

abuse of power.³⁷ The Office of the Prosecutor is yet to sue 281 more squanderers of public resources over different embezzlement cases involving 833 million Rwandan francs (Rwf).³⁸

- f. Mismanagement of Public Funds:** Mismanagement of public funds has taken place mostly in the public works and energy sectors. The Parliamentary Public Accounts Committee (PAC) has summoned the supervising public authorities repeatedly to explain the reasons behind the poor management. The root cause remains the lack of concrete governmental strategies and measures to fight graft and to arrest, try and punish the culprits.

1.7 Why Rwanda Needs Strong Anti-Money Laundering Laws

1.7.1 Operational Reasons

Given Rwanda's fragile economy and its dependence on foreign aid, it needs strong AML/CFT laws and regulations to enhance the integrity of its financial sector in order to be regarded internationally as a reliable and predictable country with which to do business.³⁹

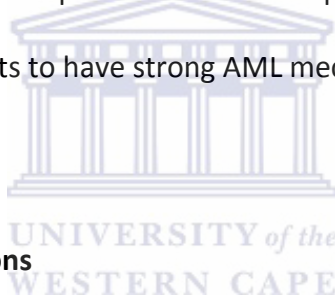
37 Twizeyimana F '765 senior officials convicted over embezzlement in the last 7 years' *Igihe Newspaper* 25 October 2014, available at <http://www.igihe.com/amakuru/u-rwanda/article/abayobozi-765-bahamijwe-kurigisa> (accessed on 27 October 2014).

38 Musoni E 'Gov't to drag nearly 300 to Court over Embezzlement' *The New Times* 16 September 2014 6.

39 International Monetary Fund *Money Laundering and Financing of Terrorism: a multi-donor Trust Fund* (2009) 2, available at <http://www.imf.org/external/np/otm/2009/anti-money.pdf> (accessed on 16 June 2014).

1.7.2 Reputational Reasons

A clean record and financial reputation are requisite ingredients for a country to grow and prosper. A country that does not have impeccable and honest financial institutions, equipped with anti-money laundering and anti-terrorist financing measures, is likely to fall prey to these crimes, thus making it a risky destination for foreign investments.⁴⁰ In other words, whenever a country is suspected of acting contrary to international standards, its reputation is affected adversely, causing an overall decline in trust and openness. For instance, refusal to comply may lead to loss of profitable business as well as financial problems through withdrawal of funds and termination of development partnerships. Since Rwanda depends hugely on foreign aid and investments, it is in its best interests to have strong AML mechanisms in place and to be serious about implementing them.



1.7.3 Regional Integration Reasons

Among the benefits attached to being a member of the East African Community (EAC)⁴¹ is the right of citizens of this community of states to move and to settle freely in each of the member states.⁴² Therefore, strong AML laws are required to strengthen the state's capacity to respond to any ML risk that may be associated with the free movement of people and capital. When ordinary people cross borders, so, too, do criminals who explore opportunities to commit crimes.

40 International Federation of Accountants *Anti-Money Laundering 2nd Ed* (2004) 13, available at <https://www.ifac.org/sites/default/files/publications/files/anti-money-laundering-2n.pdf> (accessed on 13 October 2014).

41 The Member states of the East African Community are Rwanda, Burundi, Uganda Kenya and Tanzania.

42 Article 1-6 of the East African Community Free Movement of Person Regulations, adopted in Moshi on 20 June 2009.

It is worth mentioning that the domestic laws of the EAC member states have not yet been harmonised. Apart from the cooperation framework signed amongst them, very little has been done so far by member states to enact congruent laws to curb cross-border criminality.

1.7.4 Regional Security Reasons

The African great lakes region has been characterised by conflicts of all sorts. The most affected is the Democratic Republic of Congo whose natural resources are not only the cause of the ongoing war, but also an impediment to its ending.⁴³ It is believed that a group of profiteering states would never wish to see the end of this war. Rwanda should therefore have strong AML laws to curb the cross-border movement of minerals, the proceeds from the sales of which may be used to fuel interstate conflict.



1.8 Structure of the Study

The remainder of this research paper is organised as follows: Chapter two deals with the definition of ML and the international legal instruments to combat it. Chapter three focuses on Rwanda's attempts to fight ML and the impediments encountered in doing so. Chapter Four concludes the paper with a set of recommendations.

43 Montague D and Berriga F 'The Business of War in the Democratic Republic of Congo: Who Benefits?' (2001) *World Policy Institute* 3, available at <http://www.worldpolicy.org/projects/arms/news/dollarsandsense.html> (accessed on 5 May 2014).

CHAPTER TWO

UNDERSTANDING MONEY LAUNDERING: CONCEPT AND LEGAL FRAMEWORKS

2.1 Introduction

Money laundering is a transnational concern that necessitates joint measures for its prevention detection and its eradication.⁴⁴ Different initiatives aimed at combating money Laundering have been launched at both regional and international level. These include model legal frameworks and the adoption of AML standards.

Model laws have been drafted by international specialised agencies and were proposed to states for their consideration. The aim of these propositions is to implement at the domestic level effective, uniform, preventative and retaliatory measures in respect of combating ML.⁴⁵ In addition to the existing international legal instruments, international organisations such as the United Nations (UN), the Group of Seven (the G7), the International Monetary Fund (IMF) and the World Bank (WB) have prevailed on countries to enact measures that give effect to the Financial Action Task Force's anti-money laundering recommendations, the implementation of which at national level is measured through regular peer reviews.⁴⁶

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- 44 Brett F *The Art and Science of Money Laundering: Inside the commerce of narcotic traffickers* (1998) 177.
45 Alexander K 'The international anti-money laundering regime: the role of The Financial Action Task Force' (2001) 4 3 *Journal of Money Laundering Control* 217.
46 Santha V 'Factors affecting money laundering: lesson for developing countries' (2007) 10 3 *Journal of Money Laundering Control* 361.

Despite Rwanda's partial enactment of the international AML standards and the criminalisation of ML, its AML measures are not comprehensive enough to eliminate fully the risks of ML as compared to other compliant states.

This Chapter looks into how money laundering is conceived under Rwandan law.

2.2 Understanding Money Laundering

Money Laundering is the process of cleansing the money originating from crime and making it appear lawful.⁴⁷ It enables the transformation of illegally obtained money into legitimate funds. In other words, ML aims to make dirty money look lawful⁴⁸ so that it can be used without fear of its being linked to its criminal source, which would render it confiscatable by the law enforcement authorities.⁴⁹

Rwanda, like many other countries, has opted to define ML in a way consistent with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Rwanda undertook an ostensive definition of ML where the following are described as acts of ML: the acquisition, possession or use of property, knowing that, at the time of receipt, such property was derived from an offence.⁵⁰

47 United States General Accounting Office *Report to Congressional Requesters on Combating Money Laundering: Opportunities Exist to Improve the National Strategy* (2003) 7, available at <http://www.gao.gov/assets/240/239956.pdf> (accessed on 10 June 2014).

48 Reuter P and Edwin T *Chasing Dirty Money: The Fight against Money Laundering* (2004) 1.

49 Naylor R T 'Predators, Parasites or Free Market Pioneers: Reflections on the Nature and Analysis of Profit Driven Crime' in Margaret B (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption* (2005) 36.

50 Article 3(c) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 20 December 1988.

Its definition is also broadened to cover the conversion, the transfer and the concealment of property originating from crime, to ensure that any gain or use of gains linked to crime is criminalised. This would obviate the potential risk of proceeds of crime being used to finance other crimes, such as terrorism, for example.⁵¹

Technically, money laundering consists of three phases, namely: placement, layering and integration.⁵²

- a. **Placement or placing**⁵³ is the depositing of dirty funds in financial institutions or the conversion of cash into negotiable, redeemable or saleable instruments. Being a first step towards legalisation, this step is the most difficult of all because financial institutions must verify the origin of the money and have a duty to report to the competent authority when the amount of money deposited gives rise to suspicion.⁵⁴ However, launderers opt to channel their cash into an operating business or to convert it into negotiable instruments, such as cashier's cheques, money orders, or traveller's cheques through a third person.⁵⁵
- b. **Layering** consists in transferring the ill-gotten money through a series of accounts in an attempt to hide the funds' true origins.⁵⁶ This could involve transferring the money through banks in different countries before it is integrated into the normal economy.

51 European Union Committee of the House of Lords *Money Laundering and the Financing of Terrorism Report 2009* (2010) 3.

52 Reuter P and Edwin T 'Chasing Dirty Money: The Fight against Money Laundering' (2004) 25.

53 Georgeta M 'Judicial Aspects on Money Laundering' (2007) *Agora international Journal for Juridical Science* Vol 2 154, available at www.juridicaljournal.univagora.ro/download/pdf/61.pdf (accessed on 1 June 2014).

54 Hinterseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) 15.

55 Jonathan T *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (2011) 8.

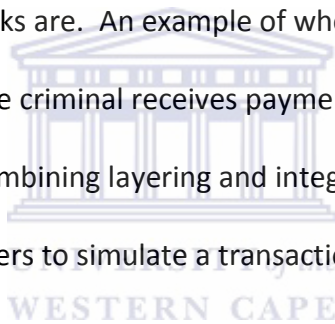
56 Jonathan T (2011) 9.

This phase may involve the buying of goods which are then resold on the open market.

The idea here is to separate the funds as far as possible from the crime, thus making it difficult to trace the money back to its source.⁵⁷

- c. **Integration** refers to the stage at which the layered money is legitimately integrated into the lawful financial system to make it appear as having a legal provenance. At this stage it is difficult to say whether the money is clean or dirty.

Given the new developments in technology, criminals do not always need to follow this three-step process to launder the proceeds of crime.⁵⁸ They might even combine the first two phases depending on how vigilant the banks are. An example of where placement and layering take place at the same time is where the criminal receives payments for business deals that never took place. Another example of combining layering and integration is the under-the-table cash transaction which enables launderers to simulate a transaction that, in fact, does not take place.⁵⁹



2.3 International Instruments Meant to Fight Money Laundering

There is no dedicated anti-money laundering convention. However, the notion is embedded in a number of international instruments aimed at combating money laundering and the financing of terrorism. They are the following:

57 Hasmet S 'Money Laundering and Abuse of the Financial System' (2013) *International Journal of Business and Management Studies* 293.
58 Stessens G *Money Laundering: A New International Law Enforcement Model* (2003) 68; Reuter P and Edwin T (2004) 25.
59 Donato M, Elod T and Brigitte U *Black Finance: the Economy of Money Laundering* (2007) 104.

2.3.1 The United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

This convention criminalises the illegal trade in narcotics, but does so in a way that mirrors the essential steps of the money laundering process. In its preamble, it calls on States Parties to eliminate criminal incentives by depriving persons engaged in illicit traffic of the proceeds of their criminal activities.

Over time, its ambit has been extended to cover other crimes which trigger money laundering, the so-called predicate offences. Rwanda ratified it in 2002.

2.3.2 The United Nation Convention against Corruption (2003)

This convention, which Rwanda ratified in 2006, considers the crime of ML as part of corruption offences due to their close connection.⁶⁰ In addition, its Article 14 mentions specifically the measures that States Parties to the Convention should adopt to combat money laundering, including:

- instituting a comprehensive domestic regulatory and supervisory regime for financial institutions;⁶¹
- implementing measures for cross border monitoring of cash and other negotiable instruments;⁶²
- managing electronic fund transfers, including remittances; and

60 Article 23 of UNCAC.

61 Article 14(1)(a) of UNCAC.

62 Article 14(1)(b) of UNCAC.

- applying various supranational anti-money laundering guidelines to combat money laundering.⁶³

2.3.3 The United Nation Convention against Transnational Organised Crime

The United Nations Convention against Transnational Organised Crimes (the Palermo Convention) which Rwanda ratified in 2003 also provides for the need to establish anti-money laundering measures. Its Article 7 provides for measures needed to:

- deter and detect all forms of money laundering through the strengthening of domestic legal regimes;
- ensure the capacity and the readiness of the law enforcement authorities dedicated to combating money-laundering; and
- cooperate against money laundering at the regional and international level.

Both UNCAC and the Palermo Convention have broadened the scope of the AML regime to cover all the proceeds of other serious crimes.⁶⁴ Whereas both Conventions urge states to enact laws applicable to banks and other financial institutions, they also call for the establishment of Financial Intelligence Units (FIUs).

2.3.4 International Convention for the Suppression of the Financing of Terrorism (2002)

This convention requires states to take measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities. Rwanda ratified it in 2002.

63 Article 14(1)(c) of UNCAC.

64 Initially, only proceeds of illicit Traffic in Narcotic Drugs and Psychotropic Substances were criminalized into the context of money laundering.

In its preamble, this Convention exhorts states to adopt measures to prevent and counteract movements of funds suspected of being intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds.

Following the terrorist attacks in the United States on 11 September 2001, the UN member states agreed that there was a link between terrorism, transnational organised crime, the international drug trade and money-laundering.⁶⁵ States were therefore urged to ratify the international conventions regulating these crimes and to implement their provisions.⁶⁶

These practical steps include a wide array of measures relating to strengthening state capacity to counter ML and a better coordination of states' efforts regionally and internationally.

2.3.5 Financial Action Task Force Standards (The FATF 40 Recommendations)

The FATF was created in April 1989 during a G7 Summit in Paris, and was mandated to design policies and procedures at both state and international level to curtail the increasing incidence of money laundering.⁶⁷ In 1990, the FATF issued a set of 40 Recommendations to improve the AML regime at national level and to enhance regional and international cooperation in the fight against money laundering.

65 Schott P *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism: Supplement on special Recommendation IX* (2006) 2 ed11. See also Sollier J (2007) 39.

66 See SC/RES/1373 (2001) of 28 September 2001, available at <http://unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233> (accessed on 15 June 2014).

67 Laurel S 'An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance' (2010) *Journal of the Professional Lawyer* 6.

These recommendations were subsequently improved in 1996, 2001, 2003 and 2012, with new additions to the requirements relating to the conducting of customer due diligence, the seizing and freezing of the proceeds of crime, and establishing identities of the beneficial owners of companies and trusts.⁶⁸

In October 2001, the FATF's mandate was extended to the financing of terrorism. This resulted in the FATF issuing a further nine so-called Special Recommendations to give effect to the UN Convention for the Suppression of the Financing of Terrorism.

Likewise, more was done by the UN in response to the threat posed by international terrorism. For instance, the United Nations Security Council (UNSC) Resolution 1617 of 2005 and the United Nations Global Counter-Terrorism Strategy adopted through the United Nations General Assembly (UNGA) in 2006, have played a significant role in alerting states to the importance of implementing the FATF recommendations.

2.4 The Rwandan Anti-Money Laundering Legal Regime

The concept of money laundering is relatively new in Rwanda. No case relating to money laundering has yet been prosecuted or even investigated by any one of the competent authorities. However, Rwanda has adopted a few proactive measures against money laundering.

68 Johnson J and Desmond L 'Money laundering: has the Financial Action Task Force made a difference?' (2002) 10 *Journal of Financial Crimes* 7.

In this study, the Rwandan AML legal regime is divided into two categories. In the first category are the core AML enactments, namely the Penal Code, the AML Law and the Presidential Order establishing the Financial Intelligence Unit (FIU). In the second category are other laws which impact indirectly on countering money laundering.

2.4.1 The Core AML Laws

2.4.1.1 Law No 47/2008 on the Prevention and Penalising the Crime of Money Laundering and the Financing of Terrorism

This law provides for a descriptive definition of money laundering by clarifying particular acts which may constitute a crime of money laundering under Rwandan law. It further regulates the supervision of the Financial Institutions (FI) and Designated Non-Financial Businesses and Professions (DNFBPs) to enhance transparency and openness in their operations. It also contains provisions on international cooperation in the fight against money laundering.

According to this law, the predicate offences committed outside Rwanda are punishable in Rwanda as well.

2.4.1.2 The Organic Law No 01/2012/OL of 2 May 2012 establishing the Penal Code.

Rwanda's Penal Code was enacted in 2012. It stipulates various offences, including money laundering, and the penalties they carry. The Penal Code adopts the definition of money laundering as contained in the 1988 Vienna Convention, with some adaptations. It makes ML punishable by a term of between five and seven years' imprisonment and a fine of two to five

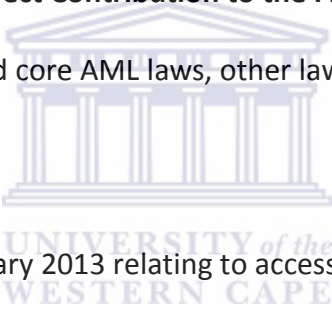
times the value of the amount of the laundered.⁶⁹ The Penal Code also provides for the permanent confiscation of proceed of crimes, not merely as a punishment, but also as a preventive measure.⁷⁰

2.4.1.3 Presidential Order No 119/01 of 9 December 2011 on the Financial Investigation Unit

This order establishes the form, function and purpose of the FIU, the biggest role player in the implementation of Rwanda's anti-money laundering regime.

2.4.2 Other Laws with an Indirect Contribution to the Fight against Money Laundering

In addition to the above-mentioned core AML laws, other laws contributing indirectly to the fight against ML in Rwanda are:

- 
1. Law No 04/2013 of 8 February 2013 relating to access to information;
 2. Law No 86/2013 of 11 September 2013 establishing the general statutes for public service;
 3. Law No 35/2012 of 19 September 2012 relating to the protection of whistleblowers;
 4. Law No 18/2010 of 12 May 2010 relating to electronic messages, electronic signatures and electronic transactions;
 5. Law No 23/2003 of 07 August 2003 related to the prevention and the punishment of corruption and related offences; and
 6. Law No 60/2013 of 22 August 2013 regulating the interception of communications.

69 Article 654 of the Penal Code of Rwanda.

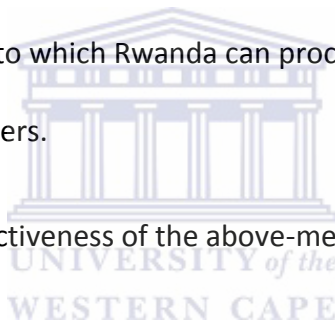
70 Article 651 of the Penal Code of Rwanda.

Although the above-mentioned laws regulate different subject matter, they are an important addition to the Rwandan AML regime because of their importance to the investigation and prosecution of money laundering.

2.5 Conclusion

Rwanda has demonstrated its commitment to stamping out money laundering by enacting a number of laws. However, there is room for improvement, especially in so far as it concerns the need to harmonize the laws and to strive for more coherent regional approaches to the problem. However, some procedural issues regarding the extra-territorial application of Rwandan AML law and the extent to which Rwanda can proceed with their prosecution remain a controversial issue amongst lawyers.

The next chapter assesses the effectiveness of the above-mentioned laws in practice.



CHAPTER THREE

ASSESSING THE EFFECTIVENESS OF ML RESPONSES IN RWANDA

3.1 Introduction

Montesquieu's famous 1748 treatise on political theory has laid a legal basis for laws being considered as pillars for policy implementation at all levels of government.⁷¹ Institutions are therefore considered as vehicles by means of which policy ideals are put into effect.⁷² As for the fight against money laundering, laws and institutions play a critical part, for without institutions which apply them, the laws would be useless.⁷³

This chapter examines the effectiveness of the legal and institutional responses adopted by Rwanda in the fight against money laundering. Furthermore, it measures these laws and practices against the FATF recommendations of 2012.

3.2 The Legal Responses

3.2.1 Scope of Criminalisation

Rwanda has a bifurcated approach when it comes to combating money laundering. The one is an all-crimes approach, meaning that all crimes are predicate crimes for money laundering; the other is a list approach, by which is meant that only the listed crimes are understood to trigger

71 Montesquieu C *The Spirit of Laws: Cambridge Texts in the History of Political Thought* (1989) 8.

72 Kent W and Bert R (eds.) *Do Institutions Matter? Government Capabilities in the United States and Abroad* (1993) 17.

73 Linda C *The Ombudsman, Good Governance, and the International Human Rights System* (2004) 85.

the money laundering cycle. The Penal Code adopts the all-crimes approach whereas the list approach is provided for in other enactments.

Thus, the existence of a dual approach in Rwanda to criminalise money laundering has made the prosecution of this crime difficult in practice, as lawyers and law enforcers are at loggerheads when it comes to the prosecution of the crime of money laundering.⁷⁴

The supporters of the all-crimes approach base their arguments on the constitutional hierarchy of norms, according to which the Penal Code is considered to supersede contradictory clauses in other laws, including the Anti-Money Laundering Law.⁷⁵ The advocates of the list approach challenge the above argument, stating that Article 5 of the AML Law, which lists the predicate offences for money laundering, is not mentioned anywhere in the Penal Code as being reviewed or repealed, submitting that this omission may be construed to mean that the article still stands and that its criminalising scope remains valid and applicable.

Each of the approaches has its strengths and weaknesses. The list approach is commended by experts in criminal law for being both specific and strategic,⁷⁶ but is criticised for its disregard of the serious offences such as the financing of terrorism, fraud, piracy, and counterfeiting of currency.⁷⁷ While the all-crimes approach is praised for its capacity to curb ML in a broader sense than the list approach, it is criticised for overreaching its purview and diverging from the overall effort to fight ML.

74 Hitimana J 'Rwanda to be assessed on its compliance with global standards of Anti-Money Laundering and combating the financing of terrorism' (2012) 23 *Le Banquier de la BNR* 12.

75 Article 93 of the Constitution of the Republic of Rwanda as amended to date.

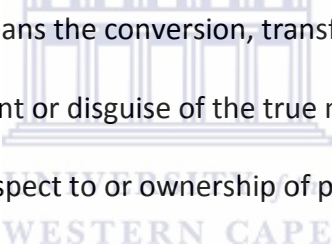
76 Humphrey M 'Fighting money laundering: The challenges in Africa' (2007) *ISS 2*, available at <http://www.issafrika.org/uploads/Paper152.pdf> (accessed on 8 October 2014).

77 Article 5 of the AML Law.

In brief, the discrepancy in content, and the resultant dilemma as to which approach to adopt, are traceable to the mistakes made when the Penal Code was drafted. As a result, the implementers of the law are now at a loss as to how to combine the two approaches in practice. This quandary presents criminals with a golden opportunity to escape the clutches of the law and to go unpunished.

3.2.2 Elements of the Crime of Money Laundering in Rwanda

Under Rwandan law, an individual may be liable for money laundering upon the commission of the following acts:

- 
- a. **Direct commission:** This means the conversion, transfer or handling of property derived from crime, the concealment or disguise of the true nature, origin, location, disposition, donation and rights with respect to or ownership of property;
 - b. **Indirect commission:** Here the material element of the crime is constituted in the acquisition, possession or use of property derived from crimes; and
 - c. **Other supplementary forms of liability:** This refers to association with a group, meaning attempting, aiding or abetting, inciting, facilitating, counseling and disregard for cross border cash declaration procedures.⁷⁸

The only mental element required to establish individual guilt, and thus to ground a conviction on a charge of money laundering, is the accused's knowledge of the unlawfulness of the conduct. This form of *mens rea* is construed strictly by the court and other forms of intent, such

78 Non respect of cross border declarations of cash was included in other supplementary forms of ML liability as incrimination by implication. It is implied that a person who crosses the border without declaring cash exceeding the declarable threshold, commits a crime of ML.

as suspicion or reasonable foreseeability, are not considered. In other words, only actual knowledge suffices to establish the mental element of the crime of money laundering.

This limitation of culpability to the perpetrator's active knowledge contravenes the provisions contained in international instruments such as UNCAC, the Palermo Convention and the Vienna Convention, all of which provide that other objective factual circumstances may reflect the knowledge, intent and purpose of the perpetrator.

3.2.3 Extra-Territorial Application of the AML Laws

Establishing the capacity of Rwandan laws to be applied to cases beyond its borders is very important for understanding Rwanda's ability to participate in the international fight against crime, its capacity to supervise the conduct of its nationals in foreign states, and its capacity to manage money laundering crimes perpetrated by foreign companies registered in Rwanda.

The Rwandan Penal Code has listed crimes over which Rwanda can exercise universal jurisdiction.⁷⁹ Money laundering is one of them, and is prosecutable in Rwanda even if the predicate offence, or the original act from which the proceeds to be laundered is derived, is committed on the territory of a foreign state.⁸⁰ However, new trends in transnational crime, which are a feature of today's global economy, have rendered this law ineffective.

79 According to article 16 of the Penal Code, Rwanda has jurisdiction over the following crimes regardless of who commits them and where they were committed: terrorism; hostage-taking; piracy; drug trafficking; illicit manufacturing and trafficking in arms; money laundering; cross-border theft of vehicles with the intent of selling them abroad; information and communication technology related offences; trafficking in human beings especially children; slavery; torture; cruel, inhuman or degrading treatment; genocide, crimes against humanity, war crimes; genocide denial or revisionism and any form of participation in these crimes.

80 Article 652 Par 1 of the Penal Code of Rwanda.

Take, for example, acts committed outside Rwanda which do not constitute an offence in the foreign country, but which would be a predicate offence if committed in Rwanda. The law is not clear as to whether these acts may give rise to money laundering. This lack of clarity on the extraterritorial application of Rwandan law has affected many individuals, including nationals who do not know the fate of their wealth acquired from countries with weak or non-existent AML regulations.

Another scenario would be that of predicate offences for money laundering which commence in Rwanda and are completed in foreign countries. This transnational execution of the crime becomes problematic because of the lack of specific skills in Rwanda not only to detect such crimes but also because the country lacks the people skilled enough to negotiate successful mutual legal assistance with the requested state.

Also, there are acts constituting secondary participation in transnational money laundering crimes, where the principal act is not criminalised in the foreign state. This becomes a problem as Rwanda does not have firm strategies to establish liability for participation in economic crimes, including corruption and money laundering.

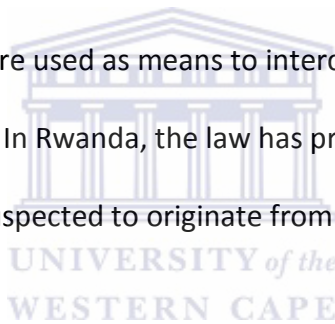
The above scenarios are deserving of attention simply because of the likelihood of their occurring, especially given the fact that Rwanda is in the process of opening itself more and more to foreign investments.⁸¹

81 Rwanda National Bank *Foreign Private Investment in Rwanda* (2011) 4, available at http://www.bnr.rw/uploads/media/Foreign_private_Investment_in_Rwanda_2011_Booklet_.pdf (accessed on 7 September 2014).

The cause for worry here is that the blind extraterritorial application of Rwandan law may lead to abuse, all the more so given the absence of guidelines which prosecutors could apply when dealing with predicate offences committed abroad. Applying an all-crimes approach to such a scenario would be unfair and may lead to unintended consequences, such as denying Rwandans who live abroad the incentive to return to their home country for fear that their property may be confiscated as the proceeds of crimes.

3.2.4 Dealing with Criminal Proceeds

Rwandan law provides on ways to deal with property originating from crime or being used to commit a crime. These measures are used as means to intercept, delay or mitigate the consequence of criminal activities. In Rwanda, the law has provided different ways in which the state can deal with the property suspected to originate from crime. These include confiscation, freezing and seizure.



3.2.4.1 Confiscation

Under Rwandan law, confiscation and forfeiture may be used interchangeably. In the Penal Code, confiscation targets objects used in the commission of a crime and its proceeds. It may be applied as an additional measure to the main penalty so that other objects belonging to the convicted person are withheld or forfeited.⁸²

82 Article 51 of the Penal Code of Rwanda.

The AML Law defines confiscation as a permanent deprivation of property by a definitive decision of a competent tribunal, which transfers to the state the ownership of this property and any related title to such property.⁸³ It concerns:

- a. the objects of the offence, including revenues and other benefits which derived from it, regardless of who the owner might be, unless it is proved that the property was acquired in good faith;
- b. The property belonging directly or indirectly to a person convicted of money laundering or to his/her spouse and his/her children, unless they are able to prove that their property has a lawful provenance.⁸⁴

The proceeds of a crime may be confiscated as long as they are proven to originate from a crime. The confiscation may be executed even when the perpetrator of the predicate offence cannot be charged before the law, either because he/she is not known, or because it is legally impossible to prosecute him/her.⁸⁵ Moreover, the Penal Code provides for the possibility to confiscate funds and property of equivalent value when the assets to be confiscated cannot be located or produced.⁸⁶

3.2.4.2 Freezing

Under Rwandan law “freezing” is defined as a measure consisting of a temporary delay in the execution of a transaction, the prohibition or restriction of the transfer, the conversion,

83 Article 2 Par 3 of the AML Law.

84 Article 57 Par 1 of the AML Law.

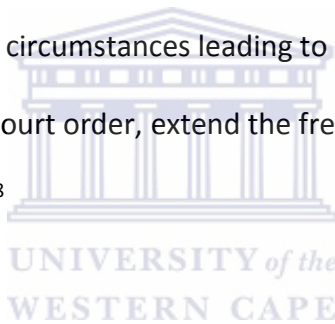
85 Article 58 of the AML Law.

86 Article 51 Par 3 of the Penal Code of Rwanda.

transformation or movement of property on the basis of a decision or a directive issued by a competent authority.⁸⁷

Freezing takes place in cases related to the financing of terrorism. Due to the urgency and gravity of cases that necessitate freezing, an *ex parte* order is not required because the FIU is invested with powers to take relevant action in the interests of national security. These powers are exercisable within a 48-hour period, after which the matter must be referred to the National Public Prosecution Agency (NPPA).

Where the FIU does freeze the assets, it must inform the relevant financial institution involved in transferring the funds about the circumstances leading to the freezing of the funds. The NPPA may, subject to obtaining a court order, extend the freezing period to seven days in order to conduct further investigations.⁸⁸



3.2.4.3 Seizure

According to the Rwandan code of criminal procedure, seizure may be effected by law enforcement authorities in order to use the seized objects as incriminating or exculpatory evidence.⁸⁹ Seizure can be applied as a penalty in addition to the main sentence when the seized property is directly connected to the crime.⁹⁰

87 Article 25 of the AML Law.

88 Article 25 Par 3 of the AML Law.

89 Article 30 of the Code of Criminal Procedure of Rwanda.

90 Article 386 and 257 of the Penal Code of Rwanda.

If the proceeds of the crime cannot be raised from the properties of the suspects, the NPPA or the competent court may seize other assets which the suspects possess, which are equivalent in value to the alleged proceeds of the offences.⁹¹

3.2.5 Identification and Protection of Property Subject to Provisional Measures

The FIU is empowered with investigative powers which it uses during the identification of property subject to provisional measures. It exercises these powers by virtue of its being a department of the Rwandan National Police. However, these powers are not used optimally in money laundering cases.

Once assets are identified, the Law Enforcement Authority proceeds with their seizure, confiscation or freezing. Confiscated property becomes State property and any financial transaction carried out thereafter with respect to such property is null and void.⁹²



3.2.6 The Fate of the Confiscated Property and the Protection of Third Party Interests

The State may use the proceeds from confiscated property to fund crime prevention projects.⁹³ However, the State must not disregard interests of *bona fide* third parties in respect of the confiscated property. In case the prosecuted person is acquitted after judicial review, the state must make restitution for the confiscated assets in cash.⁹⁴

91 Article 56 of the AML Law.

92 Article 60 of the AML Law.

93 Article 61 Par 1 of the AML Law.

94 Article 61 Par 2 of the AML Law.

Bona fide third party interests are also protected in cases of null and void transactions relating to the confiscated property, but only if the owner can prove that the property was acquired in good faith.⁹⁵

3.2.7 Cross Border Movement of Cash

Rwanda is surrounded by four countries, namely, Uganda, Tanzania, Burundi and the Democratic Republic of the Congo (DRC), and has 17 official entry points, some of which are not operational.⁹⁶ Whoever passes through any of the functioning entry points must declare whatever cash he or she has on him which exceeds the declarable threshold. But this does not apply to people in possession of withdrawal slips issued by banks. Whoever fails to make such a declaration is considered to have committed the offence of money laundering.⁹⁷

Even though everyone has a legal obligation to declare cash at the border post, other official practices undermine this requirement. For instance, Rwanda has entered into an agreement with Uganda and Kenya, in terms of which their citizens may move freely in the territory of each signatory country with the use a national identity card.

This measure has relaxed the level of control over citizens moving across the borders of these three countries. This concession has made it easy for people crossing the borders with sums of

95 Article 57 Par 2 of the AML Law.

96 See the list of Rwandan official border posts at <http://www.migration.gov.rw/index.php?id=214> (accessed on 27 August 2014).

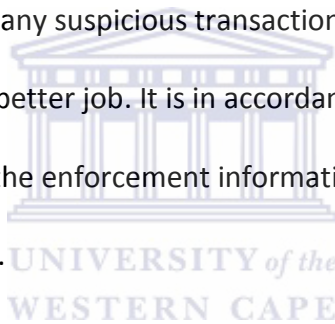
97 Article 7 of the AML Law.

money above the declarable threshold to escape controls,⁹⁸ a golden opportunity for money launderers.

3.2.8 Aligning Rwanda's Legal System to FATF Standards

The Rwandan legal system complies partly with the FATF recommendations. Its extended scope of the criminalisation of money laundering is a reflection of FATF Recommendation 3, which requires states to criminalise all serious offences, with a view to widening the range of predicate offences for ML.

Moreover, the FIU's power to stay any suspicious transaction without a court order is a strategic stride for the FIU to do a better job. It is in accordance with FATF Recommendation 29, which requires states to give FIUs the enforcement information and powers required to undertake their functions properly.



However, there are some drawbacks that need to be mentioned:

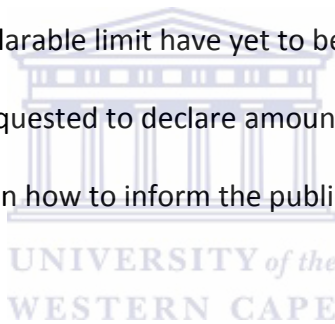
First, the only recognised mental element under Rwandan law is knowledge in the strict sense. This is due to the fact that the dynamic interpretation of criminal laws is strictly prohibited, and courts are not allowed to base their judgments on analogy. Restricting the mental element to knowledge contravenes FATF Recommendation 3, which requires states to ensure that the

98 Kimenyi F 'With cross-border trade prioritized, EAC integration process gets *accelerated*' *The New Times* 21 March 2014 3; Jean-Guy A and Gerald A *Informal Cross Border Trade in Africa: Implications and Policy Recommendations* (2012) 3 *Africa Economic Brief* 8.

intent and knowledge in money laundering cases may be inferred from objective factual circumstances.⁹⁹

Second, there is a risk that the FIU could abuse its powers to confiscate, seize or freeze suspicious assets to the detriment of third parties who have a good faith interest in the matter which, in turn, would undermine FATF Recommendation 6 which require that countries should adopt measures to enable their competent authorities to confiscate property laundered, without prejudicing the rights of *bona fide* third parties.

Another deficiency relates to cross border cash declaration requirements. The rules on declarations of cash above the declarable limit have yet to be put into effect. Even though travellers are temporarily being requested to declare amounts of money exceeding 10 000 USD, there are no published directives on how to inform the public about their duty to declare this amount.



What is more, the exemption provided for people with bank withdrawal slips undermines the purpose of the declaration. In other words, this exemption does not fully eliminate other risks such as the financing of terrorist groups operating outside the country. This exemption not only limits the effectiveness of the declaration system, but also impedes the ability of the FIU to exercise its powers to request and to obtain further information about the intended use of the money abroad.

Moreover, the sanction for people who do not declare their wealth at the border is too stringent and not proportionate to the offence. In fact, the undeclared cash of those citizens

99 Article 4 of the Penal Code of Rwanda.

who cross the border may not necessarily be for a laundering purpose, for there might be other, not necessarily illegal reasons, such as ignorance of the law or pressing family exigencies which cause people to cross borders with forbidden sums of money.

Additionally, most of the border posts are poorly staffed and lack the proper infrastructure to facilitate cash declarations, and where such infrastructure exists, it does not equate to the risk at stake.

The above-mentioned weaknesses undercut Rwanda's efforts to avert the threat posed to regional economies by transnational money laundering.

3.3 Anti-Money Laundering Coordination and Institutional Framework

3.3.1 The Financial Investigation Unit (FIU)

The FIU was created to implement and coordinate national efforts to fight money laundering and the financing of terrorism.¹⁰⁰ Its main duties are to collect, analyse and disseminate information related to potential money laundering or terrorist financing activities. It is also authorised to conduct investigations based on the information it acquires.¹⁰¹

This unit is a law enforcement-type of FIU,¹⁰² entrusted with the powers to coordinate the implementation of the laws relating to the prevention and punishment of the crime of money laundering and the financing of terrorism. The FIU consists of police officers and a few civilians

100 Article 20 of the AML Law.

101 Article 5 of the Presidential Order No 27/01 of 30 May 2011 Determining the Organization, Functioning and Mission of the Financial Investigation Unit (herein after FIU Presidential Order).

102 International Monetary Fund *Financial Intelligence Units: An Overview* (2004) 13.

recruited on the basis of their exceptional knowledge in the area of money laundering.¹⁰³ The FIU's head office is at the Rwandan National Police head office in Kigali.¹⁰⁴

The FIU, unfortunately, has the following shortcomings:

First, the FIU's operational independence is compromised by the fact that it operates under the National Police authority. Its director is appointed by the head of appointments in the Rwandan National Police.¹⁰⁵ There are no clear guidelines for the nomination and dismissal of the director of the FIU. The fact that the FIU's organisational structure is determined by the Rwandan National Police Council¹⁰⁶ undermines its operational independence.

Second, the fact that some of the FIU's staff are not appointed on a permanent basis, coupled with the lack of a clearly defined policy to retain staff, affects the unit's sustainability and capacity and also constitutes a risk to the confidentiality of the information that FIU has at its disposal.

Finally, the absence of an independent budget for the unit's operational costs, as well as its dependence on working guidelines received from above, affects its operational independence as this involves unnecessary bureaucracy during the process of requisitioning resources to carry out its work.

Operationally, the FIU's ability to exchange information with its stakeholders should be based on trust, a key ingredient for its effectiveness. However, in practice, the Rwandan FIU's

103 Article 24 of the FIU Presidential Order.

104 Article 3 of the FIU Presidential Order.

105 Article 22 of the FIU Presidential Order.

106 Article 21 of the FIU Presidential Order.

closeness to the National Police has the effect of discouraging reporting entities from disclosing information to the FIU out of fear that the information might come into the hands of the police who, in turn, could use it to investigate any other matter. In fact, the FIU's police officers are more involved in ordinary policing duties than in gathering and analysing intelligence on economic criminality. Quite apart from this, the officers are not trained to work as FIU officials.

3.3.2 National Public Prosecutor Authority (NPPA)

The NPPA has its main office in Kigali and has district offices in other areas. It is headed by the Prosecutor General, who is assisted by his deputy and six Public Prosecutors with national competence.

The NPPA has a specific department in charge of economic and financial crimes.¹⁰⁷ This department is mandated to investigate and to prosecute money laundering cases. However, in all its time of existence, it has not managed to investigate and prosecute a single case of money laundering.

3.3.3 Rwanda National Police (RNP): Economic and Financial Unit

The National Police has a twin department to the FIU which deals with other financial crime cases such as corruption, embezzlement, financial fraud and bankruptcy. At the time of writing, this department has investigated only one case similar to a money laundering case which the prosecutor declined to prosecute for lack of sufficient evidence.

107 See the NPPA organizational structure at <http://nppa.gov.rw/our-services/at-nppa-branches/ibyaha-bimunga-ubukungu-bwigihugu/?L=1> (accessed on 29 August 2014).

3.3.4 The Office of the Ombudsman

The Office of the Ombudsman was established by Article 182 of the Constitution. It is mandated to reinforce good governance in public and private institutions.¹⁰⁸ In addition to its many other functions, this office is invested with various powers, including the powers of judicial police,¹⁰⁹ powers to request administrative sanctions,¹¹⁰ prosecutorial powers,¹¹¹ bailiff's powers,¹¹² and the power to request judicial review.¹¹³ This office plays an important role in the fight against money laundering given its being a line institution in charge of anti-corruption and transparency, in general.

3.3.5 Revenue Service: Investigation Department

Another key player in the fight against the laundering of money associated with tax offences is the Rwandan Revenue Authority (RRA), which also conducts investigations. Consisting of police officers, it has judicial powers to investigate tax cases and it cooperates with other customs agents regionally and internationally. Like other Rwandan law enforcement authorities, it has not yet investigated any money laundering case within its jurisdiction.

108 Gatera A and Ngilinshuti V *Strengthening Good Governance in Rwanda: The Experience of the Office of the Ombudsman* 9.

109 Article 11 of Law No. 76/2013 of 11 September 2013 determining the mission, powers, organisation and functioning of the Office of the Ombudsman (herein the Ombudsman Law).

110 Article 9 of the Ombudsman Law.

111 Article 13 of the Ombudsman Law.

112 Article 16 of the Ombudsman Law.

113 Article 15 of the Ombudsman Law.

3.4 Preventive Measures

3.4.1 Preventive Measures in Financial institutions

AML preventive measures in financial institutions are provided for in both the AML law and the Bank Law of 2008. Whereas the AML Law sets out preventive measures in general terms, the Bank Law contains specific regulations for banks in relation to combating money laundering. They relate to the prohibition of fictitious financial banks and anonymous accounts; customer identification; identification of owners; monitoring of suspicious transactions; record keeping; and how to deal with politically exposed persons (PEPs).

3.4.1.1 Prohibition of Fictitious Banks and Anonymous Accounts

Generally, financial institutions intending to operate in Rwanda are required to be physically present in the country.¹¹⁴ In addition, they are obligated to cooperate with judicial authorities and the FIU by furnishing them with accurate information regarding their management, representation, and beneficial owners.¹¹⁵ This measure aims to enhance safety in the financial system and to prevent it from being abused for criminal purposes.

For this reason, financial institutions are strictly prohibited from opening or maintaining anonymous accounts, or accounts with fictitious or incorrect names.¹¹⁶ Financial institutions are also proscribed from establishing business relationships with institutions with no physical presence in their home country, or banks suspected of operating anonymously.¹¹⁷

114 Article 9 Par 1 of the AML Law.

115 Article 9 Par 3 of the AML Law.

116 Article 9 Par 4 of the AML Law.

117 Article 9 Par 2 of the AML Law.

3.4.1.2 Customer Identification

In Rwanda, reporting entities, including financial institutions must identify their customers prior to and during business relationships. They are required to identify and profile customers who execute occasional transactions exceeding the threshold set by the FIU, or those who conduct suspicious transactions such as the receipt of electronic transfers without originator information.¹¹⁸

The customer identification process requires Rwandan citizens to identify themselves with their national identity card or passport, and legal persons must show their registration certificate and list of shareholders.¹¹⁹ Individuals acting on behalf of others are required to submit their power of attorney documents, as well as their national identity cards.¹²⁰

3.4.1.3 Beneficial Ownership

According the AML Law, the reporting entities are required to identify the real owner of the business that is being conducted. In the case of transactions, financial institutions are required to establish by all means other unmentioned beneficiaries on behalf of whom the client is acting. In case of a persistent doubt, a reporting entity has to consider it as a reportable suspicious transaction, and take adequate steps to inform the FIU.¹²¹

118 Article 10 Par 1 of the AML Law.

119 Article 10 Par 2 of the AML Law.

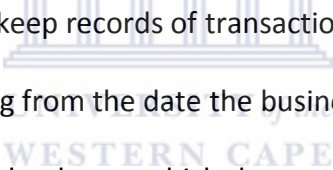
120 Article 10 Par 3 of the AML Law.

121 Article 14 of the AML Law.

3.4.1.4 Monitoring of Suspicious Transactions

The reporting entities are required to monitor certain suspicious transactions. More specifically, they are required to pay special attention to all strange transactions or exceptionally large transactions which are apparently unjustifiable. Such transactions must be thoroughly examined, and once their origin and purpose are established, the findings must be reported to the FIU.¹²² Moreover, special attention is devoted to business relationships and transactions entered into with persons resident in or originating from countries known to have lax anti-money laundering laws.¹²³

3.4.1.5 Record Keeping



Reporting entities are required to keep records of transactions involving their customers or clients for at least 10 years, starting from the date the business relationship was terminated in the case of a regular customer, or the day on which the transaction was concluded in the case of an occasional customer.¹²⁴ This period applies equally to both domestic and international transactions.¹²⁵

The requirement to keep records is also imposed on members of designated professions, such as lawyers. They are required to maintain account books and business correspondence for at

122 Article 15 Par 1 of the AML Law.

123 Article 15 Par 2 of the AML Law.

124 Article 17 Par 1 of the AML Law.

125 Article 17 Par 2 of the AML Law.

least 10 years after the end of the business relationship.¹²⁶ Stored records are exchanged solely upon the authorisation of the FIU.¹²⁷

3.4.1.6 Dealing with PEPs

In the process of dealing with PEPs, reporting entities must apply normal due diligence. They have to ensure that appropriate risk management systems exist for establishing whether the customer is a political leader, and they are duty bound to take reasonable measures to ascertain the source of the PEP's wealth. Before establishing a business relationship with such a person, the employee dealing with the case must first obtain the approval of the employer and must undertake to conduct regular monitoring of the business relationship with such a client.¹²⁸

3.4.2 Preventive Measures in Designated Non-Financial Businesses and Professions

Designated Non-Financial Businesses and Professions are other business sectors exposed to the risk of being used as conduits by money launderers. They, too, are legally required to apply measures aimed at combating money laundering and the financing of terrorism. They include lawyers in private practice, auditors and accountants, real estate agents, traders in objects of value such as precious metals, casinos, lottery agencies, and gaming halls. All these businesses are implicitly included as reporting entities which are subject to AML requirements by virtue of their owners and managers being individually subjected to AML requirements.¹²⁹

126 Article 17 Par 3 of the AML Law.

127 Article 17 Par 4 of the AML Law.

128 Article 16 of the AML Law.

129 Article 3 of the AML Law.

Like other reporting entities, DNFBPs are supervised by the FIU in matters relating to compliance with all AML/CFT obligations.¹³⁰ However, the FIU's lack of powers to impose sanctions on DNFBPs is problematic.

3.4.2.1 Lawyers

Lawyers in private practice are subjected to AML reporting requirements when they represent or assist their clients.¹³¹ However, they are not obliged to submit a suspicious transaction report to the FIU if this obligation would override legal professional privilege.¹³²

Lawyers are required to uphold professional secrecy in all their dealings with clients or with other lawyers on behalf of a client.¹³³ In exceptional circumstances, when a lawyer is required to do so, he/she may convey the confidential information only to the ethics committee of the lawyers' association.¹³⁴

Breach of professional secrecy is otherwise punishable by the Penal Code with two months' to three years' imprisonment and/or a maximum fine of 50 000 Rwandan francs. In addition, someone found guilty of such an offence may be barred from holding public office for a period of up to 10 years.¹³⁵

130 Article 13 of the FIU Presidential Order.

131 See article 3 Par 3 of the AML Law. It provides a list of activities where lawyers are required to abide by AML requirements.

132 Article 8 Par 2 of the AML Law.

133 Article 54 Par 1 of the Rwandan Bar Law.

134 Article 54 of the Rwandan Bar Law.

135 Article 214 of the Penal Code of Rwanda.

Given the constraints placed on lawyers with regard to divulging information they receive from clients, they will, in practice, be reluctant to divulge information to the FIU, especially because of the danger that the information could be used for purposes for which it was not intended.

3.4.2.2 Legal Persons and Non-Profit Organisations

Legal persons may be either companies or cooperatives. Companies are registered by the Rwandan Development Board while cooperatives are registered under the Rwanda Cooperative Agency. Whereas cooperatives deal mainly with the rural population, companies deal also with international investors, whom they welcome, but amongst whom might also be money launderers pretending to be honourable business people or entrepreneurs.

As pointed out above, the Rwandan government has devised a range of incentives to attract foreign businesses to the country. Amongst these is the speedy registration of companies, which can take place in just six hours.¹³⁶ Once the registration certificate is issued, it serves as a conclusive evidence that the company is lawfully incorporated,¹³⁷ which also means that the holder of the certificate may open a bank account without further ado.

Rwandan non-profit organisations (NPOs) are divided into three categories, namely national non-governmental organisations, international non-governmental organisations, and the religious-based organisations. Each category of NPO is governed by its specific enabling law. However, Rwanda does not have full control over the financial operations of NPOs, as they

136 Rwanda Development Board *RDB Client Charter* (2013) 3, available at http://www.rdb.rw/fileadmin/user_upload/Documents/Docs/RDB_Client_Service_Charter_01.pdf (accessed on 3 September 2014).

137 Article 17 of the Company Law.

enjoy administrative and financial autonomy.¹³⁸ It is a matter of concern that this financial freedom could be abused by launderers who could very well regard it as an opportunity to dodge what they consider to be invasive and unnecessary state interventions.

3.5 Customer Due Diligence (CDD)

The obligation placed upon reporting entities to apply CDD is imposed by Article 10 of the AML Law. It applies equally to all reporting entities and requires all reporting entities, including financial institutions and DNFBPs, to identify the customer before establishing any business relationship or whenever the customer executes an occasional transaction exceeding the threshold amount set by the FIU.

All reporting entities are further obliged to pay attention to all complex or unusual patterns of transactions with no clear purpose. They must examine the background of or circumstances attending such transactions and must report their findings to the FIU.¹³⁹

However, the laws and directives governing the application of the risk-based approach to customer due diligence do not distinguish between the following forms of customer due diligence: enhanced due diligence (EDD); normal due diligence (NDD); and simplified due diligence (SDD). The application of the risk-based approach is left to the discretion of reporting entities, which may disregard their obligation to apply it, simply because of the high premium they place on making maximum profits.

138 Article 10 of the Law Governing National Nongovernmental Organisation; Article 3 of Law Governing International Nongovernmental Organisation; Article 7 of the Law on Religious-Based Organisations.

139 Article 15 of the AML Law.

Another problem regarding the application of CDD is the rising criminal use of new technology. The non-face-to-face business relationships pose a potential money laundering risk, as launderers transacting small amounts may go undetected. It is of special concern in Rwanda due to the lack of strategies to deal with cyber laundering.

3.6 Cooperation

As stated above, cooperation is essential for the effective combating of ML, given its transnational character.¹⁴⁰ In this context, Rwanda has developed two channels of cooperation: domestic cooperation and international cooperation.

3.6.1 Domestic Cooperation

Although the Rwandan AML Law does not openly provide for domestic cooperation, the diversity of representatives in the advisory board of the FIU is considered to be an adequate domestic forum to ensure some level of domestic cooperation, even though it is not the board's main task to do this.¹⁴¹

Some degree of cooperation does take place amongst individual institutions and organisations. In addition, some forms of cooperation have been observed between individual institutions. The strong ties between the FIU and other institutions such as the National Bank, the prosecution service, the revenue services and all reporting entities have helped it to forge common approaches in combating ML. Some form of cooperation exists between non-profit organisations and their regulator, namely the Rwanda Governance Board.

140 Stessens G (2000) 252.

141 Article 19 of the FIU Presidential Order.

However, in the business sector, the level of cooperation is still low, given the existing risk of that businesses may be used for laundering purposes.

3.6.2 International Cooperation

Rwanda understands the need for international cooperation in the fight against transnational organised crime, including money laundering. It is in this context that it cooperates with other states in matters relating to the exchange of information, investigation and the implementation of provisional measures, all of which it does through the channel of bilateral and multilateral cooperation agreements.¹⁴²

However, there are instances where Rwanda may refuse cooperation, mostly in cases where cooperation is likely to prejudice public order, national security or the fundamental principles of the Constitution of the Republic of Rwanda.¹⁴³

Thus, Rwanda may decline a request for cooperation for several reasons: if the matter involved is not considered as a crime in Rwanda, if the requesting authority does not have competence to do so under the law of the requesting state, if the case has been disposed of by the Rwandan criminal justice system, if the requested measures are not accepted or applicable in Rwanda, if the person affected had not been legally represented, or if the prosecution is based on sex, religion, nationality or is politically motivated.¹⁴⁴

142 Article 28 of the AML Law.

143 Article 30 of the AML Law.

144 Article 30 of the AML Law.

3.6.3 Mutual Legal Assistance

Mutual Legal Assistance (MLA) is part of the package of international cooperation to support the prosecution and punishment of individuals suspected of money laundering.¹⁴⁵ As part of its international obligations, Rwanda provides MLA in specific areas, upon the necessary requirements being fulfilled.

Concerning the scope of assistance, Rwanda cooperates in matters relating to the collection of evidence, exchange of judicial documents, facilitation of on-site visits during case preparation, requests for the implementation of provisional measures,¹⁴⁶ the recovery of assets,¹⁴⁷ and any other matter that would help the requesting state bring suspected money launderers to the courts to be put on trial.

In terms of requirements set out by the AML Law for successful MLA, the request should be clear and concise and should not only relate to the agreed upon cooperation¹⁴⁸ but should also abide by the transmission procedure.¹⁴⁹ Once the request is accepted and processed, Rwanda requires that the content be treated in confidence,¹⁵⁰ and parties to the MLA process are prohibited from using bits of evidence for purposes other than the purpose for which the

145 Stessens G (2000) 254.

146 Article 33 of the AML Law.

147 Article 40 of the AML Law.

148 Article 42 of the AML Law.

149 Article 41 of the AML Law. Generally, the Requests for MLA are transmitted through diplomatic channels. In urgent cases, however, a request may be communicated through INTERPOL or directly by the foreign authorities to the judicial authorities in Rwanda, either by mail, or any other faster means of communication.

150 Article 45 of the AML law.

evidence was provided.¹⁵¹ Finally, the expenses incurred in the execution of a MLA process are borne by the requesting state, unless agreed otherwise.

3.6.4 Membership in International and Regional Bodies

International and regional bodies can together serve as a forum for effective cooperation in the fight against the ever increasing and widespread crime of money laundering. In this context, it is vital for Rwanda to join other countries in this fight and be able to enjoy membership benefits ranging from the exchange of best practices to regular peer reviews. At present, Rwanda is not affiliated to any such organisation. The Rwandan FIU is not even a member of the Egmont Group, the international organisation that co-ordinates the work of financial intelligence units around the world. Thus far, Rwanda enjoys only observer status at meetings of the Eastern and Southern Africa Anti-Money Laundering Group (ESSAMLG).

3.7 Impediments to Prosecution of Money Laundering In Rwanda

3.7.1 Overview

The prosecution of money laundering is considerably more difficult than other economic crimes due to its organised nature, its use of sophisticated techniques and the ability of criminals to engage the services of professional advisors such as lawyers and accountants. In addition to its difficulty, it is impeded by lack of people with the required skills to deal with the complexity and sophistication of money laundering in Rwanda.

151 Article 46 of the AML Law.

This section discusses practical impediments to the prosecution of money laundering cases in Rwanda as submitted by the NPPA (herein stated challenges) , on one hand, and the apparent shortcomings observed in the prosecution system as a whole by the outsider (herein the observed challenges) on the other hand.

3.7.2 Stated Challenges in Prosecuting Money Laundering

The following challenges were advanced by the NPPA, as hindering its efforts to effectively prosecute the crime of money laundering:

3.7.2.1 Absence of Precedence

The Rwandan NPPA has been pretexting absence of a precedent case to kick-start the process. However, the genuineness of this reason is questionable, given the fact that there will never be a prosecution specifically aimed at paving the way for further prosecutions of money laundering.

Admittedly, a case may enhance experience and pave the way for the rest of the prosecutors to apply the AML legal framework. However, the absence of precedent ML case is nothing other than a scapegoat behind which prosecutors are hiding their incompetence in matters of ML.

They should understand that prosecution is a key tool without which all AML mechanisms may be in vain. Its absence is a signal to the launderers that the domestic structures are not ready and able, and thus a motivation for them to continue their criminal acts.

In brief, as long as launderers are not successfully prosecuted for their criminal deeds or are allowed to live off the profit of their illegal activities, the work of the FIU and other law enforcement authorities involved in AML shall continue to be considered insignificant.

3.7.2.2 Lack of Resources

Another major challenge not only to the prosecution of money laundering in Rwanda is its entailed costs. In fact, Rwanda faces resource constraints in many sectors and AML costs competes with many other more pressing public issues that need funding. The resources needed are meant to cover all operational costs such as the costs to establish necessary infrastructure and skills development.

3.7.3 Observed Challenges of Prosecuting Money laundering

The following challenges are observed from an outsider perspective as impeding the effective prosecution of the crime of money laundering:

3.7.3.1 Legal Impediments

The legal impediments to prosecute money laundering in Rwanda are primarily based on the lack of clarity about the criminalisation approach to adopt. As a result of this confusion, many cases which would give rise to money laundering go unchecked.

In addition, there is an ongoing debate over the criminalisation of self-laundering¹⁵² as a separate prosecutable offence. In fact, Rwandan judges have expressed their concerns stating

152 Self-laundering is a criminal state where the offender who commits a predicate offence 'deals with' the proceeds of offending himself or herself.

that criminalising self-laundering is a violation of the *ne bis in idem* principle. According to them, the laundering of proceeds, when done by the author of the predicate offence, should be inclusive in the predicate offence itself. For this reason, they require a specific intent (*dolus specialis*) to launder or conceal the proceeds,¹⁵³ a requirement which is inconsistent with the provisions of the Palermo Convention of 2002. The difficulty in proving the special intent as required by the court constitutes an impediment to the prosecution of money laundering.

3.7.3.2 Lack of Skilled Staff, Equipment and Technical Capacity

As already noted, the fight against ML requires far more than just the creation of enabling legislation and the setting up of the necessary implementation structures. It is also important to build the capacity of agencies so that they understand the content and scope of application of the legislation, how the mechanisms in place should work, and the role that each institution should play in AML.

In Rwanda, ML is a new area of law where lack of qualified human resources is particularly severe.¹⁵⁴ First, the lack of investigation skills in this area results in cases being rejected on grounds of insufficient evidence.¹⁵⁵ Second, the deficient knowledge of AML legislation on the

153 Durrieu R *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (2013) 243.

154 Alessandra F and Pedro P 'Using money laundering investigations to fight corruption in developing countries Domestic obstacles and strategies to overcome them' (2012) *U4 Issue* 10, available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/copy%20of%20impediments%20and%20concl.pdf> (accessed on 7 October 2014).

155 CIGI, *Rwanda: Security Rector reform* (2012) 4, available at <http://www.ssrresourcecentre.org/wpcontent/uploads/2010/04/Country-Profile-Rwanda-April-7.pdf> (accessed on 10 October 2014).

side of prosecutors and judges prevents them from making better use of the opportunities provided by this law.¹⁵⁶

Investigators and prosecutors focus more on the predicate offence where they typically consider criminal proceeds as evidence to prove the occurrence of predicate offence and not a specific case of money laundering.

The problematic shortage of skills within the FIU is in some part caused by the structure and nature of the work where staff are subjected to frequent transfers,¹⁵⁷ an act which not only affects the human resource development of the FIU, but also its operations.¹⁵⁸

3.7.3.3 Lack of Familiarity with AML Laws in the Reporting Entities

Reporting entities do not have same understanding of their role in the implementation of the AML Law. Many of them believe that it is solely a FIU duty to implement the law by collecting necessary intelligence which it uses as evidence in court, while others, mostly the foreign banks, are still following guidelines from their countries of origin.¹⁵⁹ Being profit-minded, especially when the transaction involves big money, reporting entities opt to turn a blind eye to their obligations, which results into obstructing the necessary cooperation for effective prosecution of money laundering cases.¹⁶⁰

156 US Department of States *International Narcotics Control Strategy Report on Rwanda* (2014) 6, available at <http://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/227996.html> (accessed on 15 October 2014).

157 Articles 23 and 25 of the Presidential Order establishing a specific statute for Police Personnel

158 Gwintsa N 'Challenges of establishing financial intelligence units' in Goredema C (ed) *Money Laundering Experiences: A Survey* (2006) 61.

159 Agutamba K 'Loopholes for Money Laundering exposed' *The Rwanda Focus* 1 October 2012. Available at <http://focus.rw/wp/2012/10/loopholes-for-money-laundering-exposed/> (accessed on 11 October 2014).

160 Agutamba K (2012) 3.

3.7.3.4 The Indirect Effect of ML Prosecutions on Business Opportunities

Even though the intent of a country may not be to shield international criminals from prosecution, it is important to understand that a poor country like Rwanda may hesitate to enforce fully AML frameworks including prosecution, mostly when it is established that such a move would have an indirect effect on the national economy, such as loss of business, employment and tax opportunities. It is provided that such state's interests, vested in suspicious businesses, may influence its implementation of the AML system. In other words, a state cannot prioritise the prosecutions of conduct which, in reality, is a driving force for its economy.¹⁶¹

3.8 General Observations on the Effectiveness of ML Responses in Rwanda

The Rwandan AML Law appears to be comprehensive and packaged to deal with the threats of Money laundering. Its areas of strengths include the criminalisation of ML and international cooperation where strategic aspects are well captured, including a wide range of MLA as required by main international legal instruments such as article 18 of the Palermo Convention of 2000 and article 46 of UNCAC.

In addition, it has provided for the principle of dual criminality to protect ML fugitives from unjust punishment and the principle of speciality to ensure that a person can be prosecuted only for the charges on which they were extradited and that evidence obtained through

161 Castle A and Joanne L 'Money laundering and corruption in the Asia Pacific' (1999) *International Centre for Criminal Law Reform and Criminal Justice Policy* 8, available at <http://www.icclr.law.ubc.ca/Publications/Reports/Paper4.PDF> (accessed on 24 August 2014).

international cooperation may not be used for purposes and proceedings other than those for which the cooperation was requested.

The third positive aspect covered in the AML law is the consideration of the principle of *aut dedere aut judicare* to ensure that the criminals will not escape justice and find safe haven on the basis of nationality.

However, the existence of a well packaged law on anti-money laundering did not remove the challenges observed in practice. In fact, this law was brought in as a “legal transplant”, far from being self-executing. Even the financial investigation unit, which would coordinate the implementation of this law, came into force three years following the enabling act.¹⁶²

The delay in operationalising the AML Law has led to an understanding that the adoption of an AML Law in Rwanda was not based on a social problem necessitating a legal solution, but rather was an international requirement which local authorities knew very little about. Lack of knowledge and ownership has created reduced enforcement efforts which have led to significant discrepancies between the legal theories as they appear in the AML Law and the operational reality on the ground.

As an illustration of this situation, the AML Law has provided for a fund to support activities relating to crime prevention. This fund is supposed to use confiscated proceeds of crime as its operational funds. But, as of the time of writing, this fund has not been established and it remains a question as to how confiscated proceeds of crime are managed.

162 The FIU Presidential Order came into force in 2011, whereas the enabling law had been adopted in 2008.

Even after noticing the need to have an AML mechanism in place, authorities were hindered by the existence of two approaches regarding the criminalisation of money laundering. The confusion over the applicable approach, coupled with other practical challenges, has led the law enforcement authorities to become increasingly reluctant to investigate money laundering as a specific scheme compared to the predicate offence.

Moreover, the law only recognises a single mental element, the knowledge of unlawfulness. This flies in the face of the 1989 Vienna Convention and UNCAC of 2003, which provide that knowledge, intent or purpose, may be inferred from other objective factual circumstances.¹⁶³

The law has basic shortcomings regarding its provisional measures compared to the FATF recommendations. The difference is not only in the legal wording of the text, but also in regard to the civil procedure itself. The full implementation of AML laws remains a worry, as Rwanda lacks qualified and well-trained officials to deal with the crime of money laundering.

It is therefore the author's view that Rwanda is not doing enough to help fight money laundering both locally and at the transnational level. However, the existing political will to do more offers a glimmer of hope.

163 Article 28 of UNCAC and Article 3(3) of the Vienna Convention.

CHAPTER FOUR

GENERAL CONCLUSION AND RECOMMENDATIONS.

4.1 General Conclusion

The purpose of this paper was to assess the effectiveness of ML responses adopted by Rwanda by measuring them against international AML frameworks such as the FATF recommendations of 2012.

As already demonstrated in Chapters One and Two, Rwanda ranks among the poorest countries on the globe. Its main strategy to fight poverty is to position itself as an investment-friendly nation. However, this hospitality and enthusiasm to do business may present a golden opportunity for criminals who intend to launder their money through different investment schemes in Rwanda.

While money laundering is globally perceived as an operational risk affecting the foundations of national development,¹⁶⁴ it has an additional negative effect on Rwanda as it poses a threat to the state's reputation, which is key for its development.

In this paper, Rwanda's legal and institutional frameworks were evaluated to see if really Rwanda can stand the ever-growing transnational threat of money laundering.

164 Goredema C 'Tracing Proceeds of Crime in Southern Africa: Challenges and Milestones' in Goredema C (ed) *Money Laundering Experiences: A Survey* (2006) 121.

In Chapter Three, it was submitted that laws enacted aspired to meet almost all international standards. However, lack of consensus on the applicable approach to criminalise money laundering and the judicial disregard of ML as a stand-alone offence have emerged as practical challenges in the implementation of the AML law.

Interestingly, the current Government has shown a strong political will to combat all forms of criminality. It has given due consideration to the fact that development achievements so far recorded may be tarnished by opportunistic criminals, who may use the infrastructures in place as vehicles for money laundering.

This work has also attempted to sketch some of the impediments to the prosecution of crimes of money laundering in Rwanda.

In the effort to establish whether Rwanda as a developing country can meet AML requirements that are placed on it given its limited resources, capacity and expertise, this research has provided practical and realistic recommendations for a more effective AML framework.

4.2 General Recommendations

As above mentioned, the effectiveness of Rwandan AML framework requires three main responses, namely, tackling the enforcement deficit, restructuring the leadership and the functioning of the FIU and, finally, refining public awareness and cooperation in matters relating to money laundering.

4.2.1 Confronting the Enforcement Deficit

One of the most contentious and enduring problems in the fight against money laundering is the existing gap between the text of the law and the practice. It is a gap that has made it difficult to prosecute money laundering cases. Not a single case has been successfully prosecuted so far, despite a multitude of economic crime cases being lodged every year. The following suggestions are submitted to close this gap.

4.2.1.1 The Necessity to Eliminate All Identified Legal Deficiencies

One of the means to combat the enforcement deficit is to eliminate all identified legal deficiencies which may render the implementation of the Rwanda's AML regime ineffective. In particular, the Penal Code and AML Law should be harmonised in order to have a consistent approach to criminalising ML.



Second, enforcement mechanisms should be put in place to improve the level of compliance. This includes the active application of preventive measures and the provision of a wide range of proportional and effective sanctions for those who fail to comply with the AML laws. In this context, the FIU should be given the power to impose sanctions such as fines and provisional closures.¹⁶⁵

165 Such measures may allow the FIU to aggressively act against non-bank financial services and the DNFBP sectors, and improve the level of compliance with AML/CFT requirements.

4.2.1.2 The Need for a Comprehensive Implementation Strategy

It has been submitted that the FIU's poor strategic implementation of the AML regime is linked to the lack of predetermined objectives with clear performance indicators. In fact, even the FIU action plan is not reflected in the general RNP strategic plan of 2009-2013.¹⁶⁶ The FIU should therefore cooperate with other relevant stakeholders in developing a comprehensive implementation strategy indicating Rwanda's strategic responses to ML risks.

4.2.1.3 The Need to Expand Skilled Human Resources and Technical Capacity

Rwanda is advised to allocate resources to strengthen knowledge and skills for individuals working in the AML sector, such as the FIU members, regulators, public prosecutors, the judiciary and the law enforcement, and to provide them with adequate equipment such as computer software, vehicles and surveillance equipment to enable them to perform their AML functions effectively.

Where possible, some of these efforts should be extended to staff of private sector institutions with reporting obligations, especially in sectors most vulnerable to ML. Despite budget constraints, many of these needs may be solved through strategic cooperation with other states, or through funds collected from the confiscated criminal proceeds, as indicated in the AML Law.¹⁶⁷

166 Rwanda National Police Strategic Plan 2009-2013.

167 Article 61 of the AML Law.

4.2.2 Restructuring the Leadership and Functioning of FIU

As mentioned above, the FIU is overburdened by its many duties which an institution established to do the work it is supposed to do can ill-afford. It is for this reason that the following suggestions are made to make the Rwandan FIU more effective, and thus professional.

4.2.2.1 The Necessity to Delegate Powers

The FIU is advised to focus on a coordination role and delegate some of its other policing duties to the ordinary law enforcement agencies. In fact, conducting additional investigations concurrently with other police units could jeopardise the confidentiality of the information being investigated and lead to the tipping off of the reported persons before they are apprehended.



4.2.2.2 The Need to Revisit the Appointment Procedure of the Head of FIU

Special provisions relating to the appointment and dismissal of the head of the FIU need to be established so that the discretion given to the National Police Authority to appoint or dismiss personnel may not affect the autonomy of the FIU. It is recommended that the appointment of the head of the FIU be done through a process that upholds his or her autonomy in a more

formalised and solemn way¹⁶⁸ in order to create a sense of responsibility, acceptability, and respect on the part of the reporting entities.

4.2.2.3 Independence of the FIU

As above discussed, the Rwandan FIU is not completely independent as it is attached to the National Police. Tied to this is the issue of independence from political influence or abuse in the carrying out of its duties.¹⁶⁹ With respect to Recommendation 26 of the FATF, it is therefore recommended that the Rwandan FIU be given some level of autonomy to ensure that confidentiality is imposed around all information it receives. This will enable it to gain the trust of reporting authorities.

4.2.3 Refining Public Awareness and Cooperation in AML Matters

The fight against money laundering cannot be won without effective domestic and international cooperation. Domestically, Rwanda is encouraged to establish a mechanism for public awareness of the crimes of money laundering through the involvement of the media and all other actors who may play a crucial role in fostering public discussion on money laundering and its negative impact.

Rwanda is further advised to take a step towards becoming a member of ESAAMLG and the Egmont Group for their importance in building operational ties, including regular mutual evaluation and exchange of information and expertise.

168 International Monetary Fund and World Bank *Financial Intelligence Units: An Overview* (2004) 9, available at http://www.justice.gov.il/NR/rdonlyres/3DAC2825-5A9F-46C2-94C2-6199EEDB20FA/7885/FIUHandbook_English.pdf (accessed on 5 September 2014).

169 Gwintsa N (2006) 50.

In sum, the recommendations cited above are meant to address different sorts of deficiencies observed in the Rwanda's responses to money laundering. The author of this research ends with the optimism that once the above recommendations are implemented, the AML regime will become strong enough to pre-empt and respond to AML threats.



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