fine not exceeding R1 million (section 68(2)).

75 Section 31. See also sections 56 and 68.

- 76 See, in general, De Koker, *supra* note 4, par 3.3, and WG Schulze, Big sister is watching you: Banking confidentiality and secrecy under siege, *SA Merc LJ*, 2001, p 601.
- 77 Section 79 read with section 82(2) and Schedule 4.
- 78 The provision of FICA that will effect this amendment is not yet in force. In terms of s 81 of FICA reports must be submitted in terms of section 7 of POCA until section 79 of FICA comes into operation. After the commencement of section 79, any investigation of a prior offence in terms of section 7 of POCA and any prosecution for such an offence may continue as if section 79 had not come into operation (section 81(2) and (3)).
- 79 Section 29(1).
- 80 Section 29(1). Transactions in respect of which enquiries were made but which were not concluded must also be reported if they may have caused any of the above consequences (section 29(2)). Some of the obligations under section 29(1)(b) will be very difficult to meet. For instance, section 29(1)(b)(ii) calls for a judgement as to whether a particular transaction has an apparent business or lawful purpose. In practice it will be virtually impossible to train all employees to identify such transactions or to design systems that will accurately detect all such transactions. It is probable that only those transactions that have been structured so crudely that they obviously fall within the ambit of section 29(1)(b)(ii) will be identified as such. Section 29(1)(b)(iii) calls for the reporting of all transactions that may be relevant to the investigation of an evasion or attempted evasion of a tax, duty or levy administered by the SARS. In essence, all transactions may be relevant to such an investigation. The section does not state whether such an investigation must have been launched and that the institution must have been notified about the investigation or whether the institution should anticipate such an investigation. The transaction does not need to constitute an act of tax evasion. It must simply be relevant to an investigation of attempted tax evasion. An institution must therefore also judge whether the SARS will regard a particular transaction as relevant to such an investigation. These duties are so onerous that it would have been preferable for the wording to be clear and the ambit of the duties to be more limited.
- 81 Any person within the ambit of section 29(1) or (2) who fails, within the prescribed period, to report to the FIC the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry; or who reasonably ought to have known or suspected that any of the facts requiring the submission of such a report exists, and who negligently fails to report the transaction, the series of transactions or the enquiry commits an offence (section 52(1) and (2)). These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (section 68).
- 82 Section 79 read with Schedule 4 of FICA.

- 83 Section 33. See also sections 58 and 68.
- 84 For purposes of calculating the five day period, Saturdays, Sundays and proclaimed public holidays are not taken into account. Section 34(2).
- 85 Section 34(3).
- 86 FATF, *Review of FATF-anti money laundering systems and mutual evaluation procedures 1992-1999*, Paris, 2001, par 72.
- 87 Section 32(2). See also section 57 and 68.
- 88 Section 38(1).
- 89 Section 38(2). No evidence regarding the identity of that person is admissible as evidence in criminal proceedings unless that person testifies at those proceedings (section 38(3)). Section 38(3) also excludes evidence concerning the “contents or nature of such additional information and grounds” unless the person testifies.
- 90 If a person who has made, initiated or contributed to a report in terms of section 28 (transaction involving cash in excess of a prescribed amount), section 29 (unusual and suspicious transactions) or section 31 (electronic transfer of money across the border) or who has furnished additional information concerning such a report or the grounds for the report in terms of FICA declines to give evidence, the FIC may, by way of the certificate, disclose as evidence the information received in the initial report. However, the identity of the reporter as well as the contents and nature of any additional information may not be disclosed in the certificate.
- 91 See also p 101.
- 92 Section 27. Failure to furnish this information to the FIC constitutes an offence (s 50) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (section 68).
- 93 Section 32. See also p 105.
- 94 Section 35(4).
- 95 Section 35(2). An accountable institution that fails to comply with such an order commits an offence (section 59) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (section 68).
- 96 Section 36(1).
- 97 Section 36(2).
- 98 Section 36(2).

99 Sections 40(1)(b), 40(4) and 40(5).

100 No person may disclose confidential information held by or obtained from the FIC except within the scope of that person's statutory powers and duties, for purposes of carrying out the provisions of FICA, with the permission of FICA, or for the purposes of legal proceedings or in terms of a court order (section 41). Any person who discloses confidential information held by or obtained from the FIC or who uses such information contrary to section 40 or who willfully destroys or in any other way tampers with information kept by the FIC for the purposes of FICA; or knows, suspects or ought reasonably to have known or suspected that information has been disclosed to the FIC or that an investigation is being, or may be, conducted as a result of information that has been or is to be disclosed to the FIC, and who directly or indirectly alerts, or brings information to the attention of another person which will or is likely to prejudice such an investigation, commits an offence (section 60(1)). These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (section 68).

101 FICA meets the requirements of Recommendation 20 of the Forty Recommendations of the FATF in all but two respects: It does not explicitly require an accountable institution to have adequate screening procedures to ensure high standards when hiring employees and does not require the institution to have an audit function to test its compliance system. However, in practice the majority of financial institutions maintain comprehensive management systems that provide for screening of employees as well as internal audit and compliance systems that will audit the effectiveness of their money laundering control systems.

102 Section 42(1). These rules, which must comply with prescribed requirements, must be made available to every employee involved in transactions to which FICA applies (section 42(3) and (4)). The FIC and the relevant supervisory body may also request copies of the rules.

103 Section 43(a).

104 An accountable institution that fails to formulate and implement the internal rules; or to make them available to its employees in accordance with section 42(3) or to the FIC or a supervisory body in terms of section 42(4); or to provide training to its employees in accordance with section 43(a); or to appoint the person referred to in section 43(b) (person with responsibility to ensure compliance) commits an offence under section 62. This offence carries a penalty of imprisonment for a period not exceeding five years or a fine not exceeding R1 million. See section 68(2).

105 A Newton, *Compliance: Making ethics work in financial services*, Financial Times Pitman Publishing, London, 1998, pp 72–74; B Sharpe, *Making legal compliance work*, CCH Australian Ltd, NSW, 1996, pp 55–56: "While the

compliance staff engage in compliance activities, they do not comply for the company on a day-to-day basis. Their proper role is to cause other people (operating people) to carry out effective compliance and to assist, co-ordinate and ensure the consistency of the whole system.”

106 Section 68.

107 Section 70(4). This provision obviously raises excessive fines and proportionality concerns. See *US v Bajakajian* 118 S Ct 2028 (1998).

108 Section 70(6).

109 Sections 73, 75 and 76.

110 See M Schönteich, Laws as weapons: Legislating against terrorism, in H Boshoff, A Botha and M Schönteich, *Fear in the city—Urban terrorism in South Africa*, ISS, Pretoria, 2001. See also the comprehensive analysis of these laws in Chapter 5 of the South African Law Commission, *Review of security legislation (terrorism: section 54 of the Internal Security Act, 1982 (Act no 74 of 1982)*, Part 1, Discussion Paper 92, Project 105, July 2000.

111 See in general J Norton & H Shams, Money laundering law and terrorist financing: Post-September 11 responses. Let’s step back and take a breath, 2002 *RAU Annual Banking Law Update*, 24 April 2002.

112 For an analysis of these two groups, see A Botha, The prime suspects? The metamorphosis of Pagad, in Boshoff, Botha and Schönteich, *op cit*.

113 *Sapa*, New anti-terror bill expected soon, 17 October 2001, http://iafrica.com/news/us_terror/saresponse/824285.htm.

114 See A Botha, The prime suspects? The metamorphosis of Pagad, in Boshoff, Botha and Schönteich, *op cit*.

115 South African Law Commission, *supra* note 110, p 52.

116 *Ibid*.

117 *Sapa*, *op cit*.

118 See pp 99 and 100.

119 See p 102 and further.

120 Section 20(4) of FICA.

121 Information regarding the South African Police Service was kindly furnished by Director Hans Meiring of the Commercial Branch.

122 According to Director Meiring a committee consisting of representatives of the different components of the Detective Service meets once a week to evaluate

the suspicious transaction reports. This committee evaluates the reports and makes recommendations regarding the investigation of the reports.

- 123 For the background to this project see L de Koker, The prosecution of economic crime in South Africa—some thoughts on problems and solutions, in L de Koker, B Rider and JJ Henning, *Victims of economic crime*, 31 Tran CBL, 1999, p 97. For the pressures on prosecutors and the criminal justice system in general, see M Schönteich, Tough choices: Prioritising criminal justice policies, *ISS Occasional Paper Series*, ISS, Pretoria, No 56, May 2002.
- 124 For a critical analysis of the strength of financial supervisors and the criminal justice system in respect of economic crime, see Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa, *First Report*, vol. 1, 1997; De Koker, *ibid*, p 97; Schönteich, *ibid*.
- 125 See <http://www.compliancesa.org>.
- 126 In 1997 the Unit, in conjunction with the Centre for International Documentation of Organised and Economic Crime (Cambridge) and the Institute of Advanced Legal Studies of the University of London, hosted one of the first Southern African workshops on money laundering control. The event took place at Jesus College in Cambridge in September 1997 and relevant papers were published in De Koker and Henning, *op cit*.
- 127 See http://general.rau.ac.za/law/English/CenSec_2.htm. CenSEC co-ordinated the first study of money laundering trends in South Africa in 2002. It also presents a tertiary programme on money laundering control.
- 128 See for instance Smit, *op cit*.
- 129 The information was furnished by Snr. Supt Ronél van Wyk of the Commercial Branch Head Office of SAPS.

CHAPTER 5

MONEY LAUNDERING PATTERNS IN KENYA

George Kegoro

Introduction and methodology

This chapter is based on research on the nature and extent of money laundering in Kenya, which the author conducted in July and August 2002. The research took the form of interviews with selected key persons who were involved in issues relating to money laundering. As far as possible, the sources of the information in this paper are disclosed and constitute the persons who were interviewed for purposes of this research.

What is money laundering?

For the purposes of this discussion a broad working definition has been adopted, as follows:

Money laundering consists of the concealment of assets generated by crime or to be used in committing or facilitating the commission of crime.

In a slightly more comprehensive form, this same working definition would read as follows:

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

Factors relevant to the money laundering situation in Kenya

The poor record of law enforcement in Kenya and the poor keeping of public records on registered businesses registered land, make it difficult to detect instances of money laundering, and also reduce the need to launder money in Kenya as will be shown below.

Corruption and the record of law enforcement

The Corruption Perception Index published by Transparency International in 1996 ranked Kenya third from the bottom in the (ascending) list of the most corrupt countries in the world. Only Pakistan and Nigeria were perceived to be more corrupt than Kenya. In 1998 Kenya ranked 78th out of the 85 countries surveyed; in 1999, it was 90th out of 99; in 2000, it was 82nd out of 90; and in 2001, out of 91 countries, Kenya ranked 84th.¹

Both the judiciary and the police in Kenya are perceived as corrupt and weak. A local survey conducted in early 2002 to determine public perceptions of corruption in public institutions in Kenya showed that the police are perceived as the most corrupt public institution in Kenya. The judiciary was sixth on the list.² In May 2001, three judges of the Court of Appeal, Kenya's highest court, publicly accused one another of corruption. The fallout from this incredible incident was massive. The three judges later publicly apologised for any embarrassment they may have caused the public and the matter ended there. In May 2002, a panel of judges from Tanzania, Uganda, South Africa and Canada was invited to review the state of the administration of justice and advise on how to bolster public confidence in the institutions responsible for justice. After interviewing several people, including members of the judiciary, the judges declared that they were amazed at the depths to which the standards in Kenya's judiciary had fallen. In their view, Kenya's judiciary was in need of "a short sharp shock".³

The Goldenberg scandal, discussed below, inevitably led to a complex series of court cases. Like the government, which was responsible for creating the scandal, the judiciary was also sucked in, with several claims, some of which were substantiated, that judges had received large amounts of money as bribes in connection with the cases.

'Land grabbing', the presidential patronage system that rewards political loyalty with parcels of land, has greatly benefited the judiciary. Efforts to establish an independent anti-corruption authority have been stalled by the judiciary, which has evolved a jurisprudence that is hostile to anti-corruption measures. For example, in December 2001, the judiciary discharged a cabinet minister, charged with offences of corruption, by introducing the previously unknown principle of limitation of time into criminal law.⁴ Earlier, in December 2000, the judiciary had proscribed Kenya's independent anti-corruption authority on grounds that seemed legally spurious.⁵

Professor Yash Ghai, head of the Constitution of Kenya Review Commission, is said to have described Kenya's judiciary as incompetent and lethargic, noting that it has never delivered a landmark decision.⁶

In response to the drastic proposals on judicial reforms made by the Commission, in October 2002 two judges filed a suit in the High Court of Kenya seeking to prohibit the discussion of judicial reforms as part of the wider constitutional reforms. Public outrage followed the suit, with local lawyers boycotting courts for a day in protest against it.⁷

For their part, the police in Kenya are often accused of active involvement in crime. Instances of policemen being arrested in the process of committing violent robberies are on the increase. It is claimed that the police often hire out their guns to violent criminals. The conditions of service for the police are squalid. They are the lowest-paid public servants and morale among them is low. The police force is highly politicised and has been an active participant in quelling legitimate political opposition. It is believed that high-ranking police officers have become rich by engaging in crime or corruption.

The level of crime in Kenya is high. The police can scarcely cope and serious crime often goes uninvestigated. The police routinely conduct extra-judicial executions of suspects.⁸

As several examples below will show, the Kenyan state is perceived as an active participant in criminal activities that generate money that may need to be laundered. It is, therefore, not expected that the state would be effective in fighting crime or in carrying out anti-money laundering measures. There is, however, no strong motive to launder money in Kenya, because law enforcement is very weak.

The nature of public records in Kenya

The quality and nature of public record keeping concerning the registration of business entities has direct implications for money laundering. In Kenya, there are two types of records that are relevant to this discussion. These are: first, records concerning companies and other business entities registered in Kenya; and, second, records concerning registered land.

Company records

Five types of business entities are required to be registered under Kenyan law: limited liability companies, trusts, non-governmental organisations (NGOs), societies and business names. The registration of business entities is handled by the Registrar-General, an officer who is administratively responsible to the Attorney General.

There is one central registry for all business entities registered in Kenya, which is maintained in Nairobi and is called the Companies Registry.⁹ It holds records for the more than 300,000 business entities registered since the establishment of the Kenyan state. To ease the record keeping process, a decision was made to computerise these records, using funds provided by the World Bank. After an elaborate process, a private company was contracted to undertake the data-entry process. This necessitated the removal of the files from the cabinets where they were kept under the manual system. However, the data-entry process was not completed and the contracted company abandoned work midstream. The attempted computerisation disorganised the manual record-keeping system to the extent that the records can never be restored to their original status. On the other hand, the computerisation process, left incomplete, cannot deliver any of its promised advantages.

It is impossible to retrieve or to file information in the registry in its current state. The registration system has, quite simply, collapsed.

Coupled with this is the problem of deliberate concealment of official records by registry staff. For example, in 1998, it came to light that a large portion of Karura Forest, a large natural forest on the outskirts of Nairobi, had been corruptly alienated in favour of private individuals. There followed a public outcry, including street demonstrations in Nairobi, against the allocation. There were even attempts forcibly to remove the beacons demarcating the parcels of land. Police thwarted these attempts. When pressure groups involved in environmental conservation attempted to obtain information on the allottees, they found that the forest had been allocated to limited companies. However, a search at the Companies Registry showed that, although these companies were all registered, their registration files, which the registry should maintain, contained none of the usual documents on the companies.

It emerged that the allocation of Karura Forest was a well-orchestrated act of fraud and corruption. All the 36 companies were incorporated on the same day by one law firm. Given the difficulty of registering business entities in

Kenya, a process that usually takes several days, it seemed odd that all these companies had managed to obtain registration on a single day.¹⁰

Corrupt officials who desire to escape responsibility for their conduct often act under the cover of a limited liability company. The company is incorporated and the official is be given the original file containing the constitutive documents for the company, which should be kept at the registry. The public can never have redress against the company, since important particulars will never be publicly known. Whenever the directors need to make changes in the company, they simply take the file back to the registry for those changes to be endorsed, after which they take the file away again.

The business entity registration system in Kenya has thus collapsed under the weight of its own inefficiency and corruption.

Records concerning registered land

The maintenance of records concerning registered land has similarly been affected by both inefficiency and corruption. Land that has not been alienated in Kenya is classified either as government land or trust land. Government land is vested in the President, who has the power to make dispositions or grants of any estate or interest in that land to a private person. Trust land is vested in the local authority, which has jurisdiction over the land where it is located. The land is to be held by such authority for the benefit of local inhabitants.¹¹

Over time, the President has made several grants of government land to private persons. The disposition of government land in this manner has increasingly become a source of public disquiet, because it is often made on the basis of patronage and without regard to the public interest.

This direct power that the President has over public land has generally been interpreted as bestowing on him ownership of that land. Dispositions are usually by private arrangement, rather than public auction as envisaged by law. The alienation of public land, although an old practice in Kenya, reached new levels during President Moi's reign. Allocations have generally been made as a reward for political loyalty or to achieve political co-opton.

Initially, President Moi would personally sign the letters of allotment. There was a long queue of applicants who felt that they deserved compensation for supporting the establishment, and who sought the President's signature for parcels of public land. In the course of time, all unalienated land in townships

was allocated, without exhausting the demand. New methods of allotting land were devised. Persons in search of vacant public land conspired with heads of public institutions, like schools, hospitals and government farms, for land falling within these institutions to be declared vacant land. A portion of that land was then surveyed and the President was asked to make a grant of the land. Public toilets, public cemeteries, markets and even road reserves have all been the subject of allocation. Corrupt officials conspired to condemn government houses as unfit for occupation and then have the land allocated to them. In one case, the Nairobi City Council secretly sold 288 units of houses it owned in a prime area, without first requiring existing tenants to vacate. The new owners have found it impossible to evict the tenants. When all land owned by public institutions was exhausted, the search turned to public forests. The Karura Forest allocation is an example of the alienation of public forest land.¹²

The process of allocating public land created a cadre of middlemen with claims of sufficient political influence to link the supply with demand. Unsatisfied demand led to forgery of the letters of allotment. Over time, therefore, the letter of allotment came to be regarded as an instrument of conveyance. Because of fraud, several letters of allotment would be issued for one parcel of land, leading to multiple registrations. It is not unusual, in these circumstances, for a parcel of land to be claimed by several persons, each of whom has been issued with a title deed.

This mode of dealing with public land has led to a state of uncertainty and chaos concerning registered land. The government is no longer capable of discharging its duty of guaranteeing security of title over registered land.

The government, having started an arbitrary and wholly irrational land-allocation process, has opened floodgates of corruption at all levels, which it is unable to stop. The problem is now widespread and involves all ranks of public servants. Given the arbitrariness of the process, it often undermines not only the public interests of the government but also the very private interests of corrupt officials, who themselves fall victim to it.

Poor record keeping concerning land transactions, when coupled with the inadequacy or non-existence of records concerning business entities, creates an impenetrable mess, in which it is impossible to impose accountability. In a report on money laundering published in 1999, a Kenyan journal claimed that the Italian Mafia own many luxury hotels at the Kenya coast, but the lack of public information on ownership makes it difficult to prove (or disprove) this.¹³

Some common types of money laundering

It is not possible to discuss all the possible forms of money laundering in Kenya. These are only limited by opportunity and human imagination. A useful way of discussing money laundering in Kenya is by reference to the types of criminal activity that give rise to proceeds that may need to be laundered.

Laundering the proceeds of corruption

Corruption in Kenya takes many forms, all of which result in the loss of public funds or other resources. The government of Kenya lost more than Sh12 billion through fraudulent payments in the 1996–97 financial year alone. In the period 1990–95 it lost a total of Sh127 billion through corruption. These figures are said to represent the loss of one in every six shillings allocated by Parliament.¹⁴

The manner in which proceeds of corruption are laundered varies from case to case, and two illustrations will suffice.

The special conditions that typically form part of a grant include a bar to the sale or transfer of the land that is the subject of a grant, unless it is first developed. Generally, this condition is disregarded. A large number of the grantees are, therefore, land speculators.

During much of the 1990s, a scandal involving the alleged export of non-existent gold and diamonds occurred in Kenya. Other than the direct loss to the public, it had a profound negative effect on the economy. The Goldenberg scandal, as it is known, is discussed below.

The Goldenberg scandal¹⁵

The Goldenberg scandal is a series of financial scams involving high-ranking state officials, which, together, led to an estimated loss of US\$500 million by the government of Kenya. The actors in the scandal included George Saitoti (Kenya's long-serving Vice-President), Eric Kotut (then the Governor of the Central Bank of Kenya), E. Owayo (then the Commissioner of Geology and Mines), Wilfred Koinange, (then the Permanent Secretary to the Treasury), James Kanyotu (then the head of Kenya's security intelligence), and Kamlesh Pattni (a Nairobi trader in his early twenties, who was the mastermind of the scams).

Some time in 1987, Pattni made a proposal to the government to grant him exclusive rights to export gold from Kenya, where it only exists in small, uneconomic quantities. Its mining and sale have never interested the government. In the context of exchange controls, gold exports were handled on the black market, causing the government to lose foreign exchange revenue. Pattni's proposal was intended to formalise gold exports. This would, in turn, earn the government foreign exchange. As an incentive, Pattni proposed that the government should pay him 'export compensation' to give him sufficient profit margins to fight the black market trade. The government did not act on his proposal immediately.

In 1990, the government accepted a renewed proposal from Pattni, whose proposals now included diamonds as an item for export. Pattni also requested that he be allowed to set up his own commercial bank to handle the trade transactions. The government agreed to pay Pattni 35% of the value of his exports as compensation. However, it did not approve Pattni's proposal that he be allowed to set up his own financial institution to deal with the exports, but it would later grant this request as well.

In 1990, Pattni incorporated Goldenberg International Limited to handle the exports. Its directors were Pattni himself and James Kanyotu, the security intelligence head, who described himself as a farmer in the company's documents.

Three irregularities had occurred up to this stage: firstly, the export compensation level of 35% was in excess of the allowed legal limit of 20%. Secondly, giving Goldenberg exclusive rights to export gold contravened anti-monopolies legislation. Thirdly, Kenya has no known deposits of diamonds that could be the subject of export trade.

From 1991, Pattni went to work. He started sending invoices to the government for compensation, as agreed. His bankers, the First American Bank, produced records in evidence of payments that Pattni had received from the exporters. These were at variance with existing invoices. Oddly, the invoices and payments made to Pattni were in Kenyan shillings yet they purported to emanate from overseas transactions.

The Central Bank of Kenya queried the invoices. Through the direct intervention of the governor, Eric Kotut, the invoices were paid without these discrepancies being resolved. More invoices came, leading to more queries. Pattni

had, by now, increased the number of his bankers to include Citibank, NA and Kenya Commercial Bank, a parastatal bank.

In an attempt to deal with the query about the currency of payment, Pattni now produced evidence of payment in a cocktail of foreign currencies (dollars, sterling, Deutsche Marks and francs). More queries were raised: why was a single consignee remitting payment in so many different currencies?

In June 1992, the government suddenly allowed Pattni's request to start his own commercial bank. Pattni incorporated Exchange Bank, with himself and Kanyotu, the intelligence chief, as the directors. Now that he had his own bank, Pattni could easily avoid all the awkward questions raised by the Central Bank of Kenya.

It was later to emerge that Pattni was buying the foreign currency in the local market and, with the collusion of his bankers, representing it as foreign exchange earnings from the sale of gold and diamonds.

Goldenberg's exports were greatly overpriced. In 1991, a gram of gold cost about US\$12 (Sh342) in the world market. Pattni's gold was priced at US\$3,368 (Sh96,000) per gram.

Questions were raised about where the gold was being exported. Goldenberg's consignees, according to Pattni, were two Zurich-based companies, Servino Securities and Solitaire. Inquiries revealed that these firms did not exist. Pattni then claimed that exports, worth Sh13 billion (about US\$400,000,000), had been made to a company called World Duty Free, based in Dubai. This company, owned by a Pakistani called Ibrahim Ali, had an affiliate company in Nairobi called Kenya Duty Free. Ali had negotiated an agreement with the Kenyan government to run Kenya Duty Free shops in Nairobi and Mombassa. When contacted by local newspapers, Ali simply denied the allegations and did no more until 1999. In the meantime, Pattni was paid export compensation for these claimed exports.

In 1998, Pattni obtained orders of receivership against Kenya Duty Free and quickly took control of the shops in Mombassa and Nairobi.

In February 1999 an incensed Ali turned up in Nairobi and swore an affidavit, filed in Pattni's litigation, in which he made two sensational claims: first, that

the total loss by the Kenya government through Goldenberg was Sh68 billion and not any smaller sum, and, second, that the principal beneficiary in Goldenberg was President Moi. To the affidavit, he annexed evidence from painstaking investigations regarding Goldenberg that he had conducted over the years; this evidence backed up his claim.

For his efforts, Ali was arrested and quickly deported and has never been allowed back into the country.

Other than receiving money for non-existent exports, Pattni's Goldenberg was involved in more scandals. In the 1990s the government had an 'incentive package' for exporters, according to which it financed them to facilitate their trade. They would pay back the government once their overseas partners paid them. Goldenberg, naturally, claimed to be an exporter, and was paid Sh185,816,800 as pre-shipment finance for the gold and diamonds to be traded. This money was to be refunded through Delphis Bank (formerly the Nairobi branch of the Bank of Credit and Commerce International—BCCI). Pattni then negotiated a delay in refunding this money, to which the government acceded. By 1993, the Central Bank of Kenya had advanced Goldenberg a total of Sh7 billion in pre-shipment financing.

Meanwhile, in 1991, the government had introduced yet another instrument, called a forex certificate, which business people were allowed to buy. It was intended to make available convenient foreign exchange for exporters. Pattni invoiced his overseas consignees in Kenyan currency but claimed compensation from the government in foreign currency. Using the pre-shipment finances, Goldenberg amassed forex certificates, which it then redeemed at a premium.

The last instrument of which Pattni took advantage during this period was the export retention scheme. Introduced in 1992, this scheme allowed exporters to retain a portion of their foreign exchange earnings in special accounts. This would be available to them conveniently in subsequent transactions that needed foreign exchange.

The preferential treatment Goldenberg had always received was extended again. Whereas exporters of coffee and tea and other 'traditional' exporters were allowed to retain only 50% of their earnings, Goldenberg was allowed to retain its full 'earnings'. It is believed that Goldenberg amassed U\$75 million under cover of this scheme, put away in Exchange Bank.

The Central Bank of Kenya then advanced Pattni Sh13 billion, equivalent to US\$210 million, against an equivalent amount he said he had in a London account and which he would make available to the Kenyan government in foreign exchange. Pattni never made good on this promise.

Laundering the proceeds of Goldenberg

The Goldenberg scandal, as shown above, was in fact not one scandal but a series of financial scams that were distinct and separate from one another. The connecting thread through these various scandals was the involvement of Kamlesh Pattni, the mastermind. Thus, there was the export compensation for gold and diamonds, the original Pattni proposal, which led to a major loss by the government. Next, came the pre-shipment finance for gold and diamonds, which led to the loss of an unknown value by the government. This was followed by the export retention scheme, where an estimated loss of US\$ 75 million occurred and, finally, the spot contracts in which US\$ 210 million was lost.

Except for the proceeds of the spot contracts, little is known as to how the proceeds of the Goldenberg scandal were dealt with. Only the dealing in the proceeds of the spot contracts will, therefore, be discussed.

According to the Central Bank of Kenya,¹⁶ Pattni was advanced Shs13 billion (equivalent to US\$210 million) in the spot contracts as set out in Table 1.¹⁷

Table 1: Spot sale contract between Pattni and Central Bank of Kenya

Date	Expected amount in US\$
21/06/1993	24,000,000.00
21/06/1993	22,000,000.00
21/06/1993	20,000,000.00
21/06/1993	18,000,000.00
21/06/1993	16,000,000.00
30/06/1993	16,550,000.00
30/06/1993	17,900,000.00
30/06/1993	18,200,000.00
30/06/1993	18,700,000.00
30/06/1993	19,150,000.00
30/06/1993	19,500,000.00
Total	210,000,000.00

The money was paid into Exchange Bank, which Pattni had been licensed to open and of which he and Kanyotu, the security intelligence boss, were the two directors. What followed is a complex maze of transactions involving several companies through which the money was dealt with. It is not possible, in this space, to detail the transactions, which are presented in a slightly simplified form.

According to the Central Bank of Kenya, Exchange Bank in-

vested the equivalent of US\$71 million, out of these proceeds, in treasury bills. At this point in time, treasury bills were a very lucrative investment with interest rates exceeding 70% per annum. Exchange Bank invested a further US\$30 million in forex certificates, a financial instrument that has already been discussed above and which, because of the intended devaluation of the shilling by about 30%, made a lot of sense, the beneficiaries having had prior knowledge of the devaluation. Exchange Bank then advanced US\$23 million as loans to its customers. According to the Central Bank of Kenya, a further US\$14 million was the subject of a contract entered into between Pattni and the personal representatives of the estate of Mohammed Aslam, in London. Aslam had been an influential banker in Nairobi and the chairman and principal owner of the Pan-African Bank. Because of his political connections, Aslam came to be referred to as the 'President's banker', to reflect his close association with President Moi. When Aslam died mysteriously, his large estate included Pan African Bank (which was said to have a branch in Karachi, Pakistan), a country club about 100km from Nairobi known as Safariland Club, an insurance company and various other assets.

A sale agreement was entered into between representatives of various companies in which Aslam had had shares, on the one hand, and a company known as Pansal Limited, on the other, for the transfer to that company of all the assets formerly belonging to Aslam, for a consideration of US\$14 million. There must have been considerable hurry in completing this transaction since, at the time of signing the agreement, Pansal Limited had not even been incorporated.¹⁸ It was only incorporated much later, with two of Pattni's nominees as directors.

As part of this transaction, Pattni acquired the Pan African Bank, Safariland Club, and a company known as Uhuru Highway Development Limited, which owned a hotel, then under construction. Upon completion, the hotel would become known as the Grand Regency Hotel, arguably the most magnificent hotel in Kenya. In subsequent litigation over its ownership, the hotel was likened by the court to the Taj Mahal.

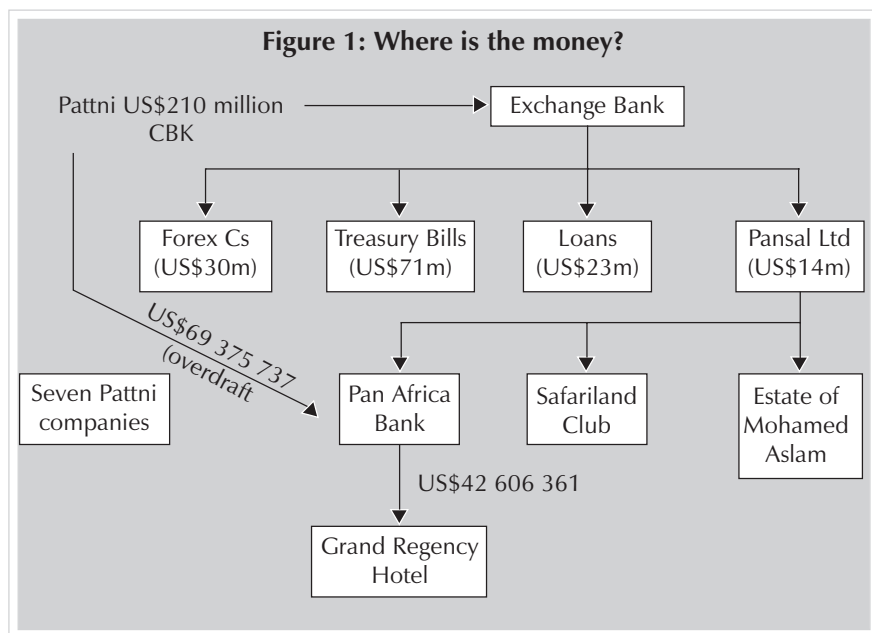
Having acquired the Pan African Bank, Pattni now controlled two banks, Exchange Bank and the Pan African Bank.

To finance the construction of the hotel, an overdraft facility was entered into with the Pan African Bank, which amounted, in the end, to US\$42 million. According to the Central Bank of Kenya, the Pan African Bank financed this by overdrawing its bank at the Central Bank of Kenya to the tune of US\$69 mil-

lion, the repayment of which Pan African Bank escaped through a fresh fraud against the Central Bank of Kenya. Briefly, that fraud worked as follows:

Pattni caused to be incorporated a total of eight limited companies, which either he or his nominees controlled. He then conceived a fraudulent scheme to obtain funds from the Central Bank of Kenya using his two banks and the eight companies by overdrawing the account of Pan African Bank at the Central Bank of Kenya and then covering the overdraft using fraudulent transfers in favour of that bank, issued by his other bank and the companies. Pattni would then carry out this fraudulent rotation of funds, all over again, to cover the overdraft created in the second bank.

Thereafter, Exchange Bank went into voluntary liquidation, no doubt having richly achieved the purpose for which it had been set up. Pan African Bank was eventually also closed, following massive donor pressure. The following chart summarises the movement of the US\$ 210 million in a simplified manner.



Epilogue

Pattni was eventually charged with the theft of the US\$210 million, together with the Governor of the Central Bank of Kenya, and other officials at the

Treasury. The case against them has never been decided, and has been the subject of endless interlocutory applications. Ten years on, the case is still in court.

The then-Vice President, George Saitoti, who was Minister for Finance when the scandal happened, was never charged despite much public pressure for him to be made accountable. Also, Kanyotu, the security intelligence boss, was never charged in court.

The Central Bank of Kenya, which lost the US\$210 million through the spot contracts and the further US\$69 through an overdraft given to Pan African Bank, sued Pattni and his companies for the recovery of the money. The Central Bank of Kenya eventually put pressure on Pattni to sign a charge in its favour, over the Grand Regency Hotel, which it says was built with its funds. Its efforts to sell the hotel, as the chargors, have been the subject of numerous successful judicial stops at Pattni's instance. In the complex litigation, Pattni has stonewalled the Central Bank of Kenya by counter-suing it. To further complicate the litigation Pattni has sued, together with the Central Bank of Kenya, the companies through which he acted in the Goldenberg scandal, and which he still controls.

Violent crime

Three forms of violent crime are prevalent in Kenya and provide substantial sources of money that may need to be laundered. These are:

- motor-vehicle theft;
- cattle rustling; and
- violent robbery.

These are discussed in turn.

Motor-vehicle theft

A survey carried out, relying on police and insurance sources, indicates that on average, 250 motor vehicles are stolen every year, mostly at gunpoint. Of these, 41% are saloon cars, 30% are light trucks and vans and the remaining 29% comprise a mixture of models. The survey estimates that the total loss, in monetary terms, from carjacking activities is Sh1.56 billion per year.¹⁹

The theft of motor vehicles is, arguably, a form of money laundering, since those who steal seek to resell or to use the vehicles in a disguised form, or dismantle the vehicles for sale as spare parts. Such theft in Kenya is often carried out violently and constitutes serious crime.

Most of the saloon cars stolen in Kenya are disposed of locally.²⁰ Formerly, some of were dismantled and sold as spare parts. However, after liberalisation, most types of spare parts are now relatively inexpensive, removing the incentive to dismantle stolen cars. Most of the stolen public-service vehicles (usually 18- or 25-seater vans) are also sold locally or in Tanzania. The vehicles are resprayed and fitted with different number plates. Large vehicles like buses are mostly sold in Tanzania. Four-wheel-drive vehicles are mostly sold in Uganda, southern Sudan, where elements in the Sudanese People's Liberation Army use them as military vehicles, and the Democratic Republic of Congo, where, again, they are used in the many conflicts in the sub-region.

An important question is how these vehicles, which bear Kenyan registration plates, are allowed to cross international borders. Vehicles destined for Tanzania cross the border by avoiding the established border point at Namanga and using a remote bush road. Nevertheless, others cross through the border point, apparently with the complicity of officials. The border with Uganda is better managed and there are no possibilities of avoiding official crossing points. The vehicles must, therefore, cross at Busia or Malava, the two border points between Kenya and Uganda, again with the complicity of border officials.

Kenya shares a 100-mile border with the Sudan. This consists of mostly arid land. The border is poorly patrolled, if at all. Vehicles destined for the Sudan, therefore, can move across the border with little possibility of detection.

How are the stolen vehicles sold in the local market dealt with? According to a Nairobi lawyer, who has acted for several persons charged with theft of motor vehicles, the process is as follows: the stolen vehicle is usually one of the most common models in the market. The gangs that steal vehicles establish businesses that buy motor vehicles that have been written off after being damaged in serious accidents. The vehicles are usually bought from insurance companies, complete with registration documents, including the log books and number plates. The stolen vehicles are fitted with the number plates of the salvage vehicles bought from insurance companies and transferred to innocent buyers, who buy under the belief that the log book for the salvage vehicle is genuine. In other cases, the number plate is fitted on a different model of vehicle

from the one that was damaged. The person who drives the stolen vehicle cannot claim innocence and would do so at the risk of being arrested.

Often, the dealer in salvage vehicles is an independent person who has a legitimate motor-vehicle repair business or a second-hand vehicle dealership alongside the one for stolen vehicles.²¹

This racket also involves freshly imported vehicles, whether new or secondhand. To avoid the payment of import tax and duty, some vehicle importers fit vehicles with the number plates of written-off vehicles. They then hold out these vehicles as genuine bearers of those registrations. For example, on 4 April 2002, police raided a warehouse in Nairobi's industrial area, where they discovered goods worth Sh500,000,000 that were hidden for tax evasion purposes. Among the goods were 13 new vehicles, hidden under drums and cartons.²²

High-ranking public officials control part of the motor-vehicle theft business. This works as follows: the government issues dummy registration plates for some of its motor vehicles for security purposes. Public officials, in collusion with registration officials, steal some of these plates, which are then fitted on stolen vehicles, or vehicles imported without paying applicable taxes. These officials often supply the guns to be used in vehicle theft.²³

Cartrack Limited, a local company involved in the post-theft recovery of vehicles, uses the same security system as its counterpart company in South Africa. Because of this, the company has, from time to time, recovered vehicles that have been stolen in South Africa and sold in Kenya. For example, on 12 November 2002, a Kenyan went on trial in a Nairobi court for being found in possession of an expensive car, stolen in South Africa. According to the prosecution, the Kenyan, a wealthy businessman, fitted the car with false number plates, having received it from South Africa as a stolen car.²⁴

Cattle rustling

Cattle rustled in Kenya are converted into meat for sale in the domestic and international market. The cattle are driven for hundreds of miles from the point of theft to where they are slaughtered.

The raiding of other communities for cattle is an age-old custom in Kenya. The Maasai people, who live in large parts of Kenya and Tanzania, for example, traditionally considered all cattle to belong to them. It was, therefore, their duty to acquire such cattle from other ethnic communities around them. Typi-

cally, cattle raiding in traditional society was carried out at night and relied on stealth. If the raiders were detected, they would retreat.

The influx of small arms (discussed below) has radically changed the nature of cattle rustling in Kenya. The northern two-thirds of Kenya is arid or semi-arid and is home to pastoralist communities. The population in these parts is sparse and is greatly surpassed by the thousands of animals each homestead keeps. Typically, pastoralist communities are nomadic and migrate within the large territories they occupy, in search of water and pasture for their animals. From time to time, they raid their neighbours to replenish their stocks of cattle.

The introduction of firearms into much of the arid and semi-arid parts of Kenya has led to an arms race among the communities living in the region. These arms have, in turn, changed the nature of cattle rustling. Human Rights Watch released a report on the effect of the small arms inflow into Kenya. The report noted that:

cattle rustling incidents have evolved into large-scale operations involving the theft, including in day light, of hundreds or sometimes thousands of cattle; the exchange of gunfire; rape and abduction; and, very often, the killing or wounding of people, including women and children.²⁵

The report noted one incident in February 2001, in which cattle raiders brandishing assault rifles and submachine-guns, killed 30 people and stole 15,000 head of cattle in a raid.

There have been attempts to determine the number of animals lost as a result of cattle rustling. According to Ilhakia Katumanga, a Kenyan former doctoral student at the University of Bordeaux, France, an average of 3,300 cattle are stolen in cattle rustling in northern Kenya per month.²⁶ The Human Rights Watch report estimates that 300,000 animals were stolen in northern Kenya in the late 1990s.²⁷

It is estimated that each stolen animal has a market value of Sh20,000. Applied to Katumanga's estimates, this means that cattle rustling generates Sh66 million per month. Applied to the estimates of Human Rights Watch, it works out to Sh60 billion for the period reported.

CATTLE RUSTLING AS A FORM OF MONEY LAUNDERING

Cattle rustling is now a commercial rather than cultural practice. According to Human Rights Watch:

stolen livestock have been sold, often across international borders, rather than being kept in communities. Non-pastoralist raiders and youths, in addition to herders themselves, have been drawn into cattle rustling.²⁸

A special report on cattle rustling in northern Kenya prepared by a local newspaper, *The Daily Nation*, claimed that cattle rustling is now controlled by a cartel of traders, politicians and administrators, who are making millions of shillings out of the business. The report claimed:

Some of the names being mentioned [as cattle rustlers] are known politicians, civil servants and administrators. These include top KANU officials and Special Branch officers.²⁹

The report claimed, further, that the cartel “hires youths and sometimes even members of the disciplined forces on leave, to carry out the dirty work”. Commercial rustlers finance the raids by providing transport for the raided animals and, importantly, the arms for use. The traders buy guns for use in the raids in the open market, where, “for Sh. 30,000/=, or two cows, one can get the latest AK-47 assault rifle”.³⁰ According to the report, the cartel sells the animals to slaughterhouses around the country and some are sold in the international market, mainly in the Middle East.

There is also evidence of political motives in cattle rustling. Cattle rustling is often carried out as part of political retribution against communities that are out of favour with the establishment.³¹ The motive of personal financial gain by the politicians who authorise the raid is usually understated but is actually the main reason why such raids are made in the first place. The establishment supports such raids, which are explained as a means of ‘teaching these communities a lesson’. The spoils of teaching the lesson go to the politicians.

In traditional society, cattle stolen from other communities was usually kept by the raiding community. In the commercialised form of cattle rustling, the cattle are sold in the Kenyan market, as noted above. The raiders, for example, typically drive cattle stolen from the Marakwet valley, to Kitale, about 100km away. They are then loaded onto waiting trucks. If they are intended for slaughter locally, they are transported mainly to Nairobi, a further 400km away, but also to other important urban centres. If they are intended for export, they are transported to Mombassa, 900km from Kitale, where they are slaughtered and then exported, mainly to the Middle East.³²

Cattle branding, for purposes of identification, has since fallen into disuse. It seems that that the administration has no great incentive to enforce the policy of identification of cattle since it has an interest in cattle rustling. It is, therefore, easy to move stolen cattle from one place to another without the risk of arrest. Commercial cattle rustlers usually act in complicity with law enforcement officials who, instead of arresting them, provide them with security.

Other forms of violent robbery

Fuelled by the increasing number of guns in Kenya, armed robberies have greatly increased in its cities, many of them targeting banks. For example, a bank lost Sh160,000,000 in a robbery in 1997, the largest loss in a robbery in Kenya.³³

Although many of these robberies do not lead to large financial losses, they are nevertheless of concern because of the serious injury, death and personal trauma associated with robbery. Rape is a dreaded accompaniment to some robberies.

Where do robbers take the money?

A substantial part of the money robbed from banks is paid to police officers, who offer the robbers protection. Increased security has often made it more difficult to rob banks. In order to succeed, the police have to be paid off to relax their security.³⁴ A significant portion of the proceeds of violent robbery is spent on relatively trivial pursuits. Informants said that robbers never bank any of the proceeds of their crime. Rather, they keep their money in all kinds of hideouts. The money therefore never gets into the financial system in the form in which it was stolen.³⁵

According to the informants, robbers typically invest their money in real estate, usually in downmarket Nairobi or in small towns on the outskirts of the city. They take particular care not to buy property in upmarket Nairobi, where they would stand out. Typically, the property is bought in the name of a woman companion. If it is residential property, the woman often resides there. If she does not stay on the property, she is, however, responsible for managing it and any other businesses the robber may establish. According to the informants, many robbers buy many such residential properties and install women companions to reside in the property and manage it. The different residences make it more difficult for the neighbours and the police to notice that the person is a robber.

According to the informants, robbers often establish retail businesses that generate a lot of cash. Such businesses include bars, butcheries and dry-cleaning

establishments. By far the most favoured business enterprise, among robbers, is passenger transport, popularly called the *matatu* business.

Profits from the business vastly vary and can be large. Often, there are bloody street fights between rival cartels for the control of *matatu* routes, and between the cartels and law enforcement officers. The police are often accused of exacting their own extortion from *matatu* operators and violent protests against the police are frequent. These cartels violently resist any form of government control.

Typically, a robber buys one or more vehicles, which join the large throng of existing vehicles on the road. It may not matter to him that the venture is not profitable, if it provides the required cover for his illegal activities. If the investment makes money, it is mixed with the proceeds of crime, which are thus laundered.

A possible attraction to investing in the *matatu* business is the fact that vehicles in Kenya can easily be bought for cash. Besides the formal motor-vehicle market, an even larger market of second-hand vehicles has developed in Kenya. Dealers hold open-air bazaars, which are completely informal and unregulated. The formal market (in which new vehicles are sold) has been in decline, while second-hand dealerships have been growing.

Some motor-vehicle dealers ask cash buyers to deposit the money into the dealer's account or to pay with a bank draft. However, the reason for this is not concern about the source of money but rather concern about the security of large amounts of cash once they are paid to the dealer. Banks do not ask questions of third parties who seek to deposit cash in the their customers' accounts. They assume that there must be a legal transaction behind the payment.³⁶

Motor-vehicle dealerships undeniably provide boundless opportunities for money laundering. Other than the local market, in which the use of cash is dominant, imports also provide an easy way of transferring money abroad. The money is easily explained as payment to a supplier of vehicles.

Where a robber invests in passenger transport, he may need spare parts for his vehicles from time to time. The theft of motor vehicles for spare parts supplies some of these needs.

Trade in narcotics

Kenya's trade partners

Kenya is believed to be mainly a trans-shipment centre for narcotics and psychotropic substances destined for markets in Europe and North America. There is increasing evidence, however, that a domestic market for drugs is developing, although it is still very small. From Pakistan (believed to be Kenya's leading trade partner in drugs), Kenya receives heroin and hashish. From India, it receives both heroin and mandrax. Heroin also comes into Kenya from Afghanistan. Cocaine comes from South America, mainly Colombia and Ecuador. Mandrax passing through Kenya is sold mainly in South Africa, believed to have the largest market for mandrax in the world. Other than Europe and North America, which provide the market for the bulk of the heroin, cocaine and hashish, an important market has developed in the Indian Ocean islands, including Mauritius and the Seychelles.

The players

Expression Today, a local journal that deals with issues of democracy, human rights and the media, conducted a detailed study on the trade in drugs in Kenya in February 1999.³⁷ The study claimed that trade in narcotics is ultimately controlled by highly-placed actors in the Kenyan state, who share in the profits, in return for political protection to the drug barons. The study named a number of people as some of the leading drug barons. These included Kamlesh Pattni (the mastermind of the Goldenberg scandal), Ibrahim Akasha (a Basel-based billionaire, since deceased), Nassir Ibrahim Ali (the same Pakistani national referred to earlier, who implicated President Moi in the Goldenberg scandal), and an assistant minister in President Moi's government. According to the report, the drug barons funded elections for the ruling party, KANU, in 1992 and 1997.

Akasha, the value of whose estate was estimated at Sh10 billion, and who owned property in Amsterdam, the Middle East and Asia, was publicly alleged to be the mastermind behind the hashish trade in Kenya. There were several public demonstrations against him in Mombassa, where he lived, but no action was ever taken against him. Eventually, on 3 May 2000, Akasha was assassinated in the red light district in Amsterdam.

A local newspaper, *The People Daily*, published an investigative story claiming that "some of Kenya's big names in business, politics, and the armed forces are behind the increasing trafficking of drugs and gun running".³⁸ The report fur-

ther claimed that members of President Moi's family were involved in drug trafficking, and added that only President Moi's personal intervention could change the situation.

Other than the international trade, there is also a local and regional trade in drugs, mainly cannabis sativa and *khat*. The latter is, however, not banned in Kenya and its trade is legitimate. Cannabis is grown in the Mount Kenya region of central Kenya, as well as in western Kenya. In the former, the crop was first grown on a small scale, but this eventually led to the establishment of large-scale Colombia-like estates in the 1990s. There are claims that hundreds of acres of forest were cleared in this area to make way for cannabis estates, owned by persons with political influence and guarded by armed police officers.³⁹

An important component of the cannabis trade is the cross-border trade between Kenya, Uganda and Tanzania. According to the head of the Anti-Narcotics Police Unit, there is more cannabis coming into Kenya from Uganda and Tanzania than is grown locally. He claims that the cannabis plantations in Mount Kenya have now been destroyed and that these do not provide any of the cannabis sold in Kenya. However, there is still a large social tolerance of cannabis growing in both Uganda and Tanzania and in these countries, the plant is grown openly. It is then sold in Kenya, where it is less easily accessible.⁴⁰

Laundering drug money

The principal method of laundering the proceeds of drugs coming into Kenya is through casinos.⁴¹ The more than 20 casinos in Nairobi are at odds with the economic realities of Kenya. In a country that has recently faced major economic hardships, which have led to massive bankruptcies, it is inexplicable how so many casinos can do legitimate business in Nairobi. A Kenyan fugitive, Said Masoud Mohammed, who jumped bail in a drug-related trial in Nairobi, is said to own one of the casinos in Nairobi.⁴²

The proceeds of drug sales are laundered in various ways, depending on the amount of money involved. Relatively small dealers usually set up retail businesses. Women dealers usually set up cash retail businesses like hair salons, massage parlours and boutiques. Whatever business is set up, it will usually have an export or import component. If, for example, a drug dealer sets up a clothes shop, she will usually have an import component to the business. Foreign travel for the purpose of buying drugs will be explained as travel for bringing in fresh orders of merchandise. Often, instead of bringing in the proceeds of crime in cash, the dealer imports items for the business. Export components

in such businesses include curios, horticultural products and agricultural produce. Therefore, a drug dealer may set up a motor-vehicle dealership, export drugs, and import motor vehicles using the proceeds of the drug sales. Exports, other than providing a cover for any proceeds that may be received from abroad, also provide a cover for the drugs themselves, which may be hidden in the exported items.⁴³

Small- and medium-scale dealers typically spread their money across many banks. In this way, the amounts look small and do not attract adverse attention. For example, a Kenya Airways hostess jailed for 20 years in November 2002 after being found in possession of 27kg of heroin at the Jomo Kenyatta International Airport, had four different accounts in several banks in Nairobi. She had a tailoring business as a front, and was also an importer of clothes for sale in Nairobi.

Large sums of money derived from drug sales are smuggled between countries.⁴⁴ The carriers of the cash bribe their way out of any trouble in which they land, or make prior arrangements with security personnel to avoid such trouble. The *Expression Today* report claims that the Jomo Kenyatta International Airport has twice been hit by “major heists involving millions of shillings being brought into Kenya” as proceeds of drug sales.⁴⁵

Large dealers also set up retail businesses that serve as fronts for their illegal activity. For example, the late billionaire, Ibrahim Akasha, a reputed drug dealer, had a business empire in Mombassa consisting of hotels, high-cost residential premises, petrol stations and commercial real estate.

Expression Today identified several ways in which proceeds of drug sales are laundered in Kenya. Treasury bonds issued by the government of Kenya are cited as providing an easy money laundering opportunity. In January 1999, for example, the government issued three billion shillings’ worth of bonds to the Kenyan market. All that one needed to do was to open an account and buy at least Sh50,000 worth of such bonds. Commercial banks, through which bids for bonds must be placed, ask very few questions about the source of the money being invested in the bonds. The successful investment of money in treasury bonds has, of itself, a laundering effect, as subsequently the money will be accounted for as proceeds of investments in government securities.

According to the report, the proceeds of drug sales are also invested in real estate:

from the coastal holiday resorts— especially Malindi, inhabited by Italians and [the] South Coast [of mainland Mombassa] dominated by Pakistani and German nationals—launderers have found Kenya's forex bureaux a haven for illicit money transfers.⁴⁶

The report further claimed that organised crime syndicates are involved in buying land in Mombassa and developing holiday facilities, using the proceeds of crimes committed in Europe.

Several informants said that they believe that proceeds of drugs are, at least in part, invested in upmarket property developments and contribute to the continued investments in this sector. Property at the coast, especially in Malindi, has remained fairly expensive notwithstanding the collapse of business in the coastal towns. In part, this is explained by the demand for coastal property created by money laundering activities.⁴⁷ The *Expression Today* report corroborates this.

The use of forex bureaux in money laundering is also identified in the report, which claims that Pakistani-run bureaux in Nairobi “use the ‘hundi’ system of informal electronic transactions enabling money to be transferred from the Asia-Pacific region”. For example, on 14 July 1999, a couple running an unlicensed forex bureau, Sterling Forex Bureau, were arrested while attempting to leave the country with currency worth Sh50 million. They claimed, on arrest, that the money belonged to two Kenyan officials, whom they refused to name.

The report claims that some of the ‘foreign investors’ in Kenya are in fact money launderers who use the system as a screen to benefit from multiple tax breaks.

In most cases, says the report, drug dealers pay for property transfers in cash. However, it concludes that there is hardly ever a need to do so in Kenya, since no law prohibits the deposit of the proceeds of crime in a bank.

According to Mickel Edwerd, of the United Nations Drugs Control Programme (UNDCP) in Nairobi, there has been increasing resort to postal money orders for purposes of money laundering. According to him:

criminal organisations are increasingly using postal money orders to transfer huge income generated from illicit activities into foreign countries, very often in those who apply bank secrecy.

However, the UNDCP has now facilitated the signing of a memorandum of understanding between the police and post office authorities in Kenya. This is aimed at combating the use of post offices for money laundering.⁴⁸

The influx of small arms

The movement of arms in Kenya

The long period of conflict experienced by the counties that border Kenya (Ethiopia and the Sudan to the north, Uganda to the west, and Somalia to the east) led to a stockpiling of arms, predominantly small arms, in those countries. During the Cold War, the arms were brought in by the United States and the Soviet Union, in competition with each other. Since then other sources of arms have been developed, including China, Bulgaria and other Central and Eastern European countries.⁴⁹

The fall of governments in Ethiopia (1991), Rwanda (1994), Somalia (1991), and Uganda (1979 and again in 1986), led to a large number of the arms that had been in government hands falling into private hands.

Other sources of arms are governments in the sub-region that arm rebels in order to destabilise other countries. For example, Uganda has been accused of arming the SPLA in the Sudan and rebels in Rwanda.

In the meantime, Kenya has developed its own capacity to manufacture bullets, with the assistance of the Belgian government. The manufacture of these bullets is, however, the subject of complete secrecy. It is not known how many are produced or how they are used.⁵⁰

Kenya has been identified as a centre for the trans-shipment of arms throughout the East African sub-region. Local newspapers have repeated claims that arms are illegally trans-shipped with the knowledge and blessing of top government officials.

Studies show that the movement of small arms in Kenya is wholly informal and difficult to detect or control. Whereas it is difficult to own a gun legally in Kenya, it is estimated that there are 40,000 arms illegally held.⁵¹ The arms are supplied mainly by impoverished people, displaced from situations of conflict in other countries, who sell them for subsistence. Prices vary greatly, but Kenya is a preferred market because the prices are relatively high compared with other neighbouring countries.

Effect of small arms

As a result of the ready availability of small arms, the security situation has worsened considerably. Guns are often used to commit violent crimes and fatalities are frequent. The high level of crime is reported to have fueled a demand for legal guns, which, however, the government is reluctant to supply.

In northern Kenya, the availability of guns has led to openly militarised communities. There has been an arms race between the various communities living in these regions. Cattle rustling, which in traditional society was a mild problem, has now evolved into a source of widespread conflict, leading to high fatality levels.

The presence of arms in the hands of criminals has exposed security officials to great personal danger and criminals often use the arms against the police. The police are making more mistakes in their use of firearms, because of the increased necessity to use them.

The proliferation of small arms has undermined legitimate political structures and avenues for the peaceful resolution of disputes. Small arms have given criminal enterprise a higher priority as an economic activity. Small arms have also greatly undermined the ability of the countries in the sub-region to build peace: Often conflicts in which small arms are used assume an international dimension involving communities in different countries.⁵²

The players

According to the Human Rights Watch report, wealthy people (in addition to impoverished subsistence dealers) import and sell guns to criminal networks in Kenya. These dealers also serve as brokers for large-scale supplies to other parts of Africa. Further, arms dealers who broker arms to other parts of Africa live in Kenya and may also be supplying the country as well.⁵³

The special report on drug trafficking that linked the practice to President Moi's family further claimed that the people involved in drug trafficking are also responsible for the importation of guns into the country.⁵⁴

A Nairobi narcotics defence lawyer believes that casinos in Kenya serve as fronts for arms dealers, in addition to laundering the proceeds of crime. He pointed out a specific casino, which, he said, has been linked to both drug trafficking and the arms trade.⁵⁵

The *Expression Today* report claimed that Eldoret Airport, newly built at Eldoret in the west of Kenya (believed to be a favourite town of President Moi's) was responsible for busting the Burundi arms embargo. Clearly, therefore, some arms must be coming into the sub-region through this airport.⁵⁶

Some arms in transit to other parts of Africa in fact end up in the local market because of the complicity of corrupt officials.

A covert arms market is believed to exist in Eastleigh in Nairobi. Outside Nairobi, the markets are more open, especially in the northern parts of Kenya.

Conclusion

This study has attempted to paint, with the broadest possible strokes, the picture in Kenya concerning money laundering activities. Breadth has necessarily compromised depth and an initiative to discuss, in depth, each of the identified forms of money laundering is clearly necessary.

As demonstrated, a large number of the criminal activities generating money that may need to be laundered, are undertaken, or supported, by elements within the Kenyan state. The Kenyan state, therefore, patronises and protects not only grand corruption but also cattle rustling, the trade in small arms and narcotics, as well as robbery, all of which generate large sums of money. The necessity to launder money, and the methods chosen for laundering reflect the laxity in law enforcement, resulting from official protection.

Income generated from these illegal activities helps to keep the Kenyan state in power. Crime is, therefore, a necessary part of politics as is money laundering.

Measures to tackle money laundering would, it follows, have to address the way politics is conducted in Kenya.

Kenya's strategic location and relatively well developed sea and air transport infrastructure, as well as her close commercial and family ties with India, Pakistan and Britain, make the country an important transit point for drug trafficking. The lax law enforcement environment also makes the country an excellent money laundering destination.

A large part of the Kenyan economy is informal or is in the process of becoming so. Record-keeping in the informal sector is largely absent, and money

laundering would be difficult to detect in such an environment. An aspect of this informality is the widespread use of cash to transact legitimate business, which makes it easy to introduce cash, earned from crime, into the financial system.

Record keeping by public authorities is in considerable chaos and has effectively imposed a secrecy, in the conduct of business transactions, which the law never intended. There is an absence of a regulatory framework against money laundering, although it is understood that the Kenyan government is trying to develop legislation to support one. Kenya, a country that has been victim to terrorist attacks, is in urgent need of such a framework, if only to address the threat of terrorism.

Notes

- 1 See M Mati and J Githongo, Judicial decisions and the fight against corruption in Kenya, an unpublished paper contributed to the *International Commission of Jurists state of the rule of law report*, Nairobi, 2001.
- 2 Transparency International, *Urban bribery index*, Transparency International (Kenya), Nairobi, 2002, p 13.
- 3 See, for example, the Constitution of Kenya Review Commission *Main Report of the Constitution of Kenya Review Commission*, 18 September 2002, p 163, which summarises the views expressed to the Commission by the public regarding the judiciary.
- 4 *Republic v. Attorney General ex parte Kipng'eno arap Ng'eny* (Unreported)
- 5 *Stephen Mwai Gachengo v The Republic* (HC Misc. Applic. No. 302 of 2000). (Unreported.)
- 6 See, for example, Ahmednasir Abdullahi, The judiciary in Kenya: Who is to reform it?, *The Advocate*, Law Society of Kenya, Nairobi, 2002 p.2.
- 7 *Republic v The Constitution of Kenya Review Commission ex parte Justices Moijo ole Keiwua and Joseph Juma* (High Court Misc. Applic. No. 110 of 2002)
- 8 See, for example, Kenya Human Rights Commission, *Quarterly human rights report*, 3 Kenya Human Rights Commission, Nairobi, 2002.
- 9 The discussion on the Companies Registry is based on a personal visit and interviews with registry staff conducted as part of the research on the nature and extent of money laundering in Kenya, referred to above.
- 10 The files of these companies were initially unavailable for public scrutiny. It took great public pressure, including a parliamentary question, for the files to reappear. Even then, they were useless for identifying the real allottees of the companies, because the directors were not disclosed. See, for example, Emman Omari, Karura: Katana names firms only, *Daily Nation*, 13 November 1998, p1, in which, in answer to a question in Parliament, the Minister for Lands, Katana Ngala, released names of the 67 companies allocated land in Karura, without details of who owned them. This information was useless and left members of Parliament no better informed than before.
- 11 Constitution of Kenya, section 115.
- 12 Based on several interviews with a Nairobi lawyer, during August 2002.
- 13 Argwings Odera, How drug money is laundered in Kenya, *Expression Today*, 11 February 1999, p 6.
- 14 Mutahi Ngunyi, Liberalising a bandit economy, *Daily Nation*, 9 July 2000.

- 15 The discussion on the Goldenberg scandal is based on research done by G Warigi, *Fools' gold: Goldenberg and the worst criminal financial scam in Kenya's history*, Transparency International (Kenya), Nairobi, 2001 (unpublished).
- 16 This is according to court documents filed in the dispute between Pattni and the Central Bank of Kenya over the hotel in HCCC No. 29 of 1995, *Uhuru Highway Development Limited v. Central Bank of Kenya*, which is pending determination
- 17 Ibid.
- 18 The contract was signed on 25 January 1993 but Pansal Limited was only incorporated on 10 March 1993, almost two months later.
- 19 Ngunyi, op cit.
- 20 This discussion is based on a personal interview with an employee of Cartrack Kenya Limited, a local company involved in the post-theft recovery of motor vehicles.
- 21 Based on a personal interview with a Nairobi lawyer who frequently undertakes criminal defence work. The lawyer said he once acted for a client who was jailed for possession of 16 engines stolen from cars.
- 22 See Stephen Muiruri, Shs. 500,000,000 goods held in tax swoop, *Daily Nation*, 5 April 2002, p 52.
- 23 According to a personal interview with a Nairobi motor vehicle dealer, July 2002.
- 24 See note 20 above.
- 25 Human Rights Watch, *Playing with fire*, May 2002, p 23.
- 26 Ibid, p 24. See also Ngunyi, op cit.
- 27 Human Rights Watch, op cit, p 24.
- 28 Ibid.
- 29 *Daily Nation*, Cartel is funding cattle rustling, 20 July 1999, p 22.
- 30 Ibid.
- 31 See, for example, Human Rights Watch, op cit, p 24.
- 32 Interview with a Nairobi lawyer, who was born in Marakwet area.
- 33 See Ngunyi, op cit.
- 34 According to a Nairobi lawyer. This assertion was confirmed in an interview with a manager at Standard Chartered Bank, 28 July 2002.

- 35 One informant, a Mombassa lawyer, said he was approached by Tanzanian robbers operating in Kenya, to retrieve Sh9,000,000 hidden in a cave.
- 36 Interview with the bank manager at Standard Chartered, Haile Selassie Avenue Branch, Nairobi, 8 August 2002.
- 37 Argwings Odera, Kenya turned into haven for drug barons, *Expression Today*, 11 February 1999, p 1. This discussion relies heavily on the findings of that study. The author wishes to express his gratitude for this.
- 38 Mukhalo wa Kwayera, *People Daily*, Nairobi, 2001
- 39 Interview with Michael Jackobam, Head of the Kenya Anti Narcotics Police Unit, Nairobi, July 2002.
- 40 Ibid.
- 41 Personal interviews with a criminal lawyer specialising in drug-related defence work and the senior staff of Transparency International (Kenya). A written request to obtain official statistics on the number of casinos in Kenya for the purposes of this research was made to the Betting Control Board, which declined to provide the information.
- 42 Personal interview with the defence lawyer.
- 43 Ibid.
- 44 Odera, *supra* note 13, p 3.
- 45 Ibid.
- 46 Ibid.
- 47 Correspondence via e-mail with Michael Edwerd of UNDCP, Nairobi, July 2002
- 48 Human Rights Watch, *op cit*.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 Ibid.
- 53 Ibid.
- 60 Ibid.
- 61 Personal interview, Nairobi, July 2002.
- 62 Kwayera, *op cit*.

CHAPTER 6

IMPLICATIONS OF FOREIGN BANKING AND OFFSHORE FINANCIAL CENTRES FOR MONEY LAUNDERING IN THE REGION

Bothwell Fundira

Introduction

Major and small financial centres regularly advertise their services on the World Wide Web. The services include internet banking, which enable individuals or corporations to open accounts without setting foot in a bank.

Some financial centres have gone a step further to ensure and guarantee that only the top officials of the institution may access certain account details. As a result, financial centres have been found useful by drug traffickers and corrupt politicians. This paper looks at how foreign banking and global financial centres can assist money launderers in the sub-region, using Zimbabwean case studies.

The use of global financial centres adds a new dimension to the menace of money laundering. By making use of these centres, an individual or company can introduce two jurisdictions into the equation, with different norms and laws. Money launderers are invariably attracted to environments where there are lax exchange, income and inheritance tax laws.

There are financial centres that assist in the concealment of ill-gotten gains by providing false invoices and bills of lading. Normally, launderers are clever enough to introduce an additional layer of defence—a lawyer to ensure that, in accordance with client confidentiality, there is no scrutiny of the transactions. Nominee ownership of accounts offers an additional useful protection to the money launderer.

Financial systems play a pivotal role in the disguise of the proceeds of crime. It is not coincidental that financial institutions of various descriptions are made accountable wherever anti-laundering legislation is introduced.

Banks, which are at the core of financial systems, have been able to develop sophisticated products, which has added additional mystique to already complicated financial systems. Transactions within banks are carried out across borders, which avails the money launderer the opportunity to conceal ill-gotten gains.

Financial centres and the link to money laundering typologies

What follows is a discussion of some of the prevailing money-laundering typologies and the way global financial centres fit into the picture. Below is an illustration of how foreign banking can be used to launder funds using methods like transfer pricing. Thereafter, laundering vehicles/ facilitators are dealt with to the extent that they are relevant to foreign banking and offshore financial centres.

Methods of money laundering

Transfer pricing

Transfer pricing works as follows: an organisation charges for goods or services at prices that are not market related with the aim of moving funds out of or into a chosen jurisdiction. Exporters use this method to ensure that funds earned from exports are externalised. This is done in order to circumvent stringent foreign currency controls. One of the key aspects of global financial centres is that there is a high degree of secrecy with which transactions are undertaken. These conditions are ideal for effective transfer pricing.

Example

Holding company A has its Head office in country X and a subsidiary B in country Z. Company A sells goods to company B worth US\$500 000 but the invoices and shipping documents are altered to reflect a value of US\$100 000. The net effect is that US\$400 000 is externalized to country Y. Income tax and duty values are altered in contravention of the law. The difference of US\$400 000 is concealed from the authorities.

Shell and nominee companies

Shell companies typically do not carry out activities on a day-to-day basis and are often formed in order to fulfill particular transactions. Money launderers open accounts in the name of such companies, deposit ill-gotten gains and subsequently introduce the proceeds into the formal system, thereby completing the laundering process. A company can deposit money through a negotiable instrument like bankers' acceptances or negotiable certificates of deposit. This can be done using ill-gotten gains and on maturity, the funds can be deposited in the account of a shell company. A number of such transactions can be carried out leading to the destruction of the audit trail.

Shell and nominee companies are normally used in money laundering in order to disguise the identity of the perpetrator of the predicate offence. The fact that there is a high degree of secrecy in the financial centres provides the perpetrator with suitable camouflage.

Registration of shelf companies in financial centres typically means that the companies at worst pay minimum taxes and in some cases avoid paying taxes altogether.

Banking institutions

Financial institutions have a remarkable ability to move substantial sums of money all over the world with no questions asked. Amounts can be transferred at the speed of a telephone call to a desired destination.

The following instruments made available by banks are good vehicles for the typical money launderer:

- SWIFT: Society for Worldwide Interbank Financial Telecommunications System
- CHIPS: Clearing House Interbank Payments System
- FEDWIRE: Federal Reserve

The above methods are ideal for the money launderer because transactions can be carried out repeatedly and speedily. The other traditional instruments are slower and cumbersome to effect.

Derivative instruments

Interest-rate swaps

A company or individual can 'buy forward' future interest obligations. 'Buy forward' involves agreeing ahead of time the obligations to be delivered later in terms of a financial contract. A buy forward arrangement enables a company/organisation to go to a bank and agree in advance the interest burden on a current or future loan.

Exchange rate swaps

A company or individual is able to predetermine obligations in a future exchange-rate arrangement. A company or individual in the same group can go into interest rate swap. Company A can have interest rate obligations in pound sterling and exchange (swap) the liability with company B for a US dollar liability. In this case, company B would have a current or future US dollar liability. Bank transactions of this nature can give legitimacy to laundered funds.

Bills of exchange

These are normally documents that promise payment to the bearer. They are as good as bank notes.

Negotiable certificates of deposit

These are faceless documents payable to the bearer. A negotiable certificate of deposit is essentially a fixed deposit except that the payee is not reflected on the instrument. Proceeds can be paid to nominated third parties, which makes it difficult to identify the principal in a money laundering situation.

Banking institutions: Lack of regulation

An illustration of the abuse of the banking system is the unreported case in Zimbabwe of *Roger Boka and United Merchant Bank v The State*. Boka, who had formed a bank, used his lawyer, Gregory Slatter, to open trust accounts that were used in laundering activities. The Boka case illustrated the ease with which capital could be siphoned off to offshore accounts or loaned to politically connected individuals and corporate entities. By using a lawyer, the proceeds were rendered relatively safe from public scrutiny. Slatter opened a foreign account in the United Kingdom into which it appears some of the money was deposited.

The Ministry of Finance has tended to issue banking licences in cases where the promoters can raise the required capital to start a financial institution. There is scant attention to management capacity. Management deficiency was responsible for the demise of Universal Merchant Bank, Zimbabwe Building Society, First National Building Society, Genesis Investment bank and its predecessor, Trade and Investment Bank.

Mr. Boka was granted a banking licence in 1995 to start operating a Merchant Bank, which he named United Merchant Bank. He was an entrepreneur of note, having successfully started other ventures. What was clear though was that he did not have the experience to run a bank, and that if he had been subjected to the rigorous screening processes required of bank promoters, he would have come seriously short.

As a banking institution, United Merchant Bank accepted deposits and paid interest rates well above the market average (part of the cleaning process). Boka was not concerned with the profitability of the bank but rather with ensuring that he would get liquidity to launder by way of deposits. The deposits were partly used to finance personal obligations both inside and outside Zimbabwe.

United Merchant Bank was given the mandate by government to raise funds for the operations of the Cold Storage Company, a parastatal involved in beef production and sale within and outside Zimbabwe. It was to issue bills to the value of \$413 million. For some reason, a government guarantee was issued to the value of \$855,16 million. Mr. Boka proceeded to issue an additional \$1,263 million worth of Cold Storage Company bills. He was able to issue as many bills as he wanted because the bills are tradable.

Mr. Boka opened external accounts and proceeded to purchase foreign currency and transfer it to accounts outside the country. He deposited money in Botswana, South Africa and the United Kingdom. Depositors' funds were mingled with personal funds and used to acquire properties. One of the more prominent properties was a tobacco auction floor outside Harare, which became the biggest tobacco auction floor in the world! Boka was able to move money into and out of the accounts in order to finance transactions both within and outside Zimbabwe.

This case also illustrates how political considerations can be used to obtain a bank licence. Ordinarily, the proprietor and promoter would not have been allowed to run a bank. When his bank was in a bad state, Boka blamed high-

level officials for not repaying money owed to the bank. He was eventually but somewhat belatedly charged under the Serious Offences (Confiscation of Profits) Act, but died before the case could be tried.

At the time of writing, the laundered funds had not been repatriated.

The Banking Act does not give power to the governor of the Reserve Bank to issue or revoke bank licences. Ironically, the governor is required to supervise banks in circumstances where his power and influence is confined to pointing out problems.

Lawyers' trust funds

In many parts of the world lawyers have been used by individuals whose intention is to conceal their illegal activities. The case of *Aitken and another v Attorney General*¹ shows how the privilege of trust accounts can be used in undertaking illegal activities.

Aitken, a prominent Harare lawyer, deposited funds into his practice's trust account and subsequently used them to carry out illegal activities. Aitken identified individuals with foreign currency held in accounts abroad. He would match these individuals to companies that required foreign currency. Agreements would be reached to exchange currencies using a parallel market rate. The predicate offence in this case was the dealing in foreign currency in a manner that was not allowed under Zimbabwean law. The funds were introduced into Zimbabwe in the form of goods and services, such as luxury items like motor vehicles. Automated Teller Machines (ATMS) were also imported for banks. In order to finance the transactions, money was paid into the lawyer's trust account. Only the lawyer knew who paid in what amounts into the trust account through specialised codes. A foreign account in London, as indicated below, was used to effect these transactions. The trust account was used to clean the ill-gotten gains as and when the providers of the foreign currency were paid their dues and the lawyer got his commission.

Seven charges of contravening the Exchange Control Act (1997) and section 63 of the Serious Offences (Confiscation of Profits) Act were leveled against Aitken and a business partner.

Section 63 of the Serious Offences (Confiscation of Profits) Act deals with money laundering. A person or body corporate is deemed to have committed money laundering in circumstances where he:

engages directly or indirectly, in a transaction, whether in or outside Zimbabwe, which involves the removal into or from Zimbabwe, of money or other property which is the proceeds of a crime: or receives, possesses, conceals, disposes of, brings into or removes from Zimbabwe, any money or other property which is the proceeds of crime: and knows or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly from the commission of an offence.

It was alleged that because of this arrangement, the country was deprived of foreign currency that would otherwise have come into the country.

It proved difficult for the state to obtain details of external accounts that were used in the exercise, making a full prosecution impossible. Other suspects in this case were never brought to court for lack of evidence. According to the prosecutor, efforts to get leads from Lloyds Bank were fruitless because the investigating officers were told that the records were destroyed by fire.

In this case, it appears that a global financial centre, Lloyds Bank, was used in order to carry out laundering activities.

Stockbrokers

Individuals and companies can purchase shares on the London Stock Exchange and trade them on the Zimbabwe bourse at inflated prices, especially at a time of high demand for hard currency in the country.

Stockbrokers have proved to be an effective way of laundering by externalising funds from the country. This is achieved by using dually listed companies. It is a requirement in Zimbabwe that all foreign currency transactions should be sanctioned by the Central Bank. At the time of writing the official exchange rate was pegged at US\$1 to Z\$55, whereas the parallel rate was generally between US\$1:Z\$1 500 and US\$1:Z\$2 000. Shares in dually listed companies can be traded in at least two jurisdictions, depending on the countries of listing. In Zimbabwe, dually listed shares include Old Mutual, NMB Bank, PPC and Trans Zambezi Industries. Under the arrangement, shares are bought on a foreign stock exchange and off-loaded on the local bourses where parallel exchange rates are obtainable and provide more favourable returns.

The Old Mutual share price moved from Z\$70 in July 2000 to Z\$1 150 in August 2001. As of 27 March 2003, the price had come down to Z\$ 950 because of the effect of the Iraq war.

Interestingly, the fall in the share price coincided with the September 11 attacks. It is a fact that the Old Mutual share price moves up and down in harmony with the fortunes of the foreign-exchange parallel market. Because of their fungibility, the shares have been used to take foreign currency out of the country. Old Mutual is listed on the London Stock Exchange.

A large listed commercial bank is under investigation for having transferred Old Mutual shares to the London and Johannesburg stock exchanges without Reserve Bank approval. The Central Bank claims that, as a result, the country was deprived of £1,4 million and ZAR9 million.

This fungibility may even provide crime syndicates or terrorist organisations with opportunities to move funds so that they can finance their activities without detection.

Bureaux de change and money transfer companies

At the time of writing, *bureaux de change* and money transfer companies are probably the foremost perpetrators of money laundering in Zimbabwe. *Bureaux de change* facilitate the externalisation of hard currency from Zimbabwe under the pretext of assisting Zimbabweans living outside the country to send money home. Nationals living abroad are provided with external account numbers into which to deposit hard currency. In turn, the Zimbabweans provide local accounts into which the local equivalent can be paid at the parallel rate. This deprives the country of much-needed foreign currency.

Bureaux de change were formally abolished in November 2002 by government decree, but they have continued to exist, albeit as informal structures, often disguised as money lending institutions.

Global financial centres make it possible to transfer or manually deposit or withdraw funds in many jurisdictions. This is not peculiar to global financial centres but such centres offer an additional incentive in laundering activities, partly on account of the secrecy observed by the financial centres.

Conclusion

In conclusion, it can be seen that global financial centres are an integral part of money laundering in the region. Money is transmitted from Zimbabwe through the banking system and *bureaux de change*. This was the ostensible reason behind the ban on the *bureaux*.

The solution lies in getting the Zimbabwean economy back on track. There is need to review the system through which the Zimbabwean dollar is controlled at unrealistic levels, a phenomenon which leads to normally law-abiding citizens breaking the law only so that they can enjoy the correct compensation in financial transactions.

The logical starting point is to educate the populace on the menace of money laundering. After the education exercise, it will be necessary to formulate appropriate legislation. In coming up with appropriate legislation, it will be important to take into account the views of all key stakeholders.

Note

- 1 1992 (1) ZLR 249 (S).

CHAPTER 7

A POLICE PERSPECTIVE ON STRATEGIES AND MECHANISMS AGAINST MONEY LAUNDERING IN SOUTHERN AFRICA

Jackson Madzima

Introduction

Interpol and SARPCCO

The International Criminal Police Organisation (ICPO–Interpol) has its head offices in Lyon, France. Its role is to co-ordinate law enforcement organisations and other authorities and organisations that have an interest in detecting and suppressing international crime. In order to achieve this goal, Interpol has strategic regional and sub-regional offices around the world. There are three sub-regional bureaux in Africa. The Interpol sub-regional bureau for the Southern African region is in Harare, Zimbabwe. This bureau also houses the secretariat of the Southern African Regional Police Chiefs' Co-operation Organisation (SARPCCO). While Interpol takes a global view of law enforcement, SARPCCO takes a more regionally focused approach. Therefore, the two organisations are complementary. The two have one director and are driven by the same vision and values.

The Economic and Commercial Crime Desk

Interpol has identified priority crime areas. These areas are managed by specialised regional officers. Economic and commercial crime is one such priority crime area. There are many facets of economic and commercial crime, and one of the major ones is obviously money laundering.

It will not assist much to dwell on the history of money laundering. Suffice to mention that since the phenomenon emerged, it continues to be refined by those who perpetrate it.

Interpol definition of money laundering

The Interpol sub-regional bureau's working definition of money laundering is "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources". However, Interpol remains aware of emerging trends in this phenomenon, which challenge the use of the phrase 'money laundering' as being somewhat imprecise. There is an increasing inclination to refer rather to 'asset laundering', a term that is broader and more encompassing of other significant forms and characteristics of laundering.¹

Rationale for money laundering

Under normal circumstances, organised criminals would like to enjoy the proceeds of their criminal activities out of reach of the long arm of the law. In order to achieve this, they need to disguise the origins of the proceeds. Thus, money laundering can be linked to virtually all other types of organised crime. By creating a perception that their wealth is not ill gotten, criminals will have succeeded in diverting the attention of law enforcement away from them. They know that by making the source of their proceeds 'legitimate', they will have reduced the probability of the proceeds being scrutinised. It will be impossible to seize and confiscate their wealth. They will have created a platform for ploughing the same wealth back into their criminal schemes and other activities.

Regional modus operandi

Our intelligence shows that money laundering is taking place in the whole of our region. The laundering takes different guises. It would be very difficult to find a more comprehensive classification than that made by the Institute for Security Studies in Cape Town.² This list includes laundering through:

- banks;
- lawyers;
- insurance companies;
- estate agents;
- casinos and gambling houses;
- shops;

- informal traders;
- car dealers;
- non-governmental organisations;
- stockbrokers;
- accountants;
- *bureaux de change*;
- government and quasi-government organisations;
- exporters; and
- alternative remittance systems.

There is a need to understand that these ways of laundering are in fact part of a process and that different countries in our region are affected by different combinations and degrees of sophistication of the above modes. The process of money laundering can be generally divided into the now widely accepted stages of placement, layering and integration.³

International law-enforcement authorities appreciate the link between laundering and other transnational crimes. Therefore, it is generally understood that combating laundering will negatively impact on the activities of criminal syndicates. Laundering can be easily linked to crimes such as the following, to mention but a few of the most significant ones:

- drug trafficking;
- armed robberies;
- commercial crime;
- tax and duty evasion;
- terrorism; and
- trafficking in blood diamonds,

An overview of regional police capacity

It is unfortunate that because our region is going through a transition, the capacity of our police infrastructures is not satisfactory. As a result, the tendency is that most of our countries labour under the misconception that there is

minimal or no money laundering in our region. In reality our systems are insufficiently developed to establish the existence of this phenomenon accurately, let alone deal with it.

Police agencies in the sub-region are generally sceptical about investigating cases of laundering and laying charges, because of the weaknesses inherent in the absence of specific anti-laundering legislation. Unlike fraud and other types of commercial crime, where investigations can start somewhere, the problem, from a prosecution point of view (whether real or perceived), is that there is neither a loser nor a complainant in money-laundering cases. The police operational rationale becomes hitched on the need to commit scanty resources to priority crimes whose investigation can produce easily visible results.

An overview of regional legislation

This analysis of regional legislation on laundering is not country-specific. I realise that other contributions in this work on other parts of the sub-regional countries are more focused and therefore more informative. The overview regional situation in this chapter is a simple one. A snap survey of the SARPCCO countries was done through a questionnaire. The questionnaire basically asked countries to specify whether they had any legislation specific to money laundering, and, if the answer was negative, to explain the law or laws under which they criminalised it. The questionnaire asked the countries to explain the challenges arising from the legislation. Further, statistics were requested on the number of cases prosecuted (successfully or otherwise), how many were still under investigation and how many had been withdrawn and why. In the questionnaire, countries were also asked to explain what strategies they had in place to deal with the challenges and finally to explain the kinds of money laundering they experience.

Responses to the questionnaire show that, generally, SARPCCO countries still do not have legislation to specifically address money laundering. They rely on other statutory provisions to criminalise it. Generally, within and between such statutes, laundering can be penalised, company officials can be held liable, proceeds may be liable to forfeiture, law-enforcement officers are empowered to investigate and search, and third parties may also be affected in similar ways. South Africa appears to have the most comprehensive anti-money-laundering provisions and these are well documented by the Centre for the Study of Economic Crime.⁴ At the time of writing, in Malawi and Mozambique the laws had yet to go through parliament. (Editor's note: Mozambique passed a

law against money laundering at the end of 2002,⁵ while parliament rejected the draft bill proposed in Malawi.)

From the feedback given by the countries, the following generalisations can be made:

- Most of the statutory provisions are restrictive in their interpretation of acts constituting laundering.
- Such provisions lack depth and lag behind the current techniques or methods being used to commit the offence.
- The laws of the countries in the region need to be harmonised not only with each other but also with those of other countries outside the region.

One solution to this problem could be for countries to seriously consider incorporating the concept of ‘reversal of the burden of proof’ into their legislation. The onus to clearly and satisfactorily explain perceived dubious acquisition of wealth, quick high-value financial and capital transfers and other suspicious transactions should be on the individuals concerned.

Generally, not many statistics were forthcoming from much of the region, apparently because there are no reported money laundering crimes, or because, due to inefficiencies in the judicial systems, no proper records were readily available. However, convictions for money laundering offences have been recorded in at least three cases in South Africa⁷ and there have also been three widely reported cases in Zimbabwe.⁶

Challenges

In view of the advent of new technology, the cyber revolution and the enhanced fluidity of capital that comes with faster communication systems, our countries are challenged to legislate against money laundering and to continuously review the legislation they pass to keep pace with changes in criminal trends.

There are huge problems in dealing with money laundering in the region, especially as concerns ‘inflowing’ laundering. Money launderers often have significant legitimate business interests and form partnerships with influential government officials. In this way, they can cloak and invest illegally generated funds while remaining untouchable. We have heard of cases where politically

significant individuals influence police investigations. Some investigations have reportedly been unceremoniously terminated. Certain governments could protect some launderers and even establish institutions for this. There are examples of countries inviting investment without the corresponding due diligence or appropriate background investigations. The link between money laundering and high-profile corruption cannot be overemphasised.

As it stands, questions of the absence of political will begin to arise. Launderers bring large amounts of money and investments into the region. Considering this from the perspective of political economy, are governments forced to choose between desperately needed investment and scaring away investors by probing them? Is it a question of 'chickens coming home to roost' for us? Are our countries labouring under the belief that historically Africa was unfairly exploited (and that the western world justified this exploitation or fails to adequately make up for it) and therefore the money flowing in, by whatever means, is simply coming back to where it 'belongs'? Perhaps these are the beliefs compromising regional political will to deal with laundering once and for all. If this is so, it is arguable that a paradigm shift is overdue in our systems. Our research institutes and influential authorities can influence a shift from such regressive mindsets.⁷

Ladies and gentlemen, all this having been said, we still have to appreciate that in Africa, most countries are desperately looking for foreign investments to improve their balance of trade and ailing economies. Therefore, these countries will continue to be vulnerable.

Strategies to overcome legislative and police capacity challenges

There are efforts by some non-governmental organisations and law enforcement authorities to heighten awareness of money laundering in some parts of the region, for example in Zimbabwe. There are also some systems being developed to monitor transactions by financial institutions, with banks being required to blow the whistle on suspicious transactions. There are apparent attempts by some countries to stiffen the licence requirements for business operations whose activities may promote laundering. Further, there are considerable regional efforts to exploit international co-operation in monitoring and controlling this phenomenon.

Interpol and SARPCCO continue to explore ways of assisting police organisations to reduce the impact of perceived regional challenges. Some courses have been developed in order to enhance investigative capacity. Such courses include the SARPCCO Generic Commercial Crime Investigation Course and the Computer-Related Crime Investigation Course. It is hoped that these will take care of the incompetence that occasionally impairs our investigations.

Interpol and SARPCCO continue to promote liaison with both the financial community and with other international organisations. The objective is to find common ground, eliminate duplication of efforts, and therefore achieve some synergy in the fight against money laundering. During the past 20 years, the ICPO-Interpol General Assembly has passed a number of resolutions which have called on member countries to concentrate their investigative resources on identifying, tracing and seizing the assets of criminal enterprises.⁸

Notes

- 1 C Goredema, *Money laundering in East and Southern Africa: An overview of the threat*, Institute for Security Studies (ISS) paper no. 69, ISS, Pretoria, April 2003.
- 2 B Fundira, Money laundering situation in Zimbabwe, unpublished report prepared for the ISS, 2002.
- 3 Ibid.
- 4 L de Koker, *Money laundering in South Africa*, Centre for the Study of Economic Crime, Johannesburg, 2002.
- 5 As Law 7 of 2002.
- 6 Office of the Attorney-General, Zimbabwe.
- 7 Speech by Mr Frank Msutu to the Barclays Bank Africa Region Money Laundering Conference, 8–9 September 1997.
- 8 At www.interpol.int <http://www.interpol.int>

CHAPTER 8

MONEY LAUNDERING CONTROL IN SOUTHERN AFRICA

Charles Goredema

In today's open and global financial world, characterised by rapid mobility of funds and the introduction of new payment technologies, the fight against money laundering needs to be globally coordinated in a comprehensive manner. Money launderers seek the weak links in the chain, and the consequences for developing economies like ours can be extremely detrimental. Confronting the menace of money laundering becomes even more challenging in our sub-region, with its largely cash-based economies, its less developed and loosely regulated financial, business and intermediary sectors, its underground banking or money-remitting services, and the gaps in its legal and law enforcement infrastructures and operational capacities.

Money laundering...can only be fully addressed on an international scale. Criminals operating without regard to national boundaries will always try to exploit the weaker links in the anti-money laundering chain. Thus, countries and institutions which have not yet put into place the necessary protective measures may find themselves attracting the sort of businesses that prudentially regulated financial centres have turned away.

Seriously addressing these gaps to contain the adverse impact of money laundering is no longer an option for us, but a real necessity. We cannot afford to ignore or sideline these daunting issues without suffering the resultant consequences.¹

Introduction

The statement above, made by the Honourable Majozi Sithole, Minister of Finance for Swaziland and President of the Council of Ministers of the Eastern and Southern Africa Anti Money Laundering Group (ESAAMLG), in a keynote address to the seminar on money laundering trends, summarises the emerging

perception of the challenge that money laundering control raises in the sub-region. While emphasising that it is no longer open to any economy in the world to turn a blind eye to, or encourage, money laundering, the Minister gave some indication of the approach to combating money laundering. Resorting to stringent regulation through legislation appears to be the common thread linking the more tangible responses. Inevitably, many variations, in terms of structure and detail, will be evident in legislative infrastructure dedicated to the objective.

This chapter sets out a broad overview of the nature of the problems that have prompted some of the visible responses. It explores the dimensions and key characteristics of money laundering trends in the sub-region.

The key challenges for money laundering control

The most basic measure in combating money laundering is criminalisation. Developments in the international sphere, and in the sub-regional economic fabric, have rendered it almost obligatory to impose criminal sanctions on money laundering as a primary and not just a derivative offence.² It is, however, one thing to proscribe the activity, but quite another to create a viable enforcement system to give practical effect to such a measure. At the outset of establishing a regulatory regime, it is important to identify the core institutions on which to impose the onerous responsibility of detecting and combating money laundering. Recently adopted legislation in South Africa, for instance has tabulated 19 kinds of institutions.³ It is anticipated that each institution will experience its own compliance challenges.

As that process occurs, it is also important to have a sense of the context in which these institutions operate, in order to determine their prospects for effectively discharging the new responsibilities while retaining viability. It is important to avoid setting up a system hamstrung by internal antagonisms.

Stretching from South Africa in the south to the Democratic Republic of Congo (DRC) in the north, and from Angola in the west to the island of Mauritius in the east, Southern Africa is a vast area of diverse economies at varying levels of development and sophistication. This chapter traverses developments in the Southern African member states of the ESAAMLG, namely Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Zambia and Zimbabwe. As the sub-region proceeds at a gingerly

pace towards a measure of harmonisation at multiple levels, the challenges emanating partly from the different stages of development come into sharp relief. It might be crucial to be aware of the most enduring of these challenges, as they will have a bearing on the effectiveness of the relatively new laws against money laundering.

Money laundering trends

A detailed exposition of the incidence of money laundering activities in Southern Africa is not yet feasible. The overview of the situation at this stage is based on anecdotal, rather than empirical data. To consider the patterns of money laundering within Southern Africa, one needs to view money laundering in its various dimensions. Three dimensions are evident:

- **internal money laundering**, characterised by the laundering of proceeds of, or assets derived from, crime within the country where the crime was committed;
- **incoming money laundering**, in which the proceeds or assets laundered are derived from crimes committed outside the country, and thereafter introduced into the country; and
- **outgoing money laundering**, wherein the proceeds of crimes committed within the country are laundered through exportation (to one or more countries).

Placement can occur in any of the three varieties of laundering. So can layering and integration of the laundered assets. It is clear that in the case of internal laundering, all three phases would occur in the same jurisdiction. Where laundering is incoming, the assets may have been kept out of the formal institutions until their introduction into the jurisdiction in which placement is to occur. The same could apply to outgoing laundering. Subsequent to acquisition of the proceeds of crime, the launderer may conceal them, with a view to smuggling them to a foreign jurisdiction. The concealment *per se* constitutes laundering, even though it precedes placement in any financial or commercial system.

Internal money laundering

The clandestine nature of money laundering makes it difficult to obtain accurate statistics on its scale and frequency. Commentators tend to rely on indicators and anecdotal evidence to draw conclusions about the incidence of laun-

dering. Some of the indicators identified include the extent of organised economic crime recorded by law enforcement authorities, the proceeds thereof, the proportion of the proceeds likely to be laundered, and where laundering is likely to take place. To these factors may be added the number of suspicious transactions identified by financial institutions (where such institutions exist), the prosecutions for money laundering activities and forfeitures of the proceeds of criminal activities, and trends in trade and the flow of funds.⁴ The nature and incidence of organised economic crime are of particular utility, insofar as they highlight sources of proceeds to be laundered. The crime-economic simulation developed by Walker in 1995 appears to offer the most reliable methodology to estimate the magnitude of money laundering at national, regional and global levels.⁵

Drug trafficking is identified most readily with money laundering virtually everywhere in the sub-region. *Dagga* (marijuana) and mandrax (methaqualone) sales tend to feature prominently among the sources of illegal funds, but these narcotics are by no means the only ones familiar to crime syndicates. Significant sums are also generated from sales of cocaine, heroin and ecstasy. The drug industry is known to influence trends in 'downstream' crimes, notably motor vehicle theft, housebreaking and armed robbery. As it is an industry which involves a range of participants, it is necessary to identify the important role players for the purposes of money laundering. Studies of the *dagga* market in South Africa have identified a chain of entrepreneurs which includes small (subsistence) farmers, transporters, wholesalers, retailers, vendors (some operating off the street) and exporters. It appears that in the market chain:

the wholesaler makes the most money. Although his mark up (sic) is less than that of the retailer, the quantities in which he deals are much larger. Most poorly paid are the producer and the street dealer, who work for subsistence-level income. At no point in the domestic market chain is much money made, however, as the market is too diffuse and the unit cost too small. The real market is in export.⁶

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

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

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

Money laundering is therefore an attractive option. In Malawi, drug trafficking shows no significant decline. *Dagga*, technically referred to as 'Indian hemp', is mainly grown in the northern part of Malawi around the town of Nkhotakota. From Nkhotakota the drug is transported to the cities of Blantyre and Lilongwe. Some of it is sold there, and the funds are used to purchase basic and luxury commodities. Much of it, however, is exported to foreign jurisdictions, mainly Zimbabwe, Namibia and South Africa, for sale.

The drug market in South Africa is the largest in the sub-region. At the end of June 2002, two 'busts', in Douglasdale, north of Johannesburg, and in Roodepoort on the West Rand, yielded massive seizures of *dagga*, cocaine, ecstasy, mandrax, and chemicals for the manufacture of mandrax. The haul was valued at R2.7 billion (US\$270 million). More than 100 syndicates are known to be active in the drug trafficking industry in South Africa. It appears that most launder their assets locally, in the acquisition of motor vehicles, legitimate businesses and front companies, and residential properties. Asset seizures during the past twelve months give an indication of the scale of laundering of drug money. In June 2002, the Asset Forfeiture Unit of the National Prosecuting Authority reported that of the 150 cases in which assets had been seized,⁷ 31% involved drug trafficking.

Drug merchants also use legitimate bank accounts of family members or third parties to de-link proceeds from underlying illegalities. In some schemes this is done with the connivance of the family member or third party, who allows the criminal to deposit and withdraw money from his or her account. In South Africa, the Centre for the Study of Economic Crime found that:⁸

Criminals sometimes deposit money into their own bank accounts, but more sophisticated criminals will often open accounts with false identification documentation or will open these in the names of front companies or trusts. There is also a trend of using legitimate bank accounts of family members or third parties. An arrangement would be made with a family member who will allow the criminal to deposit and withdraw money from his or her account. In subsequent investigations, the family member will invariably plead ignorance of the true nature of the funds that were deposited.

Zambia's Drug Enforcement Commission has recorded instances of drug traffickers who use fictitious identity documents, or the identity particulars of third parties without their consent, to open and operate bank accounts. The accounts can subsequently be used to fund further crime, or as repositories of funds for outward laundering.⁹

Drug traffickers also use business entities, notably shell companies and front companies, to legitimise dealings in illicitly obtained funds. Shell companies are distinct from front companies in that they do not trade, but they can be used to open and operate accounts with financial institutions, such as banks and insurance houses. In the sub-region, it is relatively easy to incorporate a shell company. In South Africa, the cost is as little as R450. Front companies, on the other hand, are identifiable trading concerns, used as a medium through which to infuse criminal proceeds into the financial system. They are frequently companies operating cash-based outlets such as *shebeens*, restaurants, cash loan businesses, and cellphone shops. In Namibia, South Africa and Zambia, commuter transportation fleets are a particular favourite.

The inclination of retail businesses in many countries to conduct transactions in cash facilitates the local laundering of funds. It is convenient for criminals to purchase commodities without fear that the source of the cash will be detected. Large amounts of cash, some of which are derived from drug trafficking, regularly change hands in the commercial districts of Mozambique and Zimbabwe. The advent of hyperinflation in Zimbabwe exacerbates the vulnerability of commerce to money laundering. Retailers involved in evading tax, for instance, are unlikely to report retail transactions involving tainted funds. It has been observed that retailers in Malawi generally do not issue receipts.¹⁰

Investment in motor vehicles is a common avenue for laundering illicit funds. Dealers in this industry in most of Southern Africa do not have to report any transaction to the police or anyone else, even when the source of the funds may be suspect. Any individual can buy a motor vehicle from a dealer with cash, whether legitimately or illegitimately acquired. In some cases, no identity particulars are required in motor vehicle purchasing,¹¹ which makes it possible to buy a vehicle under a fictitious name. Several motor vehicle dealers are not aware of what money laundering entails. Although figures are not available at this stage, it is probable that a significant proportion of motor vehicle sales in the sub-region involve dirty money.

ARMED ROBBERY PROCEEDS

Armed robbery is both a crime of violence and a serious economic crime, and it is frequently lucrative. It occurs with disturbing regularity in South Africa, but

in general it afflicts most countries in Southern Africa. Motor vehicles and cash account for the bulk of commodities stolen in armed robberies. Stolen motor vehicles have long been regarded in sub-regional criminal circles as an important form of currency, to be used to pay for other goods or exchanged for cash. Most of the vehicles are stolen in South Africa. Interpol statistics indicate that in 2001, between 96% and 98.7% of all vehicles stolen in the sub-region were stolen in South Africa.¹²

Some of the stolen vehicles are sold to people involved in supplying the domestic market, where they are re-registered and sold. However, since the mid-1980s an increasing number of these vehicles have crossed South African borders into neighbouring states, often to be exchanged for other illegal goods, such as *dagga*, firearms, or diamonds.

As with motor vehicle robbery, most of the armed robberies of cash-in-transit in the sub-region are committed in South Africa by relatively well-trained groups who have access to weaponry, including automatic firearms. Between 1996 and 1998, armed robbers seized more than R150 million (US\$15 million) in 854 violent cash-in-transit attacks.¹³

Evidence from other parts of sub-Saharan Africa shows that robbers find real estate particularly attractive. In Kenya, they usually buy real estate in downmarket Nairobi or in small towns on the outskirts of the city, avoiding investing in upmarket property in Nairobi, which might make them conspicuous. Typically, property is bought in the name of a female companion. If the property is residential, the companion might reside there; if not, she might be asked to manage it. One of the most notorious armed robbers in the history of Kenya held himself out to be a real estate developer in a small township 150 kilometres from Nairobi, where he had developed a complex of high-rise properties.

In addition, or as an alternative, robbers will establish retail businesses that generate a lot of cash. Popular businesses include bars, butcheries and dry-cleaning establishments, but by far the most favoured business enterprise among robbers is passenger transport, popularly called the *matatu* business.

CURRENCY SPECULATION

The exploitation of fluctuations in the availability, and consequently, value, of foreign currency has become a major source of income in parts of the sub-region afflicted by shortages. Illicit currency speculation has been rampant in Zimbabwe almost continuously since 1997. Its incidence in that country illus-

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

Currency speculators range from street traders to bank officials to senior public officials, including government ministers. Part of the reason for the 'currency rush' is the vast disparity between the stipulated, lawful but artificial, rate at which the Zimbabwe dollar should trade and the real market rate. The example below highlights the potential of relatively simple transactions to generate large amounts of money. It encapsulates the operations of street currency traders in the city of Bulawayo, who claimed that the foreign currency in which they dealt was from local sources. Their experience is typical, and can be extrapolated to similarly placed traders in other centres.

Example 1: Informal currency trading¹⁴

Foreign currency street traders use their personal savings to buy the South African rand, the Botswana pula, the British pound sterling and the United States dollar — the most popular currencies — which they sell to individuals, banks and companies in need of the scarce commodity.

The dealers position themselves on street corners to conduct their (illegal) transactions, but say business has been hit by a crackdown by police on illegal money changing in the past few weeks.

Many now engage sentries at various points of the city to look out for the police.

The foreign currency dealers quickly disappear each time the sentries alert them of suspicious people who might be plainclothes policemen. Making handsome profits through the illegal trade, however, seems quite easy for most of them. They buy the foreign currency at a cheaper rate and sell it at exorbitant rates to foreign currency-starved banks and companies.

"Apart from employing sentries, most of us now dress like shoppers in town to evade the police," Angie (a street trader) said. "But it is back-firing because they now know the trick."

If caught, the illegal foreign currency peddlers like Angie are fined Z\$500 (US\$10) on the spot but could face much stiffer sentences under the Exchange Control Act.

Police in Bulawayo denied that any of their officers could be taking bribes, as alleged by some of the moneychangers, to allow the illegal transactions of foreign currency. "Any member of the public who has paid anything to the police is free to report," said a police spokesman. "It is a crime for a police officer to take a bribe. Those who have done so in the past have been dealt with according to the laws."

Thembi, another dealer along the bustling Fort Street, said some of her colleagues had become instant millionaires because of the flourishing foreign currency exchange market.

"When the rates went mad about three weeks ago, most of the women made millions," she said, barely concealing her smile.

"The business is so lucrative that we don't mind being harassed by the police," said Thembi, one of the energetic women who sprint up and down to every car with foreign number plates driving along Fort Street.

Earlier this week, the dealers were buying the rand for \$55 and selling it for as much as \$70. They bought the Botswana pula for \$85 and sold it for \$110. The British pound was being bought at \$780 and sold for \$1 000 and the American greenback changed hands at \$800 after being bought for just \$590.

"This is good business. Why should the government want to make us poor?" protested Thembi, who said she studied commerce at high school. "We are not stealing from anyone; we are merely taking advantage of their poor economic policies." She said most dealers were in business because of large amounts of hard cash that was being sent into the country by Zimbabweans working abroad in countries such as Botswana, the United Kingdom, South Africa and the United States.

"This week, for instance, was a good one for some of us because of public holidays in Botswana," Thembi noted.

Asked how the dealers arrived at a particular exchange rate each day, she explained: "We liaise with some *bureaux de change* that we sell the foreign currency to. We also have friends at the banks. We work hand in hand with the financial institutions of this country. *The government should understand this and make sound economic policies.*" (Emphasis added.)

The difficulties confronting law enforcement authorities intent on combating currency speculation are captured in the final few paragraphs of the inset. The dispersal of nationals in the diaspora ensures a steady flow of foreign currency to the streets, and the participation of informants involved in the financial services sector secures both a source of information on market trends (availability of currency being an important factor determining price) and a market. Currency traders appear to have access to more reliable, up-to-date information on the state of the economy than state authorities.¹⁵ The italicised words point a finger at government economic policies as the major catalyst of the currency speculation industry.

Cross-border traders swell the ranks of the informal currency traders. On account of greater access to foreign currency, as well as exposure to a variety of financial markets, these traders can do better than street currency dealers through currency interchanges. Until mid-2001, Zimbabwean currency could be traded in the Botswana financial market at a rate of Z\$10 to the pula (BWP). A trader could purchase 3 000 BWP for Z\$30 000 in Botswana. Once that currency was exported to Zimbabwe, however, it could be exchanged at a rate of Z\$60 units to the BWP, yielding Z\$180 000, six times its original nominal value. The trader could repeat the process by smuggling the Zimbabwean currency to Botswana, and using it to purchase a further amount of BWP. Z\$180 000 could be exchanged for BWP18 000. If taken back across the border, the Botswana currency could be sold for Z\$1 080 000. The process could be carried out in a day. Over a longer period and with repeated transactions, the returns would rival any successful business in the legitimate formal sector.¹⁶

Until the end of 2002, the flourishing street trading in foreign currency was replicated in the numerous bureaux *de change* dotted all over the commercial centres of the country. Bureaux operators were always aware of the competition from the streets. In spite of regulations requiring the display of applicable exchange rates and recording of transactions, the bureaux traded at flexible rates, which reflected market trends rather than the dictates of government, and rarely prepared transaction records.¹⁷ Government officials had interests in some bureaux *de change* in Harare, Bulawayo, Victoria Falls and Beitbridge. Unlike street traders, operators of bureaux were not desperate to procure local currency by off-loading foreign currency received onto the market immediately. They were in a better position to 'warehouse' it for speculative purposes, or for outward laundering.

Some bureaux *de change* facilitated the externalisation of foreign currency without smuggling it out. On the pretext of assisting nationals living outside the

country to transmit money home,¹⁸ Zimbabweans living abroad would be provided with external accounts into which to make deposits in hard currency. The Zimbabweans in turn provided accounts in Zimbabwe into which the local equivalent should be paid, at the parallel, bloated rate. No documents were exchanged, although reconciliation could later be effected. While this deprived the country of much-needed foreign currency, it enabled the expatriate Zimbabwean community to acquire funds for investment in high-return spheres, such as real estate¹⁹ and the stock market.

Regulatory authorities estimate that since 2000, at least 70% of foreign exchange transactions in Zimbabwe have taken place on the streets or in bureaux *de change*.²⁰ Surveys reveal that *virtually all banks have, at some point, violated exchange control law* by selling or buying foreign currency at an unofficial exchange rate. In 2001, three commercial banks were fined by the Reserve Bank for dealing outside the controlled exchange rates. It is also a matter of record that government corporations like the National Oil Company of Zimbabwe (NOCZIM) and Air Zimbabwe procure foreign currency at the unofficial, parallel exchange rate, thereby breaking the law.²¹ At the end of November 2002, bureaux *de change* in Zimbabwe were closed by government directive. In a statement to parliament, the Minister of Finance accused the bureaux of illicit dealings in foreign currency, which escalated inflationary tendencies.²² Simultaneous with the closure, government ordered that all foreign currency accruals should be remitted exclusively through commercial banks. Indications are that the flow of foreign currency to banks in December 2002 was insignificant. Economists and market players appear to agree that the initial impact of the directive was to drive speculative activity related to foreign currency underground.

Currency speculation also occurs in Malawi and Kenya, albeit on a smaller scale.

COMMERCIAL CRIME AND FRAUD

Apart from being a species of commercial crime, internal money laundering feeds on predicate commercial crimes of all varieties. The greater the incidence of the predicate crimes, the more likely it is that proceeds for laundering will be generated. For the purposes of this report, 'commercial crime' is defined widely to encompass corruption, and 'fraud' is defined to include currency forgery.

EVASION OF TAX AND DUTY

The evasion of tax and of customs duty is a common problem in the sub-region and beyond. In Uganda, for instance, tax evasion, with or without the

collusion of revenue officials, is common. The Uganda Revenue Authority (URA), which is responsible for collecting and managing taxes, was reported in 2002 to be riddled with mismanagement and corruption, compromising its capacity to combat tax evasion. Officials from its Large Taxpayers Department have been suspended and detained for conniving with crooked exporters to lodge fictitious claims, resulting in losses estimated at US\$20 billion (US\$14 million) between September 2000 and December 2001. A commission of enquiry, headed by Justice Sebutinde, was set up in July 2002 to probe the activities occurring within URA.²³

The commission exposed a long list of big and powerful tax evaders and bribe payers, including business tycoons. The owner of Genesis, Classics and a chain of companies was directed to pay a bill of US\$4 billion (about US\$2.5 million) for taxes evaded between the beginning of 2000 and April 2002.²⁴ URA successfully sued two companies for evading tax equivalent to US\$400 000.²⁵

Fiscal coffers in Malawi, Kenya and South Africa have also been subjected to plunder, resulting in the accumulation of substantial funds for laundering.

Kenya has long been afflicted by corruption in many forms, resulting in monumental losses of public resources. In the period 1990–95, the government lost a total of KSh127 billion (US\$1.693 billion) through corruption. In the 1996–97 financial year alone, the loss amounted to over KSh12 billion (US\$160 million) through fraudulent payments. These figures represent the loss of one in every six shillings allocated by the Kenyan parliament. Kenya has experienced one corruption scandal after another, but the biggest is probably the Goldenberg scandal, which hit the headlines in the 1990s, but has yet to be buried.

Example 2: The Goldenberg Scandal

What came to be known as the Goldenberg scandal or conspiracy comprised a series of financial scams, involving collusion between a young Nairobi entrepreneur, Kamlesh Pattni, and high-ranking state officials. The scams are believed to have cost the state an estimated US\$500 million. The actors in the scam included the country's vice-president, a governor of the Central Bank of Kenya, the Commissioner of Geology and Mines, a permanent secretary, the head of national security intelligence and Pattni (P), who appeared to be the mastermind behind the many schemes.

In 1990, the government accepted a proposal from P to export gold and diamond jewellery from Kenya for an initial five-year period. The entrepreneur also requested authority to set up a commercial bank to handle the trade transactions. The government agreed to pay P 35% of the value of his exports, as compensation. (At the time there was an export incentive in terms of which government subsidised emerging exporters to the extent of 20% of the value of exports.) It initially rejected the proposal to establish a bank. Kenya has no known deposits of diamonds which could be the subject of export trade.

In 1990 P incorporated Goldenberg International Limited, to handle the exports, with himself and JK, the head of national security intelligence. From 1991 P started sending invoices to the government for the subsidy as agreed. P's bankers, the First American Bank, produced records as evidence of export receipts. There were discrepancies between some of the receipts and the invoices, but with the intervention of the Governor of the Central Bank, P's claims were paid.

As time went on, P's claims were supported by evidence of payment in a cocktail of foreign currencies (dollars, sterling, deutsche marks and francs). Government paid them all. It was later to emerge that P was buying the assortment of foreign currencies in the local market and misrepresenting them as foreign exchange earnings from the sale of gold and diamonds. Occasionally this occurred with the collusion of his bankers. Moreover, Goldenberg's exports were over-priced. In June 1992, the government granted P's request to start his own commercial bank. He incorporated the Exchange Bank, with himself and JK as directors. He started using the bank in dealings with the Central Bank of Kenya.

When questions were raised about where the gold was being exported to, P named two Zurich-based consignees, Servino Securities and Solitaire. Enquiries revealed that these firms did not exist. P then claimed that exports, worth KSh13 billion (about U\$400 million), had been made to a company called World Duty Free based in Dubai. The company denied doing business with Goldenberg. Despite indications that money was being paid for non-existent exports, P's claims continued to be settled.

P also took advantage of the export-retention scheme introduced in 1992. The scheme allowed exporters to retain a portion of their foreign exchange earnings (50%) in special accounts. This would be available to them conveniently in subsequent transactions that needed foreign exchange.

Goldenberg claimed to be an exporter. The company received preferential treatment. Whereas other exporters of raw materials like coffee and tea were allowed to retain only 50% of their earnings, Goldenberg could retain its full 'earnings'. It is believed that Goldenberg amassed U\$75 million under the cover of this scheme. This money was put away in Exchange Bank, and laundered through various projects.

Laundering the proceeds of Goldenberg

During the early 1990s, P built an hotel in Nairobi, the Grand Regency, reported to be the best hotel in Kenya. The movables within the hotel are valued at KSh2 billion (US\$26.67 million) and the whole investment is worth about KSh10 billion. (US\$133.33 million) P himself likened the hotel to the Taj Mahal. Uhuru Highway Development Limited, another of P's companies, owns the hotel.

The Exchange Bank, through which a vast number of Goldenberg's transactions were processed, went into voluntary liquidation, just before the Central Bank of Kenya commenced proceedings to recover KSh13.5 billion obtained fraudulently from the CBK.²⁶ It has been revealed that these funds were multiplied enormously through investment in government treasury bills. In 1995, CBK was allowed to sell the hotel to recover the KSh13.5 billion. To date the hotel has not been sold.

There is evidence that P engaged in outward laundering of cash from Kenya, using the Exchange Bank. P is believed to have acted for both himself and others, some of whom were in positions of authority.

Some of the money externalised through Goldenberg has since been repatriated to Kenya in the form of 'foreign' investment in equities in new ventures. A strong body of opinion in Kenya holds the view that the primary motivation for the Goldenberg Conspiracy was to raise funds for the erstwhile ruling KANU party in the wake of a competitive political playing field opened up by multipartyism in 1990. It was therefore inevitable that some of the illicitly procured funds would be laundered within Kenya, and even part of what was externalised would find its way back.

For the last seven years, P has been facing a charge of theft of a part of Goldenberg money. He is jointly charged with the former Permanent Secretary. The case has not made much progress, and not many people believe that it will ever be finalised. However, the defeat of KANU in

the December 2002 elections revived hope that the case would be resolved.²⁷ The new government established a commission to enquire into the scam, and hearings started in mid-March 2003.

In South Africa, fraudulent claims for the refund of value-added tax (VAT) for fictitious exports have been known to be a source of funds for laundering since the early 1990s. Their proliferation coincided with the re-establishment of commercial linkages with the rest of sub-Saharan Africa. Typical schemes involve companies that may be engaged in legitimate export of goods or services. A company could use a real or shell company in a foreign jurisdiction to create the false impression that goods have been exported and payment received. The export price includes VAT (currently pegged at 14%), which is subsequently claimed back from the South Africa Revenue Service. Invoices, delivery notes and export documentation may even support the false claim. Within a relatively short space of time, large sums of money can be generated virtually from nothing. This kind of fraud (involving what SARS officials describe as 'ghost exports') is usually quite difficult to detect without infiltrating one of the companies involved or securing the co-operation of law enforcement in the foreign jurisdiction. It underscores the importance of vigilance and international co-operation in combating money laundering.

Incoming money laundering

There are many reasons why criminals consider it prudent to move the proceeds of economic crime across territorial borders. The desire to complicate the investigation trail is only one of them. Another factor might be the existence of better investment opportunities, or weaker law enforcement, in the destination jurisdiction. Competition for investment and the demands for foreign currency render many countries in the sub-region vulnerable to the infusion of tainted funds from abroad.

In Malawi, bureaux *de change* conduct casual foreign currency cash transactions without any due diligence enquiries. The same applies in Zambia and Tanzania.²⁸ In 2001, the Reserve Bank of Zimbabwe directed banks to accept foreign currency deposits without querying their sources. The importation of foreign currency ostensibly for investment tends to be encouraged by open-door policies promoted by state investment agencies. In some cases, complementary concessions are put in place to reinforce these policies. In a number of countries, a prospective investor with foreign funds above a certain thresh-

old can qualify for permanent residence.²⁹ Law enforcement agencies occasionally express exasperation with such an attitude. A Tanzanian police delegation to a sub-regional conference pointed out that the police encounter much difficulty in distinguishing between genuine and bogus investors. In a familiar lament, the delegation observed:³⁰

Being a poor country which welcomes investments from all over the world, sometimes it is felt that if you start enquiries against the so-called investors you risk the possibility of chasing them away with their much wanted investments. As a result we are always in [a] dilemma not knowing the right course of action to take.

The sub-region is littered with examples of investments by shady characters. The nature and duration of such investments seems to depend on factors like the links between the launderer and the country, his or her perceptions about its political and economic stability, his or her estimation of the risk of detection, and the potential returns. Hence, where the launderer enjoys citizenship of both the country where the predicate crime was committed and the destination of the proceeds, and that destination has a stable economic environment, funds are likely to be transferred between the two countries.

Example 3: The Widdowson funds

Although Widdowson was born in England, he had dual English and South African citizenship. During the period 1991 to 1997, he spent time working for Regent Security Services in England. He returned to South Africa in 1997, but continued to render services to the company on an intermittent basis.

The company discovered that between May 1995 and April 1999, £667 480.09 (US\$1 001 220) was stolen from its bank account and transferred to Widdowson's three bank accounts in England. There were subsequent transfers to a bank account in South Africa. Widdowson then left England and returned to South Africa. At no stage did he try to earn other income from employment in South Africa. He did, however, make various investments in South Africa, in both movable and immovable property.

Following the discovery of the theft, a successful application was made for the seizure and forfeiture of Widdowson's assets.³¹

INTERNATIONAL TRADE

It was pointed out earlier that the more lucrative part of the drug industry generally, including the *dagga* trade, lies outside the sub-region. Drug smuggling from Southern Africa is a multi-million dollar business, exposed from time to time through high-profile police successes in countries such as the United Kingdom. In one operation in July 2002, the Lancashire Constabulary discovered a consignment of three tonnes of *dagga* with an estimated street value of £6 million (US\$9 million) at a warehouse in Chorley. The *dagga* was vacuum-packed in 1kg blocks and concealed in wooden crates. It appeared to have been imported from South Africa.

STOLEN MOTOR VEHICLES, CHEQUES AND ILLICIT DIAMONDS

There is a thriving trade between Namibia and South Africa, involving the movement of stolen motor vehicles from South Africa to Namibia, and the payment of the suppliers with funds stolen from Namibia. The vehicles are sold in Namibia and payment is made to the criminals in South Africa through transfers of funds from bank accounts of Namibian third parties. The government of Namibia has been a major victim. A common *modus operandi* involves the theft of specimen signatures of authorised signatories to government accounts and the forging of letters instructing a banking institution to effect transfer of funds to an account in South Africa. The funds are thereafter withdrawn without trace, partly because the operators of the account in South Africa use forged identity documents to open and operate the account.

Some fraudulent transactions may go undetected even by the government authorities. In terms of such schemes, the criminals in Namibia receive the motor vehicles without paying a cent, while their South African counterparts receive payment for the stolen motor vehicles.

Motor vehicles stolen in Botswana, South Africa and Namibia itself have been smuggled to Angola through the Oshikango border post. Particular types include sports cars and luxury 4x4 station wagons. In roughly equal proportion, the stolen motor vehicles are exchanged for diamonds or paid for in hard currency, usually US dollars. The purchase price is repatriated to the source country. Angolans appear to be generally more liquid in US dollars than most other sub-regional residents. In Angola, the long-enduring civil war, with its associated economic and financial instability, has precipitated a calamitous lack of confidence in the Angolan monetary and banking system. Individuals and corporate entities generally do not convert their funds into the local cur-

rency. Neither do they entrust their liquid assets to the banking system. Only large companies and the government make use of the banking system for their transactions. Medium-sized and small companies open bank accounts only to comply with statutory provisions. Most maintain their monetary wealth in hard cash, with large volumes of cash circulating in the economy completely outside the banking system. Business transactions, such as US States dollars. It is probably unfortunate that Angola is outside the ESSAMLG.

SECOND-HAND LUXURY MOTOR VEHICLES FROM JAPAN

For many years, motor vehicles reportedly stolen from Japan have been traced to East and Southern Africa. Since September 2000, the Motor Vehicle Theft Unit of the Namibian Police has been aware that some second-hand luxury 4x4 motor vehicles stolen in Japan have been imported into Namibia for sale to affluent buyers.

Outgoing money laundering

The existence of ethnic, cultural or commercial linkages between the source of the proceeds of crime and a given country may determine whether proceeds of armed robbery are transferred outside or laundered locally. If the criminals are of foreign origin, it is likely that the proceeds will be externalised, at least initially. In December 2001, an armed robbery occurred at Johannesburg International Airport and a large amount of money was stolen. It transpired that most of the criminals involved were Zimbabwean nationals. Within a month of the crime, some of the proceeds were discovered in Zimbabwe.

The transfer of money from the jurisdiction in which the predicate crime is committed is the other side of the coin of incoming money laundering. Outgoing laundering is not always motivated by an intention to invest in the destination jurisdiction. It can involve a number of transient jurisdictions, if only to obscure the laundering trail. The initial decision the launderer will make is whether or not to involve the financial services network.

The most basic mode of transferring the proceeds of crime, circumventing the financial services network, is to carry it out of the country. Movement of cash in bulk is common within and across the sub-region. Reports from South Africa, Kenya and Tanzania provide ample illustrations of the movement of assets in the form of bulk cash within and across borders.³² They also demonstrate the use of convertible assets as a mode of international laundering of funds.

A more insidious form of outgoing laundering, which partly sidesteps the banking system, involves a combination of tax fraud, currency speculation and resort to alternative remittance systems. It has been detected in the sub-region, although its scale has not been established. It is used to facilitate the externalisation of capital, for instance from the disposal of immovable property. Known cases involve South Africa and Zimbabwe. Its most common manifestation is the conduct of major real estate transactions in foreign currency. Transactions usually involve speculators on both sides, and often both the seller and buyer are nationals. A house with an asking price of Z\$30 million in April 2003, for instance, could be acquired for a South African equivalent price (at the non-official/parallel market rate of Z\$150 to the rand) of just R200 000. If the purchaser can afford to pay in US dollars, the price converts (at the rate of Z\$1500 to the US\$) to US\$20 000.³³ The transaction does not entail any transnational currency remission, and for that reason is attractive and relatively safe for the parties involved.

A survey carried out in real estate marketing circles in Harare in June 2002 revealed a definite preference by clients offering properties for sale to be paid in foreign currency. In all such cases, payment offshore was also preferred. Only one country in the sub-region, South Africa, featured among the likely destinations of funds thus externalised. Others were the United States, the United Kingdom and Canada. It appeared that in the destination countries, the foreign currency payments were made through the banking system. In Kenya, it was reported in July 2002 that a presidential aide had acquired immovable property valued at US\$6 million in London. In Tanzania the ubiquitous bureaux *de change* have been abused to externalise currency.

It is not always practical or prudent to completely outflank the banking system in an outgoing laundering scheme. Some funds are inevitably transferred through intermediaries in the financial services. A proportion of financial services intermediaries may facilitate transfer of illicit funds unwittingly, but some will do so knowingly, even as principal beneficiaries. Cases where institutions were found to bear corporate responsibility for outgoing laundering include the BCCI case, which exploded in 1991, and the 1997 European Union Bank of Antigua case. Between these cases, and within the sub-region, were cases involving the Meridian Biao Bank, whose collapse in the early 1990s impacted on both Zambia and Tanzania, and the United Merchant Bank, which had a short but disastrous existence.

Example 4: The United Merchant Bank saga

The United Merchant Bank (the bank) was incorporated in May 1995. In less than three years its license was revoked after it became known that it had a low capital ratio and inadequate liquidity to meet the claims of depositors and other liabilities. Police investigations subsequently revealed that many illegal activities had taken place.

1. Fraud: Cold Storage Commission bills

Following its commercialisation (a prelude to privatisation), the Cold Storage Commission (the commission) contracted the bank to raise funds on its behalf on the local money market. This was to be done through the floatation of commission bills. The commission required Z\$413 million (US\$7.5 million). Government issued guarantees to the value of Z\$855.16 million (US\$15.55 million) as security during the floatation of the bills. The bank raised the amount required by the commission and remitted it. Thereafter the bank sold further bills worth Z\$1.263 billion (US\$22.96 million) on the local money market, and converted the entire amount to its own use. The founder and chief executive of the bank, Roger Boka, was found to have been at the centre of the illicit activities, with the assistance of five others. Boka died on 21 February 1999, before he could stand trial. Up to the time of writing it was not clear how much of the converted money had been recovered.

2. Conversion of depositors' funds

Various persons and institutions deposited funds with the bank. Upon cancellation of its licence, the bank owed just over Z\$1.558 billion (US\$28.32 million) to depositors, which it was not in a position to repay. Some bank documents and computers could not be found. Money laundering charges were laid against Boka and his accomplices in terms of the Serious Offences (Confiscation of Proceeds) Act, but he died before standing trial. The investigation was transferred from the police to a special investigator appointed by the Minister of Justice, in terms of the Prevention of Corruption Act. The investigation does not seem to have moved much since. The then Minister of Justice was a known friend of Roger Boka and an acknowledged debtor of the United Merchant Bank.

3. Externalisation of funds—money laundering

In the short life of the bank, Roger Boka opened and operated several personal accounts at foreign banks in Botswana, South Africa, the United Kingdom, the United States of America, Germany, Luxembourg and France, as follows:

Botswana: First National Bank;

South Africa: Nedbank, Amalgamated Banks of South Africa (ABSA), First National Bank;

United Kingdom: Midland Bank plc, National Westminster Bank plc;

United States: Marine Midland Bank (New York), Merrill Lynch Bank (New York);

Germany: West Deutsche Landesbank;

Luxembourg: Hypo Bank;

France: Banque Société Général.

Acting personally and sometimes through his lawyer, GS, Boka externalised at least US\$21 million. GS, who was the senior partner in a law firm in Harare, was a director on the board of the bank and a signatory to the bank's account at the Zimbabwe Banking Corporation. The firm acted as corporate secretaries for the bank and as legal advisors to both the bank and the Boka Group of Companies. The main business specialities of the group were tobacco and gold marketing. GS disappeared from Zimbabwe shortly after the death of Roger Boka, by which time he had already been charged with violating the Prevention of Corruption Act and the Companies Act. It was later discovered that GS also operated a foreign bank account in England. None of the foreign funds appear to have been repatriated.

The Zambian Drug Enforcement Commission's investigations have revealed the use by drug traffickers of bank accounts opened with fictitious identity documents to facilitate outgoing laundering. The case of *The People v. De Souza and others* (unreported) (CCR. SSP/8/2001) revolves around the opening of several bank accounts using a false name, between 1 January 1999 and 28 February 2001. The prosecution alleged that, acting in concert, the accused opened several bank accounts in Kitwe and Ndola on the Copperbelt, using fraudulently obtained documentation. Using these accounts, the accused externalised a total of US\$1 158 533.20 to the USA and Taiwan.

In the first week of February, 2003, the First National Building Society in Harare, Zimbabwe, was closed down after an inspection by the Reserve Bank revealed a discrepancy of nearly Z\$3 billion (US\$54.55 million) between funds held and what the building society owed creditors and depositors. There is evidence that one of the officials arrested invested in real estate in Cape Town, South Africa. At the time of writing, a curator was investigating the extent of prejudice to creditors and tracing the destination of the funds.³⁴

Southern Africa as a destination of laundered funds

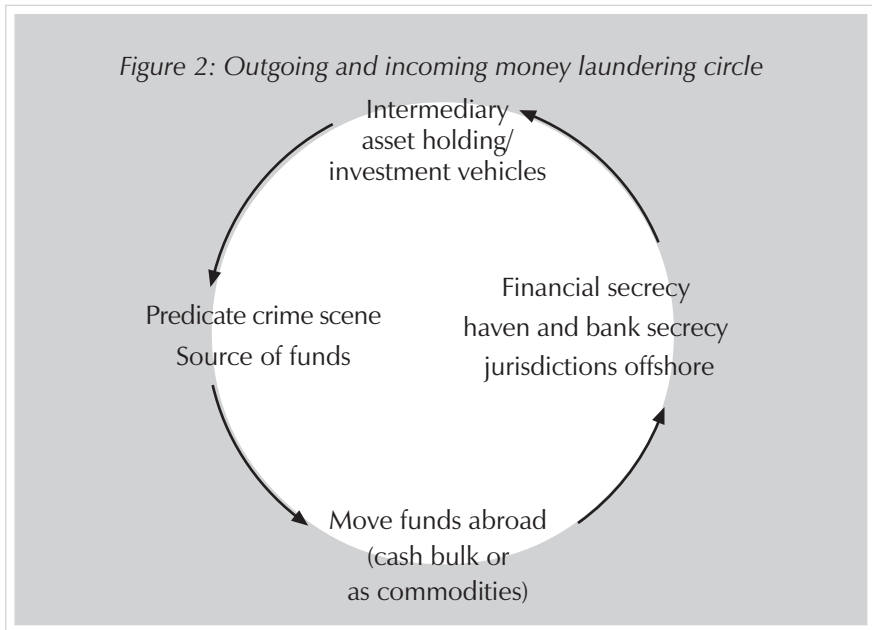
Insofar as the discussion above shows that laundered funds have tended to flow in certain directions, it raises two issues: firstly, what makes a country attractive to such funds, and secondly, does the sub-region attract laundered funds?

In a study prepared by Blum, Levi, Naylor and Williams, offshore financial systems were identified as being amenable to manipulation by money launderers.³⁵ Various components were found to be both characteristic and predisposing. The authors highlighted many factors, nine of which seem to be of particular importance. They are not necessarily listed in order of precedence:

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

- facilitation by intermediaries in establishing corporate entities, opening accounts, dishonestly or without any kind of due diligence;
- permissibility of shell companies.

To these factors can be added a tenth, namely the existence of correspondent banking relationships linking banks in the source or intermediate countries with those in destination countries. The outgoing laundering trends can be graphically presented in the form of a circle, as shown in Figure 1 below.



No single member state of the ESAAMLG possesses all of the characteristics outlined. However, the sub-region includes countries in which some of these characteristics are prominent.

Viable markets in which to trade in securities are well established across the sub-region, particularly in Kenya, Zimbabwe, South Africa, Botswana, and Mauritius. In these countries, the law permits investors to deal in bearer securities and other negotiable instruments, including derivatives.³⁶ International trends show that these instruments can be abused in the setting up of laundering schemes. The involvement of shrewd intermediaries only increases the scope for such abuse. Lawyers have been used in outgoing laundering, as the Boka case shows.

There are indications that stockbrokers may be used as a conduit for money laundering. Shares can be issued in the names of nominees, to disguise beneficiaries. This disguises launderers engaged in criminal activities.³⁷

Within the sub-region, Mauritius and the Seychelles, which have been classified by some experts as financial 'tax' havens, are regarded as particularly vulnerable. Mauritius' potential weakness stems from its offshore financial regime, which permits corporate institutions with no physical productive presence within Mauritius to open and operate bank accounts. From the standpoint of the offshore corporate, the rationale for establishing offshore is to take advantage of the lower rate of taxation in comparison to neighbouring jurisdictions. The primary incentive for the offshore jurisdiction is the revenue to be extracted through taxation and the potential to increase employment levels in the financial services sector. As a strategy to offset weaknesses in other areas of economic productivity, such as manufacturing and mining, offshore centres are likely to proliferate in the sub-region in the short to medium term. In 2001, Botswana took measures to diversify its tertiary services sector by establishing an international financial services companies (IFSCs) regime. Income tax legislation facilitates the establishment of an International Financial Services Centre to facilitate and regulate an offshore investment sector. The sector will benefit from a taxation rate of 15%, which is 10% lower than the prevailing average corporate rate.

An analysis of the offshore financial system in the sub-region indicates that one of its attractions is the relatively high level of confidentiality that it offers concerning the identity of shareholders of corporate entities operating in it. Although directors' and shareholders' names are filed with the government registry in Mauritius, the register is not accessible to the public. Mauritius has repeatedly expressed its commitment to maintain its status as a premier offshore financial centre, and its acknowledgment of the vulnerability to tainted funds that this entails.

Conclusion

To conclude this chapter, one should underline the broad consensus that laundering is occurring in the sub-region on a significant scale. The statistics often cited are based on the results of the Walker model. According to the model, in 1998 a total of US\$22 billion was laundered through the financial systems of Southern Africa. Of this US\$15 billion was generated within the sub-region. It was estimated that US\$7 billion was infused from outside the sub-region, with East Asia accounting for US\$1 billion, North America for US\$5 billion and Europe for US\$1 billion. A recent estimate was that in the last six years money laundering

Table 1 gives estimates of the magnitude of money laundering activity in the southern Africa sub-region. The East African contingent of Kenya and Uganda is included. The total amount laundered internally and brought into the ESAAMLG region during 1999 was equal to just over US\$18,07 billion. It is conceivable that some of the internally laundered proceeds were subsequently externalised, and that some of the proceeds introduced into the region were taken out again within the year.

Table 1: Amounts in US\$ millions								
Country	Inter- nal	Out- going	Total Generat- ed	In- coming	Total Launder- ed	% Inter- nal	% Out- going	% In- coming
Botswana	123.4	117.6	241.0	1722	1845.0	51.2	48.8	93.3
Kenya	734.8	140.0	874.8	77	811.8	84.0	16.0	9.5
Lesotho	0.9	0.1	1.0	458	458.7	86.4	13.6	99.8
Malawi	96.4	47.0	143.4	62	158.1	67.2	32.8	39.1
Mauritius	95.2	61.4	156.6	1129	1224.5	60.8	39.2	92.2
Mozam- bique	87.6	34.1	121.7	17	104.8	72.0	28.0	16.4
Namibia	114.6	84.3	198.9	489	603.5	57.6	42.4	81.0
Seychelles	68.1	4.8	73.0	1963	2031.5	93.4	6.6	96.6
South Africa	6143.7	4095.8	10239.5	566	6709.9	60.0	40.0	8.4
Swaziland	20.3	3.2	23.5	414	434.8	86.4	13.6	95.3
Tanzania	693.5	124.3	817.8	63	756.7	84.8	15.2	8.3
Uganda	611.4	130.6	742.0	54	665.9	82.4	17.6	8.2
Zambia	1098.0	427.0	1525.0	177	1274.6	72.0	28.0	13.9
Zimbabwe	726.6	354.7	1081.3	272	999.1	67.2	32.8	27.3
(Source: J Walker, Global money laundering estimates for 1999.)								

Notes

- 1 The Minister's remarks were made in a keynote speech at an ISS seminar on money laundering in East and Southern Africa, held at the Leriba Lodge, Centurion, South Africa, on 21 and 22 November 2002.
- 2 The two most prominent international instruments are the 1988 Vienna Convention (on illicit drugs and psychotropic substances) and the 2000 Palermo Convention (against transnational organised crime). In the wake of the terrorist atrocities of 11 September 2001, the United Nations Security Council followed up with a resolution targeting the funding of terrorist activities, numbered 1373/2001. In the sub-region, the ESAAMLG exerts a great deal of peer pressure towards formal money laundering control.
- 3 See the Financial Intelligence Centre Act, 38 of 2001
- 4 P Smit, *Clean money, suspect source: Turning organised crime against itself*, ISS Monograph Series, 2001, 51, p 18.
- 5 For a detailed explanation of the methodology see J Walker, Money laundering: Quantifying international patterns, *Australian Social Monitor* 2(6), 2000, pp 139-147.
- 6 T Leggett, Perspectives on supply: The drug trade in Johannesburg, Durban and Cape Town, in T Leggett (ed), *Drugs and crime in South Africa: A study in three cities*, ISS Monograph Series, 2002, 69.
- 7 Over a period of two years.
- 8 See L de Koker, *Money laundering trends in South Africa*, CenSec, 2002, p 19. Footnotes have been omitted from this quotation.
- 9 This was the basis of the allegation in the Zambian High Court case, *The People v. De Souza and others*, CCR SSP/8/01 (unreported at the time of writing).
- 10 J Banda, *Money laundering in Malawi*, ISS Monograph Series, forthcoming.
- 11 Ibid.
- 12 Interpol sub-regional report to the SARPCCO Annual General meeting, Mauritius, August 2001.
- 13 *African Security Review*, 8(6), 1999.
- 14 Adapted from *The Financial Gazette*, 18 July 2002.
- 15 Zimbabwe's Minister of Finance is quoted as having described Fort Street in Bulawayo as the 'World Bank' of the country.
- 16 This information emerged during an interview with an official attached to the Tender Board in Gaborone, Botswana. It was subsequently confirmed by sources within the banking sector in Zimbabwe.

- 17 B Fundira, *Money laundering trends in Zimbabwe*, unpublished paper. This was subsequently confirmed by the author's personal observation.
- 18 *Financial Gazette*, 11-17 April 2002.
- 19 The rapid upward movement in the price of residential premises has in large part been attributed to citizens outside the country who illegally change their money on the parallel market in order to boost returns. It is common for such premises to appreciate by as much as ten times in a period of a few years. A four-roomed garden flat bought for Z\$750 000 in 1998 was sold in 2002 for Z\$7 million!
- 20 A source in the currency exchange market puts the share of bureaux *de change* at 20%.
- 21 Fundira, *op cit*.
- 22 Budget statement presented to Parliament of Zimbabwe by Minister Herbert Murerwa, Harare, 14 November 2002.
- 23 *The Sunday Monitor*, 21 July 2002, quoting Maureen Owor, lead counsel to the commission.
- 24 The directive was set out in a letter from URA to Genesis, dated 10 July 2002.
- 25 *Sunday Monitor*, 21 July 2002.
- 26 The money had been obtained through a false declaration to the CBK by the Exchange Bank that Goldenberg had received US\$210 million from export activities, and deposited it into one of the CBK's foreign accounts. In return, Goldenberg received KSh13.5 billion.
- 27 Based on a report prepared by G Kegoro, *Money laundering in Kenya*, in this volume.
- 28 This finding has been personally verified by the author in Dar es Salaam and Lusaka on three occasions involving four bureaux.
- 29 The *Comprehensive investment guide to Zimbabwe* promises that an investor who invests not less than US\$1 million in a project approved by the Zimbabwe Investment Centre will qualify for permanent residence on application. An investor who invests at least US\$300 000 qualifies for a residence permit of three years, as do professional or technical persons investing US\$100 000 in their respective field, or in a joint venture with a permanent resident. In South Africa, an applicant for permanent residence who can invest at least SAR1.5 million (approximately US\$150 000 at the 2002 exchange rate), which includes a deposit in a bank or a residential property maintained for three years, will be regarded favourably.

- 30 Tanzanian delegation, 'Current situation and counter measures against money laundering: Tanzania's experience', paper presented at the First Southern Africa Regional Conference on Money Laundering, Johannesburg, 26-28 February 2002.
- 31 Based on a presentation by the investigating officer, given at a law enforcement conference on money laundering in southern Africa, Morningside, South Africa, 22 February 2002.
- 32 The South Africa study by the Centre for the Study of Economic Crime noted:

Evidence has been found that substantial amounts are transferred physically to and from destinations in South Africa, whether by the criminals themselves or by third parties who act as couriers. Cash can be transferred physically in many ways, but during the workshop specific examples were cited where cash was strapped to bodies of passengers in motor vehicles and aircraft or hidden in their luggage. Similar methods are used to convey cash across the borders of South Africa. While it is legitimate to convey cash physically within South African borders, substantial cash amounts can only be transferred across South Africa's borders legally if the exchange control requirements have been met. (A footnote reference has been removed from the quotation.)

See L de Koker, *op cit*, p 18.

- 33 This rate had fallen by the time of writing to ZAR1 = Z\$300, and US\$1 = Z\$4 000.
- 34 *Financial Gazette*, 13 February 2003.
- 35 JA Blum, M Levi, RT Naylor and P Williams, Financial havens, banking secrecy and money laundering: A study commissioned by the United Nations Office for Drug Control and Crime Prevention, 1998, accessible at <https://www.imolin.org/finhaeng.htm>
- 36 South Africa, Kenya, Mauritius and Zimbabwe.
- 37 *Motsi v. The Attorney General & others* 1995 ZLR 278 (H). In this case, nominee companies were used to conceal the proceeds of criminal activities that were perpetrated by a company chief executive and his accomplices.
- 38 *Herald*, 6 July 2002, quoting the government-aligned National Economic Consultative Forum.