THE INSTITUTIONAL CHALLENGES FACING IMPLEMENTATION OF ANTI-MONEY LAUNDERING LAW IN KENYA

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Declaration

I, Carolyn C.W. Njoroge, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LL.M.) in the Faculty of Law at the University of Nairobi. It has not been submitted before for any degree or examination in this or any other university.

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Signed  Date: …August 2, 2021

I have approved this Report

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Dr. Constance Gikonyo

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To my Family, you remain my rock!

Abstract

With the enactment of Anti Money Laundering (AML) and terrorism prevention laws in 2012 and supporting subsidiary legislation addressing the many deficiencies, Kenya is considered compliant with international AML and Combating Financing of Terrorism (CFT) standards. Key institutions have been established to support the AML combating efforts such as the Financial Reporting Centre (FRC). The FRC mandated to assist with the identification of the proceeds of crime and the combating of money laundering. Another key institution established by the AML law is the Asset Recovery Authority (ARA), established to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime.

Nevertheless, challenges remain in achieving comprehensive and effective implementation of AML laws and regulations because common AML risks such as poor inter-agency co-ordination between all Government agencies involved in combating AML, specific institutional weaknesses within the FRC, AMLAB and ARA, continued transnational organized crime, tax evasion, corruption, illicit trade flows, theft and drug trafficking continue to hinder these efforts. It is therefore clear that the POCAMLA and related AML laws have been tested and challenged and the gaps are glaring in the wake of increased levels of cyber fraud, globalisation, grand corruption and porous AML laws.

It is for this reason that, the detection and reporting mechanisms need renewed interrogation in the wake of the unprecedented disconnect between the AML legal framework and practice.Moreover, as is the case with many other issues, politics of the day greatly aggravates this disparity.This study therefore investigates the three main institutions created by the POCAMLA, the AMLAB, FRC and ARA and identifies the constraints that impede them from being robust and effective as well as propose policy changes and reforms.

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List of Abbreviation

AFU	Asset Forfeiture Unit
AGM	Annual General Meeting
AML	Anti- Money Laundering
AMLAB	Anti-Money Laundering Advisory Board
ARA	Asset Recovery Authority
ARIN-EA	Asset Recovery Inter-Agency Network for Eastern Africa
ARINSA	Asset Recovery Inter-Agency Network for South Africa
ATPU	Anti-Terrorism Police Unit
BCBS	Basel Committee on Banking Supervision
BVI	British Virgin Islands
CARA	Criminal Assets Recovery Account
CARU	Criminal Assets Recovery Unit
CBK	Central Bank of Kenya
CDD	Customer Due Diligence
CFT	Combating Financing of Terrorism
CMA	Capital Markets Authority
CTR	Cash Transactions Reporting
DCI	Directorate of Criminal Investigation
DNFBPs	Designated Non-Financial Businesses and Profession
DOJ	Department of Justice
EACC	Ethics and Anti-Corruption Commission
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force

FDI	Foreign Direct Investment
FIC	The Financial Intelligence Centre
FICA	The Financial Intelligence Centre Act
FIUs	Financial Intelligence Units
FRC	Financial Reporting Centre
FSRBs	FATF Styled R egional Bodies
ICRG	International Cooperation Review Group
IMF	International Monetary Fund
KRA	Kenya Revenue Authority
KYC	Know Your Customer
MAT	Multi Agency Team
ML	Money Laundry
MLA	Mutual Legal Assistance
MLAC	Money Laundering Advisory Council
MOU	Memorandum of Understanding
NIS	National intelligent Service
NPA	National Prosecuting Authority
NYS	National Youth Service
OAG	Office of the Attorney General
ODPP	Office of the Directorate of Public Prosecutions
OECD	Organisation for Economic Co-operation and Development
PFM	Public Finance Management
POCA	Prevention of Organised Crime Act
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act

ROSAF	Regional Office South Africa
STRs	Suspicious Transactions Reports
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series

List of International Legal Instruments

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted on 20 December 1988, entered into force 11 November 1990) UNTS 1582 p.95. (Vienna Convention)

The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) (Palermo Convention).

The United Nations Convention against Corruption (adopted 31 October 2003 entered into force 14 December 2005) UNTS 2349 (p.41) (UNCAC)

List of Statutes and Regulations

Proceeds of Crime and Anti-Money Laundering Act No 9 of 2009 (POCAMLA)

Prevention of Terrorism Act No. 30 of 2012

Proceeds of Crime and Anti Money Laundering Regulations, 2013 (POCAMLR)

The Kenya Gazette 22nd March, 2019 (VolCXXI-NO34) 1087

List of Cases

Assets Recovery Agency v Jane Wambui Wanjiru & 2 others [2019] eKLR 7. Judgement delivered on 25 April 2019.

Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others [2020] eKLR 8Judgment delivered on 20 June 2020.

The Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR. Judgement delivered on 21 September 2018.

CHAPTER ONE

1.1 Introduction and Background

The term "money laundering" has its history in the United States having been coined around the 1920's. During this period, the mafia groups acquired and ran launderettes with money obtained through criminal activities. Subsequently, illicit proceeds were declared as profits earned from the laundry business, thus the term "laundering"[1]. Money laundering is a process through which illegitimately acquired money is legitimized through a complex web of transactions designed to conceal the source, the identity of the owners of and the ultimate destination of illegally acquired funds from criminal activities[2]. Money laundering has two goals: to conceal the crimes from which the revenues were obtained, and to ensure that the criminal benefits from the monies by consuming or investing them in the legal economy. [3] Thus, it is safe to assume that the money laundering offense is fundamentally associated with the predicate offense that produced funds.

Kenya's financial sector has experienced tremendous expansion during the previous decade. A stable legal environment, quick technological adoption, mobile money innovation, and the emergence of new distribution channels have all aided this experience. Increased levels of formal financial inclusion, which have risen from 27% to 75% in the recent decade, are proof of this expansion.[4]

Kenya has benefited from being a regional financial hub, owing to its strategic location in East Africa, intricate connections to the rest of the world and a large relief operations hub[5]. Consequently however, due to its porous borders, she's always at risk of money laundering and terrorism financing. The primary money laundering avenues in this case are; tax evasion,

[1]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000).
[2]Nelson E Ojukwu-Ogba and Patrick C Osode, 'A Critical Assessment of the Enforcement Regime for Combatting Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85 <https://www.euppublishing.com/doi/10.3366/ajicl.2020.0303> accessed 20 March 2020.
[3]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000).
[4]ESAAMLG (2019), 'Eastern and Southern African Anti-Money Laundering Group 20 Years Report (1999-2019) - From Arusha to Ezulwini: Looking Back and Looking Ahead' (ESAAMLG (2019) 2019).
[5] Peter Warutere, 'Detecting and Investigating Money Laundering in Kenya' 18.

financial fraud, corruption, drug trafficking, cybercrimes and terrorism financing.[6]. Money laundering traverses both formal and informal sectors sustained by both domestic and international criminal activities. The US State Department Report[7] listed Kenya as a hotspot for money-laundering because it's a haven for drug traffickers; its close proximity to Somalia and the robust black market for smuggled goods.

Globalization has impacted criminal activities. Firstly, organized crimes and criminal activities have now become transnational and as opposed to territorial. Criminals have used the global market to trade in illicit drugs, human and child trafficking and carry out cross border fraud. Secondly, criminals have taken advantage of the global finance and fintech advancements making it very easy to move illicit funds across national borders with minimal detection. Consequently, globalization has increased opportunities for laundering money gained from criminal activities domestically and internationally.[8]

There is collective effort to combat organized criminal activities hence the focus[9] on money laundering by punishing these crimes that conceal funds from the authorities. There is a legitimate concern that profits generated from these organized and lucrative crimes threaten a country's financial system's soundness, economic development and public safety due to the association between money laundering and terrorism financing.[10] Governments also realize that the huge profits derived from criminal activities could corrupt the structures the state.

The FATF (Financial Action Task Force on Money Laundering) is the international money laundering and terrorism financing watchdog. It was founded at the G-7 Summit in Paris in 1989,

[6] ESAAMLG Secretariat, 'ESAAMLG 20 YEAR REPORT - From Arusha to Ezulwini: Looking Back and Looking Ahead' (Eastern and Southern Africa Anti-Money Laundering Group 2019) 84 <https://esaamlg.org/reports/ESAAMLG%2020%20YEAR%20REPORT.pdf> accessed 20 March 2020.

[7]US Department for State, 'International Narcotics Control Strategy Report' (Bureau of International Narcotics & Law Enforcement Affairs 2020) Money Laundering <https://www.state.gov/wp-content/uploads/2020/03/Tab-2-INCSR-Vol-2-508.pdf> accessed 20 March 2020.

[8]Eugene E Mniwasa, 'Detection and Suppression of Money Laundering in Tanzania', *Tackling Money Laundering in East and Southern Africa: An Overview of Capacity* (Institute of Security Studies 2004).

[9] The Kenya Gazette 22 March 2019 (VolCXXI-NO34) 1087. "The Government of Kenya formed a task force to develop a new policy to fight money laundering and illicit finance in the country and in line with the FATF Recommendations, Kenya's Cabinet Secretary for the National Treasury and Planning CS Henry Rotich on 22nd March 2019 declared the appointment of the Taskforce on the National Risk Assessment on Money Laundering and Terrorism Financing"

[10]Eugene E Mniwasa, 'Detection and Suppression of Money Laundering in Tanzania', *Tackling Money Laundering in East and Southern Africa: An Overview of Capacity* (Institute of Security Studies 2004).

which adopted the Vienna Convention's[11] anti-money laundering position. Money laundering, according to the Vienna Convention, occurs when a person transfers or transforms property with the goal of concealing the criminal origin and actual nature of the property. It has been defined in the Vienna Convention as "*the purchase, possession, or use of property with knowledge at the time of receipt that such property was derived from a drug trafficking offence*." [12] This definition excludes the proceeds of criminal activity such as tax evasion, embezzlement, corruption, theft of public funds, illicit arms trade, and piracy.[13] Consequently definitions derived from[14] the Vienna Convention have been broadened by various international instruments. For example, the Palermo Convention[15] which requires all the state parties to apply the Vienna Convention's definition to "*…the widest range of predicate offences*".[16]

In 2009, Kenya formalized its Anti- Money Laundering (AML) institutional and legal framework by enacting the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA).

Kenya was assessed by FATF in May 2014 to identify the extent to which it had resolved apparent AML/CFT weaknesses. The onsite team came to the conclusion that Kenya was committed to improving its AML/CFT regime on both a technical and political level, and that the institutional framework in place to carry out the reforms was adequate going forward.[17]It was on this basis that FATF delisted Kenya from the its monitoring process in the on-going global AML/CFT compliance structure. Kenya's anti-money laundering and counter-terrorist financing

[11]United Nations Organisation, ' The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95 ' (1988).
[12]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988) Article 3 (1) (b) and (c).
[13]Eugene E Mniwasa, 'Detection and Suppression of Money Laundering in Tanzania', *Tackling Money Laundering in East and Southern Africa: An Overview of Capacity* (Institute of Security Studies 2004) 39.
[14]Constance VW Gikonyo, 'Money Laundering and Piracy: The Legal Nexus' (School of Law, Faculty of Commerce, Law and Management, University of the Witwatersrand, 2016) 88.
[15]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.
[16]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 2(a).
[17]BIS central bankers' speeches, 'Njuguna Ndung'u: Brief Remarks on Kenya's Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Regime' 2 <https://www.bis.org/review/r141124g.pdf> accessed 17 November 2019.

(AML/CFT) regime continues to improve under the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) [18] framework.

Due to the evolving nature of ML, multi-faceted responsive measures are always in play at domestic, regional and international levels to combat this nefarious crime. In doing so the Government of Kenya formed a Taskforce [19](the "Taskforce") to "*undertake a national risk assessment on money laundering and terrorism financing, identifying and assessing the level, trends and threats to the country*," noted the Treasury Cabinet Secretary Henry Rotich[20]. In particular, the Government of the Republic of Kenya has noted these risks and formed an institutional / inter-agency Task Force[21] and one of the intended effects is that the Financial Reporting Center, as the anchor institution, will improve its capabilities and increase reporting organizations' and supervisory agencies' compliance levels. It is therefore clear that the POCAMLA and related AML laws have been tested and challenged and the gaps are glaring in the wake of increased levels of cyber fraud, globalisation, grand corruption[22] and porous AML laws.[23] In addition, the institutions under the POCAMLA framework and other supporting institutions such as the Directorate of Criminal Investigations, the Asset Recovery Authority, Office of the Director of Public Prosecutions, to name but a few, are facing technical, capacity and duplication of roles challenges. For instance, the gaps in the investigative institutions leads to the likely event of amending charge sheets while the prosecution of a matter is underway.[24] In addition, the detection and reporting mechanisms need renewed interrogation in the wake of the

[18]Grace Zhao, 'Kenya's Removal from FATF's Gray List Doesn't Mean Much « Global Financial Integrity' (*Global Financial Integrity*, 14 July 2014) <https://gfintegrity.org/kenyas-removal-fatf-gray-list/> accessed 22 March 2020.
[19]The Kenya Gazette 22nd March, 2019 2020 (VolCXXI-NO34) 1087.
[20]Frankline Sunday, 'New Team to Review Law on Dirty Money' (*The Standard*, 21 March 2020) <https://www.standardmedia.co.ke/business/article/2001318020/new-team-to-review-law-on-dirty-money> accessed 22 March 2020.
[21]The Kenya Gazette 22nd March, 2019 2020 (VolCXXI-NO34) 1087.
[22]Fredrick Obura, '2018, the Year of Big Eating: NYS Scandal' (*The Standard*, 22 March 2020) <https://www.standardmedia.co.ke/article/2001307344/2018-the-year-of-big-eating-nys-scandal> accessed 22 March 2020.
[23]'Sh800bn Laundered via Amnesty, US Says' (*Daily Nation*, 21 March 2020) <https://www.nation.co.ke/news/Sh800bn-laundered-via-amnesty--US-says/1056-5478664-et4ukez/index.html> accessed 22 March 2020.
[24]'NYS I Suspects Charged with Money Laundering' (*Daily Nation*, 22 March 2020) <https://www.nation.co.ke/news/NYS-I-case-Kabura-Gethi-face-fresh-money-laundering-charge/1056-5242490-vfbai9/index.html> accessed 22 March 2020.

unprecedented National Youth Service (NYS) scandals that banks failed to notice or report the large cash transactions.[25]

In 2009, the domestic impetus behind AML legislation was to solve an issue of such magnitude that it had become a political agenda. The two-years long Goldenberg scandal (1991-1993) whose effects on the Kenyan economy was the major impetus as well as global soft pressure from FATF, as remarked by the then Minister for Finance, Amos Kimunya[26]. A decade later, the impetus has changed, in addition to the role of the Taskforce set up.

As recent as the year 2020, it was reported[27] that Kenya was not able to monitor inflows of cash and its sources following a cash repatriation amnesty from offshore accounts leading to laundering of more than $7.9 billion (Sh803 billion).[28]In addition, Kenya has not joined the Egmont Group having expressed interest circa 2015.[29] This could only be a signal that our AML legal and institutional framework does not completely meet the international standards and if it so does, there are capacity gaps within the actors of AML enforcement and prevention. In conclusion, it remains a valid question in regard to the effectiveness of our institutions charged with combating ML and state of policy to prop these institutions.

The goal of this research paper, therefore, is to look into the role of Kenyan institutions in detecting, preventing, and enforcing anti-money laundering (AML) legislation., with a particular focus on the structure, mandate, and functions of the Anti-Money Laundering Advisory Board (AMLAB), the Asset Recovery Authority (ARA), and the Financial Reporting Centre (FRC). Cooperating institutions within the AML chain, that is the Central Bank of Kenya (CBK), Directorate of Criminal Investigations (DCI), Office of the Directorate of Prosecutions (ODPP)

[25]'Five Banks Fined Sh392.5m for Handling NYS Funds' (*Daily Nation*, 22 March 2020) <https://www.nation.co.ke/news/1056-4756378-d2ln9g/index.html> accessed 22 March 2020.
[26]*Kenya National Assembly Official Record (Hansard)* (2008) <https://books.google.co.ke/books?id=43OUzHZFCZgC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> accessed 22 March 2020.
[27]US Department for State, 'International Narcotics Control Strategy Report' (Bureau of International Narcotics & Law Enforcement Affairs 2020) Money Laundering <https://www.state.gov/wp-content/uploads/2020/03/Tab-2-INCSR-Vol-2-508.pdf> accessed 20 March 2020.
[28]'Sh800bn Laundered via Amnesty, US Says' (*Daily Nation*, 21 March 2020) <https://www.nation.co.ke/news/Sh800bn-laundered-via-amnesty--US-says/1056-5478664-et4ukez/index.html> accessed 22 March 2020.
[29]Vincent Ngethe, 'How Joining the Egmont Group Could Help Kenya' (*Daily Nation*, 8 September 2015) <https://www.nation.co.ke/newsplex/how-joining-the-Egmont-Group-could-help-Kenya/2718262-2826272-nb29i3z/index.html> accessed 22 March 2020.

and the Ethics and Anti-Corruption Commission (EACC) will be complementary to this research. In addition, Kenya's AML regime and the creation of AML related crimes will be marking a decade anniversary on 28 June 2020. This research is thus timely in interrogating the success and failures of the AML institutions.

1.2 Statement of the Problem

With the enactment of AML law[30] and terrorism prevention laws in 2012[31] and supporting subsidiary legislation addressing the many deficiencies, Kenya has established the following institutions; AMLAB, FRC and ARA. Indeed, Kenya is considered compliant with international AML and Combating Financing of Terrorism (CFT) standards. Particularly, one of the key institutions, the FRC is tasked with aiding in the identification of the proceeds of crime and combating of money laundering[32]. Lately Kenya has established a multi-agency team (MAT) to address the evolving challenge.

Despite these efforts, these institutions/ initiatives have not been effective in attaining effective and comprehensive implementation of AML laws and regulations. For instance, in 2019 Kenya ranked 7th place worldwide in the Basel ML risk index. The previous year 2018, Kenya was 9th place, alluding to a worsening trend year over year. There also has been poor inter-agency co-ordination between all Government agencies involved in combating AML, specific institutional weaknesses within the FRC, AMLAB and ARA, continued transnational organized crime, tax evasion, corruption, illicit trade flows, theft and drug trafficking hindering the realization of AML efforts.

There is need to evaluate these institutions to assess the levels of success. This study therefore examines the three institutions created the POCAMLA; the AMLAB, FRC and ARA with a view of identifying the constraints that impede them from being robust and effective as well as propose policy changes and reforms.

[30]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.
[31]Prevention of Terrorism Act.
[32]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 2 (3).

1.3 Research Questions

(a) What are the regional and international institutional initiatives that Kenya has adopted?
(b) What are the challenges and shortcomings of the current institutional AML framework in Kenya?
(c) What regional best practices can Kenya adopt from international AML best practices?
(d) What reform measures can Kenya adopt to create a more effective AML institutional framework?

1.4 Objectives of the study

The general objective of this study is to evaluate how effective the AML framework has been for the last decade since enactment of this law. The specific objectives of this study are to;

(a) analyse the international and regional AML institutional initiatives adopted by Kenya;
(b) identify the challenges and shortcomings of the Kenyan AML institutional framework;
(c) Consider the regional AML best practices that Kenya can adopt; and
(d) Suggest appropriate ways of creating a more effective AML institutional framework in Kenya.

1.5 Hypothesis

This study is based on the hypothesis that the current AML institutional framework in Kenya is not as effective in line with international best practices and international legal instruments whose obligations she is committed to due to poor inter-agency co-ordination between all Government agencies involved in combating AML, specific institutional weaknesses within the FRC, AMLAB and ARA, continued transnational organized crime, corruption in public offices and political interference.

1.6 Justification of the Study

In terms of development and enforcement, Kenya's AML governance system consists of many entities that cover both legislative and non-legislative forms. The forces at play in these institutions display some incompatibilities and departures one from the others. Thus far policy development has been the main adopted solution. Consequently, in the course of implementation,

certain institutional dynamics have emerged, which have both enlivened and constrained key procedures and decisions. [33] AML law, institutions, policy formulation and regulation remains an underserved area of study by legal scholars and researchers and for this reason, the study will be timely, useful and of benefit too.

At first instance institutions of higher learning such as Schools of Law, which should be leading in the role of influencing theoretical knowledge of ML and AML law, the study will thus be useful to law students and academicians.

Secondly, this study will be of relevance to the Taskforce's current exercise of auditing and reforming the current AML regime in Kenya. This Taskforce, a joint multi-agency team of over thirty institutions involved in the anti-money laundering chain, comprises of key policymakers drawn from the FRC, AMLAB, ARA, Treasury, Judiciary, the ODPP, DCI, EACC, CBK among others. This study will thus be useful to the key AML institutions in proposing multi-agency cooperation reforms as well as administrative reforms within each of these institutions.

Thirdly, this study will provide valuable lessons in respect to our AML institutional framework and form a basis for to researchers and scholars in developing further areas of interest within AML body on knowledge.

In conclusion, the influence of the FATF remains significant in Kenya and FATF's AML institutional integrations, consequently at a global level, the study will assist such international trendsetters understand from an in-depth perspective of what ails Kenya's AML institutional framework. Further, a significant part of this study will inform Kenya's international and regional partners of the roles, functions and challenges faced by the ARA, AMLAB and FRC and in their conjunctive roles with other agencies involved in prevention, enforcement and eradication of money laundering.

[33]Dennis Vicencio Blanco, 'Anti-Money Laundering Governance in the Philippines: Legal Foundations, Institutional Dynamics and Policy Challenges' (2017) 39 Asia Pacific Journal of Public Administration 51 <https://www.tandfonline.com/doi/full/10.1080/23276665.2017.1290901> accessed 7 April 2020.

1.7 Theoretical Framework

Criminological theories are critical in hypothesizing predictions as to why people commit crime. Albeit hypothetical, starting from a point of examining criminology perspectives will provide orderly clarification about a certain criminal's behavior. This will ultimately serve to utilize existing knowledge to extrapolate on how crime should be controlled and prevented[34].

Criminalization can be understood to be the classification of certain behavior as a crime and the individual deemed a criminal. Criminalization refers to the process of classifying certain conduct as criminal offences with attendant penalties on the individual engaged in said conduct[35]. In context of money laundering, this is a criminal offence domesticated in the POCAMLA.

Money laundering is a crime with significant effect on an economy and stability of its financial institutions hence the criminalization in accordance to Vienna Convention[36] and Palermo Convention[37]. Although the Vienna Convention does not use the term "money laundering," the three listed categories of offenses form the basis of the money laundering offense[38], and this is reflected in the law[39].

[34]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[35]Hanafi Amrani, *The Development of Anti-Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement, and Their Implications on the Effectiveness in Countering Money Laundering* (Erasmus University, Rotterdam 2012) <https://repub.eur.nl/pub/37747/> accessed 24 March 2020.
[36]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[37]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.
[38]Paul Allan Schott, 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism - Second Edition and Supplement on Special Recommendation IX' <http://documents.worldbank.org/curated/en/558401468134391014/pdf/350520Referenc1Money01OFFICIAL0USE1.pdf> accessed 24 March 2020.
[39]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya ss 3, 4 and 7.

1.7.1 Harm Theory in the context of Money Laundering

Two factors that have to be considered regarding criminalization are the 'harm principle' and 'legal moralism[40]'.The 'harm principle' refers to the initiatives of a state in preventing and minimizing the harm being meted to its citizens. John Stuart Mill introduced the "Harm Theory".[41]Three variables define the level of harm, namely; the number of individuals involved in the crime, the number of distinct crimes committed by each individual, and the intensity of the harm to victims. The harm concept extends beyond physical harm, and into non-material or intangible harm. Such harms include harm to public safety and security, institutions, as well as personal reputation.

The Harm Theory asserts that every offence has a corresponding harm to a legally protected interest. It has consequently been argued that the social importance of certain interests is so important that they require a preemptory safeguard. This then allows states to sanction some activities that may present a threat to some interests but does not harm any of them directly[42].

Money laundering is a threat to an economy's financial sector, and by extension a threat to peace due to its capacity to destabilize the global financial system[43]. Money laundering accounts for two to five percent of global GDP, according to estimates from the International Monetary Fund (IMF), and thus has the potential to affect financial and economic stability[44]. Such effects include; distrust to the banking system, discouraging of investments, and creating a liquidity crisis. The world bank through a comprehensive statement has argued that money laundering leads to a rise in crime and corruption, damages a state's reputation negatively influencing

[40]RA Duff and P Green Stuart, *R. A. Duff, Stuart P. Green (Eds.) - Defining Crimes_ Essays on the Special Part of the Criminal Law-Oxford University Press (2005).Pdf* (Oxford University Press 2005).
[41]RA Duff and P Green Stuart, *R. A. Duff, Stuart P. Green (Eds.) - Defining Crimes_ Essays on the Special Part of the Criminal Law-Oxford University Press (2005).Pdf* (Oxford University Press 2005).
[42]Verena Zoppei, 'Money Laundering: A New Perspective in Assessing the Effectiveness of the AML Regime' Money Laundering 19.
[43]Hanafi Amrani, *The Development of Anti-Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement, and Their Implications on the Effectiveness in Countering Money Laundering* (Erasmus University, Rotterdam 2012) <https://repub.eur.nl/pub/37747/> accessed 24 March 2020.
[44]Paul Allan Schott, 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism - Second Edition and Supplement on Special Recommendation IX' <http://documents.worldbank.org/curated/en/558401468134391014/pdf/350520Referenc1Money01OFFICIAL0USE1.pdf> accessed 24 March 2020.

foreign investment, weakening of financial institutions, distorts investments, and damages privatization efforts[45].

It is not in contention, as has been shown, that ML is a vice that causes harm in the society. At face value therefore, this theory, that informs the development of criminal law and by extension AML legal and institutional framework, is best suited to guide policy makers in combating ML. Yet the harm principle is not intended to limit the actions of individuals, on the contrary it is designed to limit the scope of criminal law and government interference of personal liberty. It follows then that mechanisms stemming from this theory are reactive and not proactive. This presents a number of challenges to the development of the policy and institutional framework for ML. Unlike most other crimes, it is not always evident an ML offence is taking place or likely to take place within a given setting. Example in this case being churches, charity organizations and fundraises being used as covert ML operations[46]. So, whereas the harm approach is arguably comprehensive in as far as it focuses on money launderers, it fails in preventive legislation targeted at money launderettes[47].

Further, the dynamic and constantly evolving nature of ML means legislation following the harm theory is always playing catchup. Thus, institutions whose blueprint was designed to combat analog forms of ML buckle under the wight of digital ML. If the institutions in the AML chain are not efficient and effective in combating the ML and related predicate offences, a review of their underlying theory ought to be inevitable.

The theory also underpins the functions of the enforcement institutions in the AML chain. The principal institution charged with enforcement of AML is the Asset Recovery Authority (ARA)[48]. In order to support its activities, the ARA has official cooperation agreements with the Office of the Director of Public Prosecutions (ODPP), the Directorate of Criminal Investigations (DCI), and the Ethics and Anti-Corruption Commission (EACC). Together, they form the enforcement arm of the AML institutional framework.

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[45]David Williams, 'Governance, Security and Development: The Case of Money Laundering' [2008] London, UK: Department of International Politics, City University London.

[46] KTN News Kenya, *Point Blank: Money Laundering in Churches* (2019) <https://www.youtube.com/watch?v=gMEYUykpnzo> accessed 25 March 2021.

[47]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000).

[48]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 53.

1.7.2 Rational Choice Theory and Money Laundering.

The Rational Choice Theory explains the logic behind the crimes being committed by criminals. It argues that criminals use cost-benefit analysis, portraying a tendency to commit crimes where least effort is required and the potential rewards outweigh the risks.[49]. A crime is not usually a random activity, it rather stems from predictable human habits where offenders will offend where the benefits offset the risks[50]. A potential criminal thus weighs the cost (pain and punishment) as against the benefits (gain/pleasure) in the plan to undertake a particular criminal activity[51].Factors usually taken into account by an individual contemplating an offense are; Stigma, the probability of being caught/ arrested and subsequently imprisoned weighed against. the potential rewards such as money, respect from others, and the thrill of "getting away with a crime." This theory therefore provides a foundation for incentives and deterrents to the crime of ML.

As highlighted under the harm theory, the constant and rapid evolution of ML strategies forms part of the reason why AML institutional framework is perpetually inadequate. This theory is particularly important in as far as it provides insight into the mind of the launderers. The deployment of ingenious ML mechanisms can be seen as a means of the criminals to lower the risk of being caught and subsequently penalized while at the same time maximizing the benefits. Consequently, a formidable AML framework will likely catch an offender and deter other potential offenders while the inverse is true for a weak AML. Robbery, drug use, vandalism, and white-collar crime are all examples of crimes where the rational choice theory can be used.

Rational choice theory provides understanding of an aspect of the crime of money laundering. It also provides comprehension of 'cost benefit analysis' thought process associated with predicate offences and in so doing explains the genesis of entire processes in money laundering methods. This wide scope of comprehension is deemed crucial in supporting preventive and enforcement

[49]Nicholas Gilmour, 'Understanding the Practices behind Money Laundering – A Rational Choice Interpretation' (2016) 44 International Journal of Law, Crime and Justice 1 <https://linkinghub.elsevier.com/retrieve/pii/S1756061615000385> accessed 24 March 2020.
[50]Nicholas Gilmour, 'Understanding the Practices behind Money Laundering – A Rational Choice Interpretation' (2016) 44 International Journal of Law, Crime and Justice 1 <https://linkinghub.elsevier.com/retrieve/pii/S1756061615000385> accessed 24 March 2020.
[51]Constance VW Gikonyo, 'Money Laundering and Piracy: The Legal Nexus' (School of Law, Faculty of Commerce, Law and Management, University of the Witwatersrand, 2016).

methods intent on incapacitating the various processes that facilitate the cleansing of illicit funds[52]. It also serves as an indicator of the level effectiveness of the AML regime and might inform decisions to tighten or discard some AML measures.

In the Kenyan context, the institutions charged with AML detection and enforcement lack the powers to ably prosecute ML crime and even seize assets and proceeds of ML. Without a strong and cooperative relationship with prosecutors and police, AML efforts are all but a waste of time and resources. Criminals will use the most "favourable" jurisdictions to "cleanse" the proceeds of crime. Favourable in this case would be the jurisdictions with evidences of weaknesses along the AML chain. The Kenyan FRC is akin to a toothless dog, with its core function being collecting and disseminating Suspicious Transactions Reports (STRs) to relevant investigative and enforcement agencies. By the time these STRs are acted upon by the secondary agencies, the laundered funds will have crossed several transnational borders and it becomes a case of tracing in addition to proving the ML crime. This gap has created a huge incentive to criminals, the ease in which funds move despite the existence of the FRC.

Under the ARA, the cost-benefit analysis by criminals is easily justified as the freeze orders are easily lifted by the judiciary arm. To further disincentive the ML crime, the ARA needs to have powers to sequester the suspect funds, remove the needs for interim orders to unfreeze bank accounts that release funds that are in essence the evidence and object of an investigation.

In summary, the increase in risks and cost of money laundering makes this activity less profitable to the perpetrators. Therefore, this study will thus argue and eventually recommend that the costs or punishment of perpetrating the ML crime needs to be much higher and expensive through institutional interventions thus reduce the overall and cumulative gain to the offenders.

1.8 Literature Review

Several authors have discussed issues on money laundering and AML internationally, regionally and nationally. This study will be enriched and inspired by a wealth of literature that has been developed over time by these authors. Money laundering being a fairly recent phenomenon, the

[52]Nicholas Gilmour, 'Understanding the Practices behind Money Laundering – A Rational Choice Interpretation' (2016) 44 International Journal of Law, Crime and Justice 1 <https://linkinghub.elsevier.com/retrieve/pii/S1756061615000385> accessed 24 March 2020.

literature will look at its short history involving the race for capital by developing nations, globalisation in the 1990s to early 2000s, the processes in money laundering that involve cross-border movement of funds and comingling and finally the late and hurried rise of AML institutions.

In addition to academic authors, recent conference papers and institutional reports are considered in this study. These reports are instrumental in critiquing effectiveness of the AML institutions and the law underpinning the detection, enforcement and prevention of ML will improve study.

1.8.1 The Genesis of Anti-Money Laundering Activism and Institutions

1.8.1.1 The Race for Capital and Rise of Anti-Money Laundering Institutions.

In a research discourse conducted in 2008 and published in the Global and Economics Review by two professors[53], the study revealed the effects of deregulation in the 90s that opened up countries to criminal funds or criminal capital. The urgency to deregulate markets in the 1990s made countries vulnerable to money laundering as these countries had in place laws that enforced strict bank secrecy and minimal to no reporting requirements. This led to such countries competing for this criminal capital to an extent of legislating policies to secure these monies. Criminals were able to take advantage of such regimes. It was not until the late 1990s, that many countries became aware of the risks posed by the infiltration of criminal money into their financial systems. This realization was spanned by a chain of corporate collapses, banking scandals, terrorist financing and the risk to financial markets by money laundering. Governments and multilateral organizations consequently moved with speed against criminal money through increased institutional and regulatory intervention[54].

The study further revealed that in addition to legislation, due to increased globalization, countries tried to attract foreign capital by lowering taxes (creating the tax haven regimes), gave high subsidies to firms leading to with low labour standards, little concern for environmental impact and low wages. The consequence was that these countries got trapped in a dilemma of lowering

[53]Brigitte Unger and Gregory Rawlings, 'Competing for Criminal Money' (2008) 10 Global Business and Economics Review <http://www.inderscience.com/link.php?id=19987> accessed 28 March 2020.
[54]Brigitte Unger and Gregory Rawlings, 'Competing for Criminal Money' (2008) 10 Global Business and Economics Review 333 <http://www.inderscience.com/link.php?id=19987> accessed 28 March 2020.

entry barriers for foreign capital but at the same time, the political class needed to win elections promising higher standards of welfare to their electorate. One smart way out of this dilemma by the political class in these countries was to introduce ring-fenced financial regimes that as an unlikely consequence, appealed to international criminals who were incentivized to place their ill-gotten money in such countries[55]. An example is Seychelles, which in 1995 had enacted an economic development law, that gave incentives to foreign investors. One of the incentives was absolute immunity from criminal prosecution and the protection of assets from seizure even if investments were obtained through criminal activities outside the Seychelles. This was an explicit announcement to the world that it was openly competing for proceeds of crime – criminal money.

This led to countries competing with each other for the versatile capital in search of investment opportunities. The report further revealed how poor countries with small economies were comparatively disadvantaged in competition for capital. The implication of tax competition was that countries were not able to obtain adequate income through their tax systems. Consequently, they either overburdened labour by exorbitant taxes or turned to capital from any source, including criminally obtained funds. In a way, due to the disregard of the sources of these funds, such small countries became key conduits for money laundering.

The downside for the above-described race for "seed capital" by developing countries raised concerns at the OECD. The OECD found that funds that moved from G7 countries into the Caribbean and Pacific Island states more than US$200 billion per annum representing a fivefold increase between 1985-1995. This amount far exceeded the total outward bound Foreign Direct Investment (FDI) in these regions that accounted for less than 1% of the world's population[56]. This scenario was not aimed at any conventional investment need, it was rather intertwined with money laundering and tax evasion.

This globalized sense of doing business led to a "race to the bottom" in competition for capital, but was not to last. Between the mid-1980s and 2005 most of these countries were shocked with

[55]Brigitte Unger and Gregory Rawlings, 'Competing for Criminal Money' (2008) 10 Global Business and Economics Review <http://www.inderscience.com/link.php?id=19987> accessed 28 March 2020.
[56] 'Harmful Tax Competition: An Emerging Global Issue' 17 <https://www.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en> accessed 28 March 2020.

scandals involving criminal investments, drug trafficking and money laundering. For instance, the collapse of mighty Enron that had concealed losses in over 500 shell companies in the Cayman Islands[57]

This study revealed that by the end of the 1990s and particularly after the September 11, 2001 terrorist attack in US, the myth of "capital neutrality" was a fallacy. It was at this point that key supranational institutions such as IMF and FATF intervened to stop this problem, by assisting countries create institutions that regulate capital sourcing and identifying criminal capital. In a sense the study informs us the growth of AML institutions from the global scene down to the national level, which was a consequence of deregulation of economies and fight for FDI and capital by economies of the world. In giving us an un-common yet real history of money laundering institutions, the authors concluded that unless AML institutions are carefully developed and effectively funded and strengthened countries may continue to compete for criminal money despite best intentions.

Despite these visibly progressive indicators of AML efforts, a deeper study into tailored ML mechanisms unique to different jurisdictions (in this case Kenya), needs to be carried out to determine the best modifications that can be done to these institutions to make them more context effective.

1.8.1.2 Anti-Money Laundering Law and the Institutions

Alldridge[58] gives a historical background and basis of money laundering law and how money-laundering crimes have evolved over time in the criminal justice agenda. The author introduced to this study the range of legal mechanisms that are directed towards the proceeds of crime. These are detection, confiscation, asset recovery and taxation of those proceeds. These legal mechanisms underpin the establishment of key institutions involved in efforts to curb money laundering.

[57]Brigitte Unger and Gregory Rawlings, 'Competing for Criminal Money' (2008) 10 Global Business and Economics Review 349 <http://www.inderscience.com/link.php?id=19987> accessed 28 March 2020.
[58]Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering, and Taxation of the Proceeds of Crime* (Hart Pub 2003).

This author's book will guide this research in understanding the conception of AML institutions and the ideals or roles they ought to play as part of the chain of curbing AML. For instance, in Kenya, confiscation and asset recovery led to inception of the Asset Recovery Authority. The Judiciary is the grand institution that aids in civil and criminal forfeiture of proceeds of crime . The scholar's work also dwells at length on the financial intelligence units' role, as the institution mandated to detect proceeds of crime in an economy. These intelligence units then relay data to investigative institution, the Directorate of Criminal Investigations who upon successful investigations hand over the matter to the prosecutorial institutions.

The author has also discussed the critical history, theory and the practice of all these developments, culminating in the Proceeds of Crime law enacted by various countries through assistance of FATF. As with many authors, the book cites money laundering as the crime of the 1990's[59] though at such time there was no sound AML framework hence very minimal convictions for this crime. The analysis of the theories of justification of criminalization of ML and forfeiture in this current study has been discussed by Alldridge[60] and this has contributed to the theoretical framework herein.

In a further discussion[61] on the criminality aspect of ML and organized crime, it has been noted that the classic tools of the criminal law were inadequate in combating organized crime. Legislators, particularly in the United States, turned to confiscation of criminal proceeds and incrimination of money laundering as more effective methods for combating organized crime. Rather than strictly discouraging individuals from participating in organized crime, this technique took away the rewards from crime. The method was more effective when combined with measures that make it more difficult to launder criminal proceeds. In essence, law enforcement agencies strive to disrupt not only the motivation for organized crime, but also the operation of organized crime itself.

[59] ibid 43. Alldridge citing G Richard Strafer, 'Money laundering: the crime of the '90s' ' (1989) 27 American Criminal Law Review 149.
[60]Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering, and Taxation of the Proceeds of Crime* (Hart Pub 2003) 45.
[61]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000) 36.

Various authors have also attempted to explain what is money laundering; this study is enriched by Stessen in his discourse of the description of ML and its characteristics. By a definition in his book, he asserts that in most money laundering schemes, three aspects are relevant, according to a 1990 analysis from the Canadian Ministry of the Solicitor-General.: "*the conversion of illicit cash into another asset, the concealment of the true ownership or source of the illegally acquired proceeds and the creation of the perception of legitimacy of source and ownership"*[62]. These three elements[63], which will be alluded to later in this study, can also be found in widely accepted analysis, aunder which most money laundering operations are split into three stages.

1.8.1.3 Understanding the Predicate Offence, Money Laundering and the Cycle

This study is interrogating the efficacy of the Kenyan institutions in curbing money laundering. The readers thus have to understand the unique crime of money laundering and the reasons why several institutions are involved to report, detect and prosecute the crime. In addition, there has to sound institutions that will target the profits of the predicate crime through investigations, asset recovery, forfeiture and confiscation.

"Money Laundering Cycle" or "Three Stages of Money Laundering" are the names commonly used to refer to the ML process.[64] Before ML can take occur, a criminal offense that generates the funds to be laundered is committed. The criminal offense in question is referred to as a predicate crime for ML, examples of predicate crimes include tax evasion, bribery and terrorism. In essence, the crime it is impossible for ML to occur without an underlying predicate. Thus, the scope of AML in the fight against ML is dependent on the number of crimes classified as predicate offenses.[65] The predicate offence provides the two main drivers of ML process. Firstly, to prevent the money from being traced back to underlying source. Secondly to prevent seizure of the funds following successful tracing by authorities. As the purpose of the process is to conceal ill-gotten wealth it is no surprise that it changes often, and differs from one cycle to another. Fort this reason ML is described as a "dynamic three-stage process". The process is described below with the goal of each stage.

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[62] ibid 111. citing M. Beare and S. Schneider, Tracing of Illicit Funds: Money Laundering in Canada (Ottawa: Ministry of the Solicitor General of Canada, 1990), p. 304

[63]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.

[64] Andrea Dietz, 'Anti-Money Laundering' p.21.

[65] ibid.

The first stage is the placement stage, in which money is placed in a financial institution, albeit this is not always the case. The placement procedure should be considered solely as the process of transferring unlawfully obtained monetary profits from its original form to another. Once in this new form, the money launderer will take additional steps, known as layering, to get the monies to their final destination. To start the money laundering process, the launderer usually seeks to deposit the monies into the banking system. Other transactions may take place before the cash is deposited into the banking system in order to isolate the monies from their illicit source. As a result, these actions must also be considered placement, with placement defining the initial transfer of illegally obtained proceeds into another kind of valuable assets.[66] One of the more common and widely known methods for placement is Smurfing, where a large cache of proceeds is broken down into smaller amounts and deposited into several bank accounts) or Structuring (where a series of small amounts are deposited into a bank account over a period of time.) with the aim of arising any suspicion.

Attempts are undertaken during the second stage to mask the paper trail and obscure the unlawful origin of the funds by carrying out a series of tiny transactions, a process known as layering. At this stage, the money launderer attempts to distance away from the criminal origin of illegal proceeds. Thus, a series of transactions is carried out to move funds from the original account to a large number of accounts across banks, geographical locations or entities so as to disguise the origin of these funds. These transactions are designed to obscure the audit trail and thwart any potential examination or surveillance of transactions.

The final stage is the integration of proceeds of crime into the legitimate economy, giving them a legitimate appearance. The placement step is critical for the discovery of money laundering operations from both a repressive and a preventive standpoint.[67]. Being the last stage of the money laundering cycle and implies successful completion of placement and layering stages. Integration looks at legitimizing the proceeds of criminal money and assimilation of the same into the economy. At this stage buying of assets such as real estate, jewelry, shares and stocks, cars using the illegal proceeds would involve integration stage of the money laundering.

[66] ibid p.24.
[67] Stessens (n 1) 111. Citing FATF-p. 9, Secretary-General of the UN, Note Strengthening Existing International Co-operation, p. 9 and I.

As a result, from the perspective of law enforcement, the complexity of an integration system is not a barrier to integration. It's more a case of the money appearing to be from a legitimate source after it's reached this degree of integration. Once the first and second processes have been completed, the easiest of the three stages is to return the money to the white economy. This could also be because criminals are ready to pay taxes on the returns of assets obtained with unlawful proceeds, providing them with some legal protection for their illegal operations.[68] Understanding the cash flow cycle and the launderer's aims is critical for detecting different schemes because no two schemes will be set up identically.

The two books by Alldridge and Stessens are central to this study because they identify pertinent issues relating to the roles of played by institutions within the ML cycles. At the layering stage, banks and related financial institutions, being the first line of defense, are expected to take a risk-based approach and flag suspicious transactions. The reporting institutions relay this questionable transaction reports to the financial intelligence unit for analysis and dissemination to the relevant institutions. Where further investigations are required or further monitoring of bank accounts, the intelligence and investigative authorities are mandated to do so. If the analysis involves tax and bribery related funds, the tax and anti-corruption institutions are called upon.

The authors offer best practices, which will be one of the key recommendations in this study. The current study will rely on the two authors to discuss international ML practices. While the two authors were published almost a decade ago, the current study will focus on later FATF Recommendations that has informed the current AML institutional framework in Kenya.

In the grand scheme of things, this literature effectively depicts money launderers' aims, the money laundering process, and the best practice in AML. However, a closer examination of the details reveals a generalized approach whose effectiveness and accuracy might be limited in certain contexts particularly in the west. This study will seek to bridge that gap by linking the international AML best practices to local best fit interpretation and implementation.

[68] Dietz (n 62) p.25.

1.8.2 The Institutional Weaknesses of Developing Countries

Anti-Money Laundering (AML) is defined as a set of policies, processes, and technologies that are designed to prevent money laundering. It is used to monitor possibly fraudulent behaviour in government networks and huge financial organizations. Thus, the very nature of AML requires strong robust and well-funded institutions to carry out their specific mandates.

One of the thorny issues in domesticating treaties, Agreements/Understandings or General Resolutions of public international organizations, is the developed countries versus developing countries' expectations. The former will not hesitate to lobby for hurriedly drawn laws and establishment of institutions to domesticate and entrench international obligations under such treaties and agreements, leaving the latter no option for fear of facing soft sanctions and international pressure for blacklisting. As is always the case, this is regularly in disregard of the distinct socio-economic circumstances of developing countries such as funding, competing budgetary needs, skills and political will.

In discussing the challenges of implementing effective AML policies and structures, Money-laundering activities, according to Parashar, are being pushed into developing countries to mirror a comparable status in the industrialized world, where regulations are more stringent.[69] To compound the problems of developing counties, they had to give in to pressure of adopting AML policies, despite this not being a priority in light of broader challenges within the third world countries. The unfortunate end was that the AML frameworks and institutions in place did not effectively address the uniqueness of developing countries such as Kenya. As the challenges mentioned resulted in poor inter-agency co-ordination between all Government agencies involved in combating AML, specific institutional weaknesses within the FRC, AMLAB and ARA, continued transnational organized crime, tax evasion, corruption, illicit trade flows, theft and drug trafficking.

The 30-year-old FATF model has not been an easy journey for Kenya and her counterpart developing countries. For members, the FATF model entails enacting legislation to make

[69]Neha Parashar, 'Factors Affecting Money Laundering: A Lesson for Developing Countries' (2020) 3 32 <http://www.publishingindia.com/GetBrochure.aspx?query=UERGQnJvY2h1cmVzfC8xMTg5LnBkZnwvMTE4OS5wZGY=> accessed 26 April 2020.

money laundering a criminal offense, providing for the freezing and confiscation of criminal assets, ratifying related international conventions, establishing due diligence and Know Your Customer requirements, establishing records on suspicious transaction reports, and establishing financial intelligence units (FIUs).

The myriad of institutions involved so as to align to the FATF Recommendations has not come easy to developing countries, the costs, the inception of several institutions, working out inter-agency modes of operations has caused severe challenge for Kenyan institutions. Sharman[70] pointed out that the FATF initially mirrored the Vienna Convention[71] in emphasizing the significance of enacting legislation to make money laundering illegal. The FATF Recommendations, in a significant break from the Vienna Convention, stated that the criminal justice system alone was insufficient to combat money laundering. Instead, it was vital to focus on preventing and regulating money laundering through private financial institutions. As a result, private financial businesses that adhere to FATF-mandated guidelines enacted by national governments have borne the brunt of the burden of combating money laundering.[72] Specifically, financial institutions and Designated Non-Financial Businesses and Profession (DNFBPs) to apply "Know Your Customer" rules and report "suspicious transactions" to FIUs. These FATF requirements have thus strained the nascent FIUs, banks and DNFBPs have to now make budgetary allocations for AML purposes yet they are in profit making businesses. Sharman concludes, in his research paper, just as found by Prosper[73], the burden shift from tackling AML to complying with the law. This has the effect of weakening the AML institutions that Kenya is trying to grow. The low budgetary allocation by developing countries towards AML institutions will be understood from reading of this literature, for instance, despite the enactment of the AML law in 2009, the Kenyan FRC has to date never published an annual report, remains in the

[70]JC Sharman, 'Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States' (2008) 52 International Studies Quarterly 635 <https://academic.oup.com/isq/article-lookup/doi/10.1111/j.1468-2478.2008.00518.x> accessed 26 April 2020.
[71]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[72]JC Sharman, 'Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States' (2008) 52 International Studies Quarterly 635, 640 <https://academic.oup.com/isq/article-lookup/doi/10.1111/j.1468-2478.2008.00518.x> accessed 26 April 2020.
[73]Prosper Maguchu, 'Revisiting Money-Laundering Legislation in Zimbabwe and the Role of International Organisations' (2018) 27 African Security Review 278 <https://www.tandfonline.com/doi/full/0.1080/10246029.2018.1544915> accessed 26 April 2020.

shadow of the Central Bank of Kenya (CBK) and thus fights for budgetary allocation between itself, CBK and the Asset Recovery Authority (ARA).

The perceived lack of technical capacity, funding and allocation of offices for the Anti-Money Laundering Advisory Board (AMLAB) the AML policy making body and Kenya's non-membership of the Egmont Group are factors this study will interrogate for being among the basis for institutional weaknesses.

1.8.3 Government's Multi-Agency Approach in Curbing Money Laundering

A discussion in combating the crime of ML is incomplete without a discussion of the institutions involved in AML efforts and the supporting agencies. In the larger context of eradication of corruption, AML efforts are key to achieving this**.** In context of the Kenyan legal and institutional framework in the implementation of the Convention against Corruption[74], the UNODC Country Report[75]alluded to the multi-agency approach towards fight against corruption.

The Report will be useful in this study since it analyzes Kenya's progress in creating an effective anti-money laundering system (legal, regulatory and institutional). The POCAMLA and its implementing Regulations (2013), the Central Bank of Kenya (CBK) Act, and the CBK's rules, circulars, and recommendations, particularly the CBK Prudential Guidelines of 2013, make up the AML legal framework. The POCAMLA also names a group of entities to serve as AML supervising authorities. The Financial Reporting Centre (FRC), established in Section 21 of the POCAMLA, is the AML supervisory authority for designated non-financial companies and professions (DNFBPs) that do not have a regulator or self-regulatory organization (SRO). All financial institutions[76] and DNFBPs are expected to have internal AML systems in place that cover Customer Due Diligence (CDD) requirements such as "Know Your Customer" (KYC) standards and beneficial owner identification, ongoing transaction monitoring, record keeping,

[74]The United Nations Convention against Corruption (adopted 31 October 2003 entered into force 14 December 2005) UNTS 2349 (p.41) (UNAC). 2005.
[75]United Nations Office on Drugs & Crime, 'Country Review Report of The Republic of Kenya - Review by Democratic Republic of the Congo and New Zealand of the Implementation by Kenya of Articles 5-14 and 51-59 of the United Nations Convention against Corruption for the Review Cycle 2016-2021' (UNODC 2019) <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2019_07_08_Kenya_Final_Country_Report_English.pdf> accessed 25 April 2020.
[76]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 2.

enhanced due diligence in higher risk situations, and reporting of suspicious transactions, according to the POCAMLA.

The POCAMLA further establishes the Asset Recovery Authority (ARA)[77], and the Report has alluded to its successes and failures since its inception. The ARA is a self-governing agency tasked with identifying, freezing, and seizing assets that are the proceeds of crime in order to combat money laundering. Nyaga[78], has discussed the Report and the Multi Agency Team (MAT) approach to fighting corruption. The MAT was established in 2005; it is not anchored in law; it rather stemmed from a Presidential directive in November 2015. MAT embodies multi-agency cooperation, coordination, and partnership in the fight against corruption. The MAT framework was established by the following core members: (i) Ethics and Anti-Corruption Commission, (ii) Office of the Director of Public Prosecutions, (iii) 3. Directorate of Criminal Investigations; (iv) Financial Reporting Centre; (v) National Intelligence Service; (vi) Asset Recovery Agency; (vii) Office of the President; and (viii) Attorney General's Office and Department of Justice.

MAT has also continuously co-opted other agencies on a need basis. Some of these co-opted members include Central Bank of Kenya; National Land Commission; Kenya Revenue Authority (KRA); Anti-Counterfeit Agency, Kenya Wildlife Services; National Transport Safety Authority[79]. The MAT framework focusses on asset recovery, mutual legal assistance, corruption, economic crimes and other organized crimes; disruption of cartels and syndicates. The Report and Article by Nyaga were reviewed and will form a key guide in this study as they inform of the cooperating institutional framework in fighting AML, which is a sub-study of the bigger fight in elimination of corruption and corrupt practices in Kenya.

[77]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 53.
[78]Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency Experience in Fighting Corruption in Kenya' (2017).
[79]United Nations Office on Drugs & Crime, 'Country Review Report of The Republic of Kenya - Review by Democratic Republic of the Congo and New Zealand of the Implementation by Kenya of Articles 5-14 and 51-59 of the United Nations Convention against Corruption for the Review Cycle 2016-2021' (UNODC 2019) <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2019_07_08_Kenya_Final_Country_Report_English.pdf> accessed 25 April 2020.

1.8.4 The Money Launderettes

Aside from criminal anti-money laundering legislation that, in principle, applies to citizens, anti-money laundering legislation frequently applies to specific types of institutions and professions. Unlike criminal law, which focuses on money launderers, preventive legislation focuses on money launderettes, or institutions and professions that are vulnerable to being used for money laundering.[80].

Looking at the Kenyan AML regime as contextualized within the broader international framework, Gikonyo[81] studies the loopholes in the current AML framework in Kenya. Specific to this study that is interrogating the AML institutions, Gikonyo discusses the reporting obligations of the potential money launderettes. The preventative perspective of AML targets the financial institutions and designated non-financial businesses and professions (DNFBPs). The law has created various reporting obligations[82]for both the financial institutions and the DNFBPs as defined in Section 2[83]. The journal discusses the need to enlarge the scope of DNFBPs from accountants to other professions that knowingly engage in ML practices. In a 2003 modification of its Forty Recommendations, the FATF recommended that the worldwide AML regime's prevention pillar be extended to lawyers, notaries, other independent legal professionals, accountants, and trust and company service providers involved in specified activities.[84] Once the scope of reporting institutions is enlarged, it is expected that the efficacy of the law and AML institutions will be achieved.

The study, however, indicates that Kenya is lagging behind in legislating FATF Recommendation 12, as POCAMLA only gives an obligation to accountants in certain

[80]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000).
[81]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.
[82]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 44.
[83]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.
[84]Michael Levi and Peter Reuter, 'Money Laundering' (2006) 34 Crime and Justice 289 <https://www.journals.uchicago.edu/doi/10.1086/501508> accessed 28 March 2020.

circumstances[85]. The recommendations of the author will enrich Chapter 5 of this study as we seek to propose certain reforms in the AML policy and institutional framework.

In a study carried out by the Gikonyo[86], specifically addressing the Kenyan legal profession and its contribution in the fight against money laundering, the study proposes the development of an efficient and effective AML framework through a consultative process that will balance the objectives of AML and client-confidentiality[87].The journal has identified the need to fully comply with the FATF Recommendation[88] 12 and 16, which would enhance Kenya's effectiveness in fight against ML on the global plane. It was noted earlier in this study that Kenya's application to join the Egmont Group of financial intelligence units remains pending to date[89]. This study by the Kenyan author will enrich the recommendations to comply with FATF, as it is only though such compliance will Kenya reap her full benefits of membership in global AML institutions, and in this case the Egmont Group.

The study by Gikonyo is particularly in sync with the problem being addressed in this research. This is because it touches on one crucial aspect of the ineffectiveness of AML institutions in Kenya which is lag in compliance to the international best practices. However, there needs establishing whether this is the result of other fundamental problems or the cause. A third option would be the story of the chicken and the egg where, the problem causes ineffective AML institutions which make the institutions weak and unable to comply… and the cycle continues to the detriment of the AML efforts.

[85]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.

[86]Constance Gikonyo, 'The Legal Profession in Kenya and Its Anti-Money Laundering Obligations or Lack Thereof' [2019] Journal of Money Laundering Control.

[87]Constance Gikonyo, 'The Legal Profession in Kenya and Its Anti-Money Laundering Obligations or Lack Thereof' [2019] Journal of Money Laundering Control 254.

[88] 'FATF Standards - 40 Recommendations Rc.Pdf'. "The Financial Action Task Force is an inter-governmental body which sets standards, and develops and promotes policies to combat money laundering and terrorist financing. It currently has 36 members: 34 countries and governments and two international organisations; and more than 20 observers: five FATF-style regional bodies and more than 15 other international organisations or bodies"

[89]Vincent Ngethe, 'How Joining the Egmont Group Could Help Kenya' (*Daily Nation*, 8 September 2015) <https://www.nation.co.ke/newsplex/how-joining-the-Egmont-Group-could-help-Kenya/2718262-2826272-nb29i3z/index.html> accessed 22 March 2020.

1.8.5 Summary of Literature Reviewed

The issues identified by the authors above are quite pertinent to this study. However, the authors have dealt with the various topics in their studies differently from the current study for two reasons. First, some of the authors have dealt with AML institutions founded in jurisdictions other than Kenya, for instance, the South Africa, US and UK. Secondly, some authors have dealt with specific ML issues such as duty of legal professionals, role of financial institutions and the preventative and enforcement framework of AML.

On the other hand, the current study is specific to Kenya, deals with the Kenyan AML institutional framework in a current and more holistic way and seeks to identify the inadequacies of the framework.

The author notes that the field of AML institutional efficacy is under-researched and also not a key study module at graduate level. The study will reveal the gap and lead to one of the key recommendations of having AML as a thematic area of study so as to build research interest among new scholars.

1.9 Research Methodology

This was primarily a doctrinal study that used primary sources such as cases and statutes as well as secondary material like published texts, articles and journals from online publishers and libraries. In particular, the primary source will be the POCAMLA and the enabling Regulations together with the FATF 40+9 Recommendations in enabling the researcher state the expected international best practices.

This study uses a doctrinal research approach, which analyzes legal principles, concepts, and doctrines to find quick answers to the practical challenges at hand. As a result, it serves as a handy reference for researchers who don't have the time to conduct the study themselves. Moreover, conducting a doctrinal research takes less time. This research approach ensures a steady stream of material on a regular basis, provides insights into the evolution and development of the law, provides a logical explanation for the law, while also highlighting discrepancies and uncertainties. It is also easier to identify gaps, ambiguities, and inconsistencies in the law, resulting in a more focused and successful study outcome.

Furthermore, doctrinal research lays out a roadmap for developing the law while avoiding pitfalls, it aids in the accumulation of legal information, future legal direction can be projected based on such studies, and it provides a solid foundation for non-doctrinal research. Because non-doctrinal inquiry would be directionless and thereby worthless without the necessary basic Knowledge. Despite the advantages of the approach taken, this research could have benefited from meetings with experts and agents of the various institutions discussed here. However, that was not to be, as setting up meetings was a challenge as this research took off right at the onset of COVID-19. Online meeting measures had not been adopted at the time of this research and the priorities of public officers had been redefined.

The primary limitation of this mode of research is the fundamental assumption that secondary sources depict an accurate account of the information. Further limitations included the costly value of some important journals and books, depriving the author the privilege of additional perspectives.

This research makes an anecdotal reference to South Africa that has implemented a robust AML institutional framework. Among other reasons, South Africa’s success can be attributed to her adoption of significant global anti-money laundering treaties. Further, because both Kenya and South Africa are categorized as developing countries, South Africa's anti-money laundering framework would be a good starting point for benchmarking. Finally, South Africa has held the FATF presidency from July 2005 to June 2006 and is a member of the Egmont Group. As a result, when it comes to examining Kenya's institutional AML framework, South Africa would be an excellent resource.

1.10 Chapter Breakdown

The study is comprised of four chapters. Chapter One is the introduction to the study and includes the background, statement of the problem, research questions, general objectives, hypothesis, justification for the study, theoretical framework, literature review, research methodology and chapter breakdown.

Chapter Two is an examination of the AML institutional framework in general. The aim of this Chapter is to examine the current institutions and instruments that have globally formed the basis for development of anti-money laundering laws.

Chapter Three is a review of the key statutory agencies / institutions involved in reporting, prevention and enforcement of anti-money laundering law in Kenya and detailed successes and challenges they face or have been facing in their efforts to curb the crime of ML. In addition, the chapter will delve into an analysis of the shortcomings of the Kenyan institutional AML framework based on the global standards and best practices set by its membership of regional and international money laundering institutions as well as international conventions.

Chapter Four delves into the South African AML regime in a bid to draw best practices that can be emulated by Kenya. The successes of South Africa's institutions have also been discussed and lessons from these successes summarized.

Chapter Five comprises the findings conclusion and appropriate recommendations towards a more effective AML framework, based on the research carried out and the best practices identified.

CHAPTER TWO

INTERNATIONAL, REGIONAL & NATIONAL INSTITUTIONS & INITIATIVES IN ANTI-MONEY LAUNDERING

2.1 Introduction

Money laundering (ML) as a global concern and its overall negative impacts on a national and global scale were explored in the previous introduction chapter. If left unchecked, ML crime accelerates crime and illegal activities, has an economic impact, impairs financial market integrity, undermines the legitimate private sector, results in income loss, poses security dangers to privatization initiatives, and has reputational and societal implications. Money laundering is a transnational crime by definition, and attempts to combat it have cascaded from the global to regional organisations like the East African Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and then to the national level. Kenya's experience in detecting, preventing, and investigating money laundering have been introduced, and a decade later, there is empirical information to support an assessment of her AML institutional structure.

Kenya has domesticated a large number of these international obligations through the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) Cap 59B and other related AML laws. In terms of collaboration, members of these ML treaties were encouraged to ratify relevant international conventions on money laundering, search, seizure, and confiscation of proceeds of crime, as well as mutual legal aid through competent institutions, in accordance with Recommendation 35. This chapter also covers the expected collaboration as a result of the recognition of money laundering as an extraditable offense. This will also set the historical background of Kenyan AML institutions by looking deeper at the source in international instruments.

Section 2.2 is a comprehensive review of Kenya’s treaty based initiatives in the AML field that have set the stage for her institutions to discussed in Chapter 3. The Section will look at the global gaps that lead to adoption of the three main treaties that have provided for intense efforts to alleviate the crime of money laundering. Section 2.3 reviews the treaty based initiatives adopted by Kenya, which have been mainly positions taken by groups of nations globally or

regionally in dealing with money laundering. These discussions are necessary in reviewing the AML efforts made by Kenya in creating institutions to support AML. The international treaties and institutions have created obligations that have led to creation financial intelligence units, asset recovery organizations and stiffer penalties for crimes related to AML. These discussions will achieve the aim of Chapter 2, which is an in-depth analysis of regional and global actions that have led to the establishment of AML related institutions.

2.2 Treaty Based Global Initiatives by Kenya

Internationally and regionally, Kenya is party to various conventions and institutions relating to prevention, enforcement and combating the crime of money laundering. These conventions and institutions are key to creating common rules, guidelines, best practices and regulations for the member states. The membership in these international organizations creates treaty based binding obligations. Treaties create obligations that bind member states and consequently creating benchmarks against which the effectiveness of the respective frameworks would be evaluated. Further, the POCAMLA provides obligations relating to (Money Laundering) ML, which the country has largely conformed. In an endeavor to shield the economy from wanton effects of money laundering, the POCAMLA created institutions to detect, enforce and prevent/deter the crime of ML and other predicate offences.

Following the September 2011 terror incident in the United States, the subject of terrorism financing was linked to the impacts of money laundering, resulting in the addition of nine new Financial Action Task Force (FATF) recommendations to the FATF-40. After three decades, the international AML standards can now be deemed to have reached a new level of maturity, with over 200 nations and nine FATF Styled Regional Bodies as members (FSRBs).[1] When the FATF released the amended requirements, several assessor bodies throughout the world began a new round of compliance reviews.[2] It was evident that declaring political support for the international

[1]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020.

[2] "Compliance with AML/CFT assessments are conducted by the IMF and the World Bank in the context of the Financial Sector Assessment Program as well as by the FATF and the FATF-Style Regional Bodies (FSRBs) in a process of mutual evaluations amongst their members". "All AML/CFT assessments are carried out in accordance with a commonly agreed assessment methodology. Reference to 'assessor bodies' is therefore a reference to the IMF, the World Bank, FATF and all FSRBs. Currently, there are 9 FATF-Style Regional Bodies representing different regions of the world"

norm or simply passing legislation and regulations was no longer regarded progress at this point. What matters is that each member state effectively implements anti-money laundering (AML) and counter-terrorist financing (CFT) measures. This raises the question of whether an AML/CFT policy is operationally successful.[3]

The AML/CFT standard is a collection of measures that can be summarized as follows: "(1) Making money laundering and terrorist financing illegal, (2) the establishment of freezing, seizure, and confiscation systems, (3) subjecting a variety of businesses and professions to preventative regulatory requirements, (4) the establishment of an FIU, (5) the creation of an effective supervisory framework, and (5) the establishment of channels of communication. The AML system aims to accomplish a number of goals, including (1) removing profit from crime through confiscation, (2) detecting crime by following the money trail, (3) targeting third-party or professional launderers who allow criminals to retain the only link to the proceeds of crime through their services, and (4) targeting the upper echelons of criminal organizations whose only link to the proceeds of crime is the money trail, and (5) protecting the integrity of the financial system against abuse by criminals."[4]

To now support these rather intricate and complex nature of AML Standards and System, international, regional and national bodies have been set up. The national institutions have been set up mainly in compliance to the conventions and international agreements binding member states. Further, in actualizing the AML global system and standards, Kenya has created institutions by dint of the POCAMLA.

The AML regime has evolved towards internationalization as a result of the cross-border nature of ML practices. The Vienna Convention on Drug Trafficking,[5] the Palermo Convention, [6] the

[3]Carrington Ian and Heba Shams, 'Elements of an Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity' (2006).
[4]Carrington Ian and Heba Shams, 'Elements of an Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity' (2006) 3–4.
[5]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[6]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.

Convention Against Corruption,[7] and the International Convention for the Suppression of the Financing of Terrorism (1999), all of which contain provisions relating to the tracing, freezing, seizing, and confiscating instrumentalities and proceeds of crime, have all contributed to the internationalization of ML.

2.2.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[8]

Citing from Amrani[9] the UN Vienna Convention[10] built a foundation for implementing international standards and establishing the bar for global anti-money laundering operations. The Vienna Convention, as a globalization of the criminal aspect of money laundering, required each state signatory to the treaty to outlaw the laundering of narcotics proceeds. Each state party is bound by the Convention's binding authority. It means that under the Law of Treaties principle of *pacta sunt servanda*, member states are bound by the duties imposed by the Convention.[11].

The Convention establishes an AML framework for a number of concerns, including the definition of money laundering, enforcement methods, and international collaboration. The Convention served as a foundation for promoting cooperation in the areas of criminal proceeds

[7] United Nations Convention against Corruption 2005. Article 14 on measures to prevent ML, Each state party shall: (a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions.

[8]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).

[9]Hanafi Amrani, *The Development of Anti-Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement, and Their Implications on the Effectiveness in Countering Money Laundering* (Erasmus University, Rotterdam 2012) 56 <https://repub.eur.nl/pub/37747/> accessed 24 March 2020.

[10]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).

[11]. "Pacta sunt servanda is a Latin term, which means agreements must be kept. It is the principle in international law, which says that international treaties should be upheld by all the signatories. The rule of pacta sunt servanda is based upon the principle of good faith. The basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to pacta sunt servanda is the peremptory norms of general international law (jus cogens) which means compelling law."

seizure, [12] extradition, [13] mutual legal assistance, [14] and transfer of proceedings. [15] Despite the fact that the Convention's reach and scope were limited to drugs-related crimes as predicate offenses, it played a vital role in bringing the subject of money laundering into the worldwide spotlight. The Strasbourg Convention of 1990, the Convention against Terrorist Financing of 1999, the Palermo Convention of 2000, and the Convention against Corruption of 2005 have all been praised for laying the groundwork for other international accords and intergovernmental initiatives (such as the FATF) (the Strasbourg Convention of 1990, the Convention against Terrorist Financing of 1999, the Palermo Convention of 2000, and the Convention against Corruption of 2005).

The Vienna Convention provides for reciprocal legal aid in investigations, prosecutions, and judicial proceedings. [16] Mutual assistance is separated into three categories: investigative assistance to locate and track property and acquire documentation; temporary measures to freeze or seize property in the requested party's jurisdiction; and enforcement of confiscation orders issued by another country. Article 7(5) requires parties not to decline, on the basis of bank secrecy, in order for mutual legal assistance to proceed smoothly. Finally, the Vienna Convention stipulates that the parties enter into bilateral and multilateral conventions for the purposes of confiscation, extradition, and mutual legal assistance in all aspects of investigations, prosecutions, and judicial procedures.[17]

[12]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988), Article 7.
[13]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988), Article 6.
[14]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988), Article 7.
[15]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988), Article 8.
[16]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988) Article 7 (i).
[17]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988), Article 5(4)(g); 6(11) and 7(20).

The author believes that the central objective of this international approach by the Vienna Convention was to have countries share the same vision, mission, and strategy and to facilitate international collaboration to prevent and combat drug trafficking and money laundering. It is difficult to maintain collaboration, for example, if one government considers ML a crime but another does not. When the predicate offence(s) underlying the ML offense are not the same in both countries, the same conditions apply. As a result, countries that cooperate in areas like extradition or mutual legal assistance must follow the principle of dual criminality, which holds that a crime is punishable in both the requesting and receiving countries.[18]

The key takeaway is that the Vienna Convention was the first to create aspects of investigations, property tracing, interim measures to freeze or seize property and the enforcement aspects. This would become the main institutional frame recommended under FATF for compulsory adoption by member states leading to national institutions as FIUs, asset recovery agencies and the AML reporting institutions (financial and non-financial based).

2.2.2 The International Convention against Transnational Organised Crime[19]

The International Convention against Transnational Organized Crime was established by the United Nations in order to expand the battle against international organized crime. This Convention contains a comprehensive collection of regulations aimed at combating organized crime, and countries who ratify it commit to incorporating the articles into domestic law. [20] The Convention entered into force on September 29, 2003, and Kenya ratified it on June 16, 2004. Its anti-money laundering rules are based on the Forty Recommendations on Money Laundering by the FATF.

This Convention's goal is to promote international cooperation in the prevention and fight against transnational organized crime. The Convention affirms that parties would fulfil their

[18]Hanafi Amrani, *The Development of Anti-Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement, and Their Implications on the Effectiveness in Countering Money Laundering* (Erasmus University, Rotterdam 2012) 54 <https://repub.eur.nl/pub/37747/> accessed 24 March 2020.
[19]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.
[20]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000 Article 5 (1).

obligations under the Convention according to the principles of sovereign equality, territorial integrity, and non-interference in the internal affairs of sovereign nations.

According to the Palermo Convention, money laundering is defined as the conversion or transfer of property with knowledge that it is proceeds of crime with the intent of concealing or disguising the illicit origin of the property or assisting any person involved in the commission of the predicate offence to avoid the legal consequences of his actions. It further defines it as The concealing of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, with knowledge that such property is the proceeds of crime; and subject to those constitutional provisions and the essential notion of its legal system. [2122] Acquisition, possession, or use of property with knowledge that the property is the profits of crime at the time of receipt; involvement in an association or conspiracy to commit, as well as aiding, abetting, facilitating, and counseling the commission of any of the crimes listed in this article. The Convention, in contrast to the Vienna Convention, broadens the definition of laundering charges to include all crimes, not just drug offenses.

2.2.3 The United Nations Convention against Corruption[23]

When the UNCAC was opened for signature on December 9, 2003 in Merida, Mexico, Kenya was the first state party to sign and ratify it. [24] The UNCAC was adopted on October 31, 2003, and came into force on December 14, 2005. The main purpose of the UNCAC is to ensure that all state parties prohibit corruption and implement measures to prevent it. The Convention has gone even farther to outlaw the laundering of proceeds of corruption, [25] and the criminalization of proceeds of crime is further consolidated in Article 14 with provisions on anti-money laundering measures. It is by dint of this Article 14 of UNCAC that the Multi-Agency Taskforce (MAT) was formed in Kenya and further this Article is the bedrock of the enforcement and preventive institutional framework for combating AML.

[21]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 6.
[22] ibid Article 6.
[23]The United Nations Convention against Corruption (adopted 31 October 2003 entered into force 14 December 2005) UNTS 2349 (p.41) (UNAC). 2005.
[24]The United Nations Convention against Corruption (adopted 31 October 2003 entered into force 14 December 2005) UNTS 2349 (p.41) (UNAC). 2005.
[25]The United Nations Convention against Corruption (adopted 31 October 2003 entered into force 14 December 2005) UNTS 2349 (p.41) (UNAC). 2005, Article 23.

It's worth noting that, just as anti-corruption instruments refer to AML directly, so do AML instruments refer to anti-corruption measures. For instance, the FATF Methodology (2013) emphasizes on Page 2, paragraph 7 that an efficient AML system also necessitates the presence of some structural features that are not covered by the AML assessment criteria. Appropriate measures to prevent and fight corruption should be among these factors, including where information is available, laws and other related measures, participation by the jurisdiction in regional or worldwide anti-corruption initiatives (such as the UNCAC), and the impact of these measures on countries.[26]

Customer and beneficial owner identification, record-keeping, cash-flow monitoring, and suspicious activity reporting are all covered by Article 14 of the UNCAC. These provisions of Article 14 are based on well-established anti-money laundering (AML) standards that set customer due diligence[27] (including Know Your Customer (KYC) and account monitoring procedures), reporting, [28] and record-keeping[29] obligations that the legislation imposes on certain persons. [30] In conclusion, the UNCAC recognized the significance of AML framework as its plays a role in tracing and recovering the proceeds of corruption. In the succeeding chapter, we will see how the UNAC Convention requirements have informed and been integrated in Kenyan initiatives and institutions involved in curbing ML.

[26]Indira Carr and Miriam Goldby, 'The United Nations Anti-Corruption Convention and Money Laundering' [2009] May 25, 2009 25, 12 <https://ssrn.com/abstract=1409628> accessed 27 May 2020.
[27] See FATF Recommendations 5-11. The BCBS created the foundation for customer due diligence standards in it 2001 document Customer Due Diligence for Banks, October 2001, as supplemented by General Guide to Account Opening and Customer Identification, February 2003. Both are available at http://www.bis.org/list/bcbs/tid_32/index.htm.
[28] See FATF Recommendations 13-15
[29] See FATF Recommendation 11
[30]Indira Carr and Miriam Goldby, 'The United Nations Anti-Corruption Convention and Money Laundering' [2009] May 25, 2009 25, 15 <https://ssrn.com/abstract=1409628> accessed 27 May 2020.

2.3 Non-Treaty Based International Organisations

2.3.1 The Basel Committee on Banking Supervision[31]

The Basel Committee on Banking Supervision (BCBS) is one of the key AML international institutions and whose actions towards AML efforts can be traced far back to 1988. The BCBS is not treaty based but a committee of central banks and is instrumental in deploying prudential guidelines including AML/CFT Guidelines to financial institutions that must be adopted by members within their respective policy frameworks, with the latest being the Introducing of guidelines concerning the interaction and cooperation between prudential and AML/CFT supervision.[32]

The BCBS is concerned with the internationalization of the idea of financial regulations prohibiting the use of financial institutions for the purpose of money laundering. The Basel Principles[33] laid the groundwork for the majority of today's anti-money laundering (AML) regulations. Legal, institutional, and regulatory requirements have built on this foundation to make certain chargeable conduct within the illicit transit of funds. Countries such as the United States previously opposed these ideas, in particular challenging efforts to require financial companies to identify the source of customer cash. This was because banks, in particular, believed they would be held liable for their clients' unlawful activities. The final requirement, after much debate, was for stronger know-your-customer requirements, which required authentication of an individual's identity via an official government-issued identity document and the keeping of documents used to open accounts.[34]

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[31] The Basel Committee on Banking Supervision (BCBS) is a committee of banking supervisory authorities established by the central bank governors of the Group of Ten countries in 1974. In 2019, the BCBS had 45 members from 28 Jurisdictions, consisting of Central Banks and authorities with responsibility of banking regulation. The BCBS provides a forum for cooperation on banking supervisory matters. Its objective is to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide. The Committee frames guidelines and standards in different areas – some of the better known among them are the international standards on capital adequacy, the Core Principles for Effective Banking Supervision and the Concordat on cross-border banking supervision

[32] Latest AML/CFT Guidelines issued on 6 February, 2020 available at https://www.bis.org/bcbs/publ/d483.pdf

[33] Basel Principles of 28 December 1988 issued by the Basel Committee on Banking Regulation and Supervisory Practices available at https://www.bis.org/publ/bcbsc137.pdf accessed on 18/04/2020.

[34] Jonathan E Turner, *Money Laundering Prevention : Deterring, Detecting, and Resolving Financial Fraud* (John Wiley & Sons Inc) 159–160.

The Basel Committee does not force any law, but provides very strong recommendations through its statements of principles ensuring best practices in banking supervision. In Kenya through the prudential regulation by the CBK, we have cascaded the Basel Principles published as the AML Prudential Guidelines as Supervisory Standards and Guidelines for purposes of curbing money laundering even before the POCAMLA came to effect. This has had the consequence of creating a very strong institution in combating ML within the CBK framework and as we shall note later, the Kenyan FIU was initially a unit of the CBK.

The Central Bank of Kenya (CBK) published the Guideline on Proceeds of Crime and Money Laundering (Prevention) - (AML Guideline) prior to the enactment of the POCAMLA, as part of its obligation to provide directives under Section 33(4) of the Kenyan Banking Act (Cap 488).It is these AML Guidelines that had earlier in 1988[35] been cascaded down to central banks by the BCBS. The BCBS 1988 Statement of Principles echoed the Committee of Ministers of the Council of Europe's report,[36] which stated that the growing international component of organized crime, particularly in the narcotics trade, has motivated international collaborative actions. [37], the Council concluded that "*…and the banking system can play a highly effective preventive role while the cooperation of the banks also assisting in the repression of such criminal acts by the judicial authorities and the police".* The BCBS Principles focused on measures to prevent criminals from the launder of illegal proceeds through the financial system, attracting increased attention from legislative authorities, law enforcement agencies, and banking supervisors in a number of countries. It is due to this historic perspective that CBK became a very strong institution in the fight against ML, and which role it continues to play within the financial sector.

2.3.2 FATF (Financial Action Task Force)

The Financial Action Task Force (FATF) is the international watchdog on money laundering and terrorism financing. FATF states that it is "*leading global action against money laundering,*

[35] Basel Committee on Banking Supervision, BIS, 'Principles on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering' <https://www.bis.org/publ/bcbsc137.htm> accessed 20 April 2020.
[36] Measures against the transfer and safeguarding of funds of criminal origin. Recommendation No. R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27th June 1980.
[37] ibid

terrorist financing and the financing of proliferation of weapons of mass destruction"[38]. The FATF studies money laundering and terrorist funding strategies and updates its recommendations as needed to address new dangers, such as virtual asset regulation, which has become more prevalent as the use of crypto currencies has grown. The FATF monitors countries to ensure that they are following the FATF Standards fully and effectively, and holds those who do not comply accountable.[39]

The Financial Action Task Force (FATF) is an institution of governments that develops international guidelines to combat money laundering and the problems it causes. Being a policy making organization, the FATF attempts to generate the political will needed to achieve national legislative and regulatory reforms in these areas. More than 200 countries have signed the FATF's commitment to execute its recommendations. FATF Recommendations, commonly known as FATF Standards, ensure a global coordinated response to organized crime, corruption, and terrorism. The Recommendations assist authorities in pursuing offenders' assets related to illegal drugs, human trafficking, and other crimes.[40]

Some state delegations questioned the appropriateness of utilizing UN Conventions to regulate money laundering by the end of the Vienna Convention deliberations[41]. The Vienna Convention took over ten years to negotiate, making it the least probable arena for regulating the highly adaptable financial industry.[42] In response, the United States suggested a one-year fact-finding task group to list all AML laws in existence around the world.

FATF was an 11-member task force[43] with a one-year mandate[44] when it was established in 1989, and its main purpose was to block the flow of funds from the illicit narcotics trade. In the

[38]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020.
[39]FATF, 'About - Financial Action Task Force (FATF)' (18 April 2020) <https://www.fatf-gafi.org/about/> accessed 18 April 2020.
[40]FATF, 'About - Financial Action Task Force (FATF)' (18 April 2020) <https://www.fatf-gafi.org/about/> accessed 18 April 2020.
[41]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[42]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.
[43] "In 1989, the G7 created the Financial Action Task Force, to stem the financial flows associated with drug trafficking. The task force had 16 members: the Summit participants (Canada, European Commission, France, Germany, Italy, Japan, the United Kingdom and the United States) as well as eight additional countries, to enlarge

decades thereafter, FATF members have widened their focus to include international crime, terrorism financing,[45] and the development of weapons of mass destruction. FATF's current goals[46] are to develop standards and support the successful implementation of legal, regulatory, and operational measures to combat money laundering, terrorist funding, and other risks to the international financial system's integrity. [47]

FATF is a worldwide public policy network in terms of governance and membership. The IMF, World Bank, and World Customs Union are among its members. FATF also involves a wide range of people and institutions as part of its consultative network, which includes representatives from private sector organizations directly affected by FATF's activities, such as bankers, attorneys, accountants, and non-profit organizations.[48]

The central theme of FATF is the FATF 40 Recommendations, which now member states adopt in their national AML framework to meet the goal and objective set forth in the relevant recommendations. FATF plenary meetings happen thrice in a year with one of the plenaries being hosted in Paris, France.

The FATF has some of the most extensive monitoring powers of any international agency. There are two main mechanisms for monitoring. Mutual evaluation is the first and most essential method. All states that want to comply with FATF criteria are subjected to these intrusive evaluations on a rotational basis. An on-site visit by a team of experts is part of the evaluation. Other FATF members or representatives from international organizations make up the

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the FATF's expertise and to reflect the views of other countries particularly concerned by or having a particular experience in the fight against money laundering (Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden and Switzerland)."

[44]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109, 115 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.

[45] "By 2001, the FATF's success as an anti-money laundering standard-setting body led to a significant change to its mandate. Following the terrorist attacks of 11 September 2001 in the United States, the FATF took immediate action and developed clear standards to prevent terrorist financing. This expanded the FATF's mandate to include the fight against terrorist financing. The FATF's new Special Recommendations provided countries with powerful tools to trace and intercept terrorists' assets and pursue individuals or countries involved in terrorist financing."

[46]FATF, 'About - Financial Action Task Force (FATF)' (18 April 2020) <https://www.fatf-gafi.org/about/> accessed 18 April 2020.

[47]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020.

[48]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109, 116 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.

monitoring team, which conducts interviews on relevant actors carry out site visits. The inspections team's result is a detailed report that follows a standard approach to assess how well the target state's AML system adheres to the 40 Recommendations. The Report is considered in a peer review in the Plenary after the mutual evaluation inspections. Unsatisfactory performance leads to increased surveillance and the necessity to report on improvement at the next Plenary. While the evaluations were initially carried out by FATF officials and member representatives, the standard methodology today allows them to be carried out by recognized institutions like as FATF regional iterations or the World Bank. Within the FATF plenary, peer assessment of that evaluation continues to play a role.[49]

Second, Typology Exercises is a diagnostic and generative monitoring tool. The typology exercises bring money-laundering specialists from all around the world together to discuss contemporary money-laundering concerns. A typology serves three purposes: I exchanging information on ongoing cases and activities, (ii) identifying and describing current money laundering trends, and (iii) identifying and describing effective and ineffective anti-money laundering remedies.[50]

As the global watchdog for anti-money laundering, FATF enforcement is crucial. The current enforcement system, the International Cooperation Review Group (ICRG), is a combination of earlier FATF blacklisting procedures and G20 recommendations, and in order to strengthen the ICRG, FATF now publicly lists nations with poor AML systems. The naming and blacklisting of states with poor standards within their AML frameworks, in addition to the publicity, face various sanctions and deemed to have a weak financial system, thus not attractive for any form of investments. When the ICRG finds that a country's system is too weak, the FATF monitors it on a regular basis. To cease the extra monitoring, the target country must establish a meaningful reform plan backed by high-level political commitment.[51]

[49]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.
[50]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109, 117 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.
[51]Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109 <http://link.springer.com/10.1007/s10611-017-9747-6> accessed 20 April 2020.

2.3.3 The Egmont Group

Specialized government agencies have been established in recent years as governments develop procedures to combat money laundering and financial crimes. The term "financial intelligence units," or "FIUs," is used to describe these organizations. They provide a vital information sharing channel for law enforcement authorities across the world..[52]

Simply put, a financial intelligence unit (FIU) is a central institution that collects financial report data, processes it in a certain way, and then delivers it to the appropriate government body in support of a national anti-money laundering effort.[53] An FIU is a national body tasked with three main responsibilities: "i) collecting (receiving and requesting); ii) analyzing; and iii) disseminating financial information linked to suspected financial crimes, such as money laundering."[54] With their ever-increasing importance in anti-money laundering, FIUs have attracted increased attention over their ability to provide a rapid exchange of information (between financial institutions and law enforcement/prosecutorial authorities, as well as between jurisdictions under the auspices of mutual legal assistance) while safeguarding the interests of the innocent individuals contained in their sphere of influence.

Domestic FIUs are expected to share information with international FIUs in order to enhance AML/CFT efforts in other countries and to assist in cross-border investigations, according to Transparency International. [55] This is because, financial investigations form a crucial component of the international AML/CFT system, according to FATF Recommendation 30 (Responsibilities of law enforcement and investigative authorities).

Within the FATF framework Recommendation 29 - (Financial intelligence units)[56], countries have established and operationalized their respective FIU's. Despite the fact that FIUs were

[52]Wouter H Muller, Christian Kalin and John G Goldsmith (eds), *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons / Henley & Partners 2007) 85.
[53]Wouter H Muller, Christian Kalin and John G Goldsmith (eds), *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons / Henley & Partners 2007).
[54]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.
[55]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.
[56] FATF/OECD, 'FATF (2012-2019), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.' <www.fatf-gafi.org/recommendations.html>. Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction

established in a number of jurisdictions around the world during the early 90s, their establishment was still considered as an isolated phenomenon tied to the special needs of the jurisdictions that established them. Government agencies and international organizations assembled in Brussels in June 1995 to discuss money laundering in the Egmont–Arenberg Palace. The Egmont Group, an informal group of government disclosure receiving agencies with a common purpose of improving mutual collaboration and sharing of information useful in detecting and countering money laundering and by extension terrorism financing, was formed as a result of this meeting.[57]

Today, in addition to the aforementioned international sources for FIU standards, the Egmont Group, which has 164 members, plays a vital role in coordinating financial intelligence sharing, training, dispute resolution, and standard formulation among its members and other stakeholders.[58]

The Egmont Group "*provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF). This is relevant as FIUs are uniquely positioned to cooperate and support national and international efforts to counter terrorist financing and are the trusted gateway for sharing financial information domestically and internationally in accordance with global Anti Money Laundering and Counter Financing of Terrorism (AML/CFT) standards*"[59].

Egmont Group supports the efforts, resolutions, and pronouncements of the UNSC, the G20 Finance Ministers, and the FATF. The organization can rely on its operational expertise to guide

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reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.

[57]Wouter H Muller, Christian Kalin and John G Goldsmith (eds), *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons / Henley & Partners 2007) 86.

[58]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13, 4 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.

[59]'About - The Egmont Group' (25 April 2020) <https://egmontgroup.org/en/content/about> accessed 25 April 2020.

policy decisions, such as AML/CFT implementation and changes. The Egmont Group is the worldwide AML/CFT apparatus' operational arm.[60]

FIUs are required by international AML/CFT standards to exchange information and participate in international collaboration because that information sharing is the cornerstone of global efforts to combat ML/TF. The Egmont Group, as an international financial intelligence forum, both supports and encourages this among its member FIUs.[61]

2.3.4 East and Southern Africa Anti-Money Laundering Group (ESAAMLG).

The East and Southern Africa Anti-Money Laundering Group (ESAAMLG) is a regional FATF Styled Body (FSRB) formed of currently nineteen (19) countries within the eastern and southern regions of the African continent and over thirty (30) observer organizations such as World Bank, World Customs Union, the FATF and the Egmont Group.

ESAAMLG was established in Arusha, Tanzania, on August 27, 1999, during a meeting of eastern and southern African ministers. Botswana, Kenya, Mauritius, Mozambique, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe were among the nine member countries in attendance. These nations signed a Memorandum of Understanding (MOU) in which they approved the FATF 40 Recommendations and affirmed their commitment to implementing international standards at a national level to combat money laundering, terrorism financing, and proliferation.[62].

FATF's regional mobilization program, which included regional meetings in Asia Pacific, Central and Eastern Europe, Caribbean Islands and Central American States, Africa, and Latin America, allowed the FATF Recommendations to trickle down to Africa and subsequently to ESAAMLG. The agenda for these meetings was to assess the AML milestones in these countries and obtained endorsements of the FATF Recommendations. Of importance to note is that none

[60]'About - The Egmont Group' (25 April 2020) <https://egmontgroup.org/en/content/about> accessed 25 April 2020.
[61]'About - The Egmont Group' (25 April 2020) <https://egmontgroup.org/en/content/about> accessed 25 April 2020.
[62]ESAAMLG (2019), 'Eastern and Southern African Anti-Money Laundering Group 20 Years Report (1999-2019) - From Arusha to Ezulwini: Looking Back and Looking Ahead' (ESAAMLG (2019) 2019) 4.

of the countries in the above stated regions contributed to the drafting of the Recommendations but either way had to endorse them, and rapidly adopt in their national laws.[63]

In light of the risk of cross-border crime and money laundering in the region, it was decided at this meeting on August 27, 1999, that there was an urgent need to collaborate with other countries in countering money laundering by implementing AML international instruments.[64] This meeting also resolved to adopt the aforementioned Memorandum of Understanding (MOU) as a tool to help members develop a cooperative process for implementing the Recommendations. At this meeting, governments ratified and signed the ESAAMLG MOU, reaffirming their commitment to adopt the FATF Recommendations in order to combat money laundering on a national level. As a result, the MOU acts as a sign of ESAAMLG members' dedication as well as a point of reference for the organization's operations.[65]

2.3.5 Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA)

The Asset Recovery Inter-Agency Network of Eastern Africa, or ARIN-EA, is an informal network whose goal is to improve the tracing and recovery of proceeds of crime and deprive criminals of their illegal gains. This is accomplished through facilitating the informal sharing of information about individuals, assets, and businesses on a regional and international scale. [66] ARIN-EA was conceived on the 4th of July 2013 at a side event conducted in Bangkok, Thailand, at the 4th Global focal Point Meeting on Asset Recovery. The network was launched on November 6, 2013, in Kigali, Rwanda, with the support of the World Bank, during the Annual General Meeting (AGM) of the East African Association of Anti-Corruption Authorities (EAAACA). [67]

[63]Jean Phillipo, 'Obstacles to the Implementation of the Financial Action Task Force's Recommendations in the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)' (Western Cape 2011) <https://etd.uwc.ac.za/handle/11394/5086> accessed 26 April 2020.
[64]ESAAMLG (2019), 'Eastern and Southern African Anti-Money Laundering Group 20 Years Report (1999-2019) - From Arusha to Ezulwini: Looking Back and Looking Ahead' (ESAAMLG (2019) 2019) 6.
[65]Jean Phillipo, 'Obstacles to the Implementation of the Financial Action Task Force's Recommendations in the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)' (Western Cape 2011) 31 <https://etd.uwc.ac.za/handle/11394/5086> accessed 26 April 2020.
[66]'About ARIN-EA | EAAACA - ARIN-EA' (28 May 2020) <https://eaaaca.com/about-arinea> accessed 28 May 2020.
[67]'About ARIN-EA | EAAACA - ARIN-EA' (28 May 2020) <https://eaaaca.com/about-arinea> accessed 28 May 2020.

In coordination with relevant partners, ARIN-EA recognizes the necessity to strengthen regional and international cooperation in order to effectively track/trace and recover stolen assets inside and beyond the territorial boundaries of Eastern Africa. While asset recovery has a formal structure to act outside territorial borders due to elaborate legal provisions on Mutual Legal Assistance (MLA), ARINs immediately turn to faster and less formal channels that lead to a more rapid identification of assets, confirmation of the assistance required, and the proper foundation for an MLA request.[68] It is on this basis that the ARIN-EA was established with the primary objective of: the identification, seizure, freezing, confiscation and recovery of assets pertaining to all crimes, including money laundering. As we will see in the next Chapter, the Asset Recovery Agency (ARA) established in the POCAMLA is a pillar institution in the fight to tame money laundering. Kenya's membership in the ARIN draws representations from the ARA and the EACC.

ARIN-EA, along with other regional asset recovery inter-agency networks, promotes international cooperation by facilitating informal communication between requestors and recipients. Prior to filing formal requests for mutual legal aid, they bring together the competent authorities for all offences, including practitioners active in asset recovery and anti-corruption.[69] Any ARIN's common goal is to realize a knowledge-building function by providing training on all aspects of combating proceeds of crime. Regional networks frequently use their meetings to discuss their experiences on a variety of topics. These specialized conferences of specialists can help policymakers and practitioners in asset recovery discover best practices and formulate recommendations.[70].

Burundi, Djibouti, Ethiopia, Kenya, Rwanda, South Sudan, Tanzania, and Uganda are among the eight Eastern African countries represented in ARIN-EA. Each member state has designated two network focal points, one from an anti-corruption agency and the other from the government. Prosecutorial/Judicial/Law enforcement Authority (as may be relevant to each jurisdiction).

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[68]WBG and UNODC, 'Open-Ended Intergovernmental Working Group on Asset Recovery 12th Session' (2018) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf> accessed 29 May 2020.

[69]WBG and UNODC, 'Open-Ended Intergovernmental Working Group on Asset Recovery 12th Session' (2018) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf> accessed 29 May 2020.

[70]'About ARIN-EA | EAAACA - ARIN-EA' (28 May 2020) <https://eaaaca.com/about-arinea> accessed 28 May 2020.

2.4 Conclusion

This Chapter has outlined the principal international instruments on money laundering as well as global and regional bodies/networks that bring together national AML institutions. The Chapter has captured how FATF works in collaboration with various international bodies such as the WB, IMF and the UN. This assists in understanding the 40+9 Recommendations, which consequently inspired the Vienna and Palermo Conventions. As the global AML watchdog, it is noted that the FATF, though informally set up, monitors enforcement of its Recommendations through FSRBs such as ESAAMLG, Egmont Group, mutual evaluations, typology exercises and the ICRG process. These monitoring and cooperation mechanisms give pressure for compliance within member states. The UNCAC has elaborate provisions on punishing the crime of money laundering and a link has been established between corruption and ML. it has been established that one of the reasons behind quicker set up of the ARA is the obligations had under the UNCAC. Agency cooperation is the golden thread running through all the institutions and initiatives discussed in this Chapter, this is mainly due to the transnational nature of AML, how quickly the proceeds of crime move and get converted to other assets. Kenya's non-membership to the Egmont Group has drawn attention to our weak institutions within the AML framework, as a FIU is the bedrock of information sharing and allowing detection of suspicious transactions. Nevertheless, we hope to get a clearer picture in the next chapters on the shortcomings of the Kenyan FIU and what best practices she can adopt to meet membership status.

There have been remarkable efforts in the battle against money laundering inside the regional networks of ESAAMLG and ARIN-EA, which we hope to mirror on the national AML institutions. Nonetheless, doubts remain as to whether these mechanisms have ipso facto proven sufficient to combat the threat of money laundering. Relating to Kenya, issues exist about whether international instruments are appropriate bearing in mind the complexities of Kenyan society in terms of both reception and adoption, as we will examine in the next Chapter.

CHAPTER THREE

THE KENYAN ANTI-MONEY LAUNDERING INSTITUTIONAL FRAMEWORK.

3.1 Introduction

Highlights of international and regional devices and structures that deal with money laundering were examined in the preceding chapter. The discussion was useful in clarifying the origins of the anti-money laundering idea in Kenya and around the world, as well as the legal and quasi-legal basis for it. This chapter attempts to fulfil the overall research objective, that is, a review of the key statutory agencies involved in reporting, preventing and enforcing Anti-Money Laundering (AML) law in Kenya. The Chapter will also probe the institutional successes, challenges and failures in the short history of AML law in Kenya.

As mentioned in the previous chapter, there are two types of AML solutions that have been developed internationally: prohibitory and preventative.[1] Kenya established the Anti-Money Laundering Advisory Board (AMLAB), Financial Reporting Centre (FRC), and Asset Recovery Agency in response to a global request to establish an institutional framework to combat money laundering (ARA). The FRC, AMLAB, and ARA were established with the primary purpose of ensuring the integrity and stability of Kenya's financial system and preventing economic criminal activity. The FRC, AMLAB, and ARA, among other AML institutions, provide assurance that Kenya has the necessary anti-money laundering and anti-terrorist financing mechanisms in place (TF).[2] This however, is not a guarantee of the AML/CTF system's effectiveness, despite the compliance with international standards. The FRC and ARA will be discussed in this chapter, with an emphasis on its organization, composition, powers, and functions in light of the AML FATF Recommendations and worldwide best practices.

[1]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.

[2]Denis Moroga, 'An Appraisal of the Institutional Framework under the Kenyan Proceeds of Crime and Anti-Money Laundering Act, 2009' (LLM, Western Cape, 2017).

These anti-money laundering methods, according to Gikonyo, [3] have been implemented through the adoption of conventions such as the Vienna[4] and Palermo[5] Conventions, as well as the establishment of particular organizations such as the Egmont Group and the Financial Action Task Force (FATF). Money laundering (ML) is criminalized through the identification and categorization of predicate offenses from which laundered funds are originated. Financial institutions, as well as certain non-financial firms and professions, are the targets of preventative actions (DNFBPs). This aims to prevent them from being used for money laundering because of their vulnerability and susceptibility to abuse.[6]

The Palermo Convention requires each state to establish:

> *"a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money laundering, within its competence, in order to deter and detect all forms of money-laundering[7] ...."*

The Palermo Convention, to which Kenya is a signatory, emphasizes on client identification, record-keeping, and suspicious transaction reporting, [8] as well as licensing and operating restrictions as part of the regulatory framework. The government's reactive duty is to maintain frameworks for investigating and punishing prohibited conduct, whether perpetrated by accountable institutions or those attempting to abuse them. This includes allocating sufficient human, financial, and technical resources to enable administrative and investigative activities to be established.

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[3]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.

[4]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).

[5]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.

[6]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, 60 <https://www.emerald.com/> accessed 20 March 2020.

[7]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 7 (3).

[8]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 7 (1) (a).

International treaty obligations[9] may include a requirement to work with foreign entities in the fight against money laundering. States are required by the Palermo Convention[10] to enhance international cooperation and information sharing among administrative, regulatory, and law enforcement authorities tasked with fighting money laundering. Accountable institutions, on the other hand, must develop trustworthy client profiling systems based on acceptable customer identification standards. This will allow them to investigate the source of payments in order to detect criminal proceeds. Client profiling, it has been argued, also makes it easier to track down the whereabouts of funds.[11] Accountable institutions are also obligated to submit timely reports of suspicious transactions to the state sector.

Money laundering, as a manifestation and facilitator of organized crime, has sparked a lot of interest since the early 1990s, culminating to many initiatives all over the world. The initiatives in Kenya led to the passage of the Proceeds of Crime and Money Laundering Act (POCAMLA) [12] on December 31, 2009, which took effect on June 28, 2010. The POCAMLA's anti-money laundering activities are aimed largely at state and non-state actors, who are generally the responsible institutions. [13]

The ultimate goal of the POCAMLA's anti-money laundering measures is to prevent the hiding of the proceeds of illegal activity. According to Goredema and Montsi,[1415] one of the government's proactive functions is to identify the situations, practices, rules, and laws that facilitate money laundering. This should be done in order to have a beneficial impact on the environment in which such transactions may take place. Furthermore, the government is

[9]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 7 (4).
[10]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.
[11]Charles Goredema and Fazila Montsi, 'Towards Effective Control of Money Laundering in Southern Africa: Some Practical Dilemmas' (2002) 11 African Security Review 5 <http://www.tandfonline.com/doi/abs/10.1080/10246029.2002.9627776> accessed 12 July 2020.
[12]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.
[13]Charles Goredema and Fazila Montsi, 'Towards Effective Control of Money Laundering in Southern Africa: Some Practical Dilemmas' (2002) 11 African Security Review 5 <http://www.tandfonline.com/doi/abs/10.1080/10246029.2002.9627776> accessed 12 July 2020.
[14]Charles Goredema and Fazila Montsi, 'Towards Effective Control of Money Laundering in Southern Africa: Some Practical Dilemmas' (2002) 11 African Security Review 5 <http://www.tandfonline.com/doi/abs/10.1080/10246029.2002.9627776> accessed 12 July 2020.
[15] ibid.

expected to collect and analyze data on the use of formal and informal means of money transfer to conceal the proceeds of illegal activities. [16]

The AML/CFT standard is made up of a number of different measures that can be summed up as follows: (1) Implementing the Palermo[17] and Vienna[18] Conventions, as well as the FATF Recommendations, [19] to make money laundering and terrorism financing illegal. (2) establishing freezing, seizure, and confiscation systems, (3) imposing preventive regulatory requirements on a variety of businesses and professions, (4) establishing a financial intelligence unit, (5) establishing an effective supervisory framework, (5) establishing domestic cooperation channels, and (6) establishing international cooperation channels. [20] The study proceeds to analyze crucial institutions that come alive if there are suspected or identified proceeds of crime within the country based on these precepts.[21]

3.2 The Financial Reporting Centre

The Egmont Group recommends that countries establish a financial intelligence unit (FIU) that serves as a national center for receiving and analyzing: "(a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate crimes, and terrorism financing, as well as disseminating the findings of that analysis." [22] The FIU should be able to receive additional information from reporting entities, as well as have timely access to the financial, administrative, and law enforcement data it needs to carry out its duties. The FIUs are shaped by a few fundamental considerations: Anti-money laundering and counter-terrorism

[16]Charles Goredema and Fazila Montsi, 'Towards Effective Control of Money Laundering in Southern Africa: Some Practical Dilemmas' (2002) 11 African Security Review 5, 6 <http://www.tandfonline.com/doi/abs/10.1080/10246029.2002.9627776> accessed 12 July 2020.
[17] Palermo Convention.
[18]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[19]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020.
[20]Carrington Ian and Heba Shams, 'Elements of an Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity' (2006) 2.
[21]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, 60 <https://www.emerald.com/> accessed 20 March 2020.
[22]'Financial Intelligence Units (FIUs) - The Egmont Group' (29 July 2020) <https://egmontgroup.org/en/content/financial-intelligence-units-fius> accessed 29 July 2020.

funding legislation, existing law enforcement, and the necessity of a body to receive, analyse, and share financial data are all factors to consider.[23]

Law Enforcement Model, Judicial Model, Administrative Model, and Hybrid-Administrative Model are the four basic FIU models acknowledged by the Egmont Group.[24] The FRC is primarily administrative in nature, with little or no ability to expedite the investigation and prosecution of suspected money laundering cases; these two key functions are mainly handled by the Directorate of Criminal Investigations (DCI) and the Office of Directorate of Public Prosecutions (ODPP).[25]

(i) ***Law Enforcement-type FIUs***: "Under this authorities, anti-money laundering measures are implemented alongside existing law enforcement systems resulting to a situation where law enforcement agencies take part in investigating money laundering."

(ii) ***Judicial or Prosecutorial-type FIUs*** : "The judicial model is setup within the judicial arm of government. This is whereby disclosures of suspicious financial transactions are received by a country's investigative agencies from the financial sector, allowing the judiciary to use its powers to seize funds, freeze accounts, conduct interrogations, detain people, and conduct searches."

(iii)***Administrative-type FIUs***: "These FIUs are usually embedded in an existing government agency or ministry that isn't a judicial or law enforcement agency or ministry. Placements in a finance ministry, central bank, or other regulatory body are common. However, some FIUs that follow the administrative model are not housed within an existing agency or ministry, but rather exist as a separate, self-contained entity. The administrative model is used by the majority of Egmont Group members (in 2018, 119 members of the Egmont Group were classified as administrative)"[26] .

[23]'Financial Intelligence Units (FIUs) - The Egmont Group' (29 July 2020) <https://egmontgroup.org/en/content/financial-intelligence-units-fius> accessed 29 July 2020.
[24]Louis Forget and Vida Šeme Hočevar, *Financial Intelligence Units: An Overview* (International Monetary Fund : World Bank Group 2004) 18.
[25]Beth Ngima Warui, 'Implementation and Enforcement of the Law on Money Laundering: An Analysis of Kenya's Legal and Institutional Framework.' (University of Nairobi 2016).
[26]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.

(iv) ***Mixed or Hybrid FIUs***: The hybrid approach acts as a link between judicial and law enforcement authorities and acts as a disclosure intermediary. It incorporates components from at least two FIU models.

The Financial Reporting Centre (FRC or the Centre) is an autonomous state body established[27] under the POCAMLA with the primary goal of assisting in the identification of proceeds of crime and money laundering prevention. It began operations in April 2012.[28] The mission of the Centre is to;

(a) "make the information it collects accessible to investigating authorities, supervisory bodies, and other entities as necessary to aid in the administration and enforcement of Kenyan laws;

(b) share information about money laundering and associated offenses with similar bodies in other countries.; and

(c) Ensure that anti-money laundering measures are in accordance with international standards and best practices."[29]

In making information available to related agencies under the POCAMLA, the Centre has very far and wide-reaching powers derived from Recommendation 29[30]. FIUs are widely regarded as playing a critical role in efforts to detect and counteract money laundering and terrorism financing. FIUs are agencies that receive suspicious transaction reports from financial institutions and other individuals and entities, analyze them, and recommend them to law

[27]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 21.
[28] 'About Frc' <http://www.frc.go.ke/10-about-frc.html> accessed 12 July 2020.
[29]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 23 (2).
[30]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) 22 <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020. "Recommendation 29 Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly."

enforcement authorities as well as international FIUs if they believe the reports reveal underlying criminal activity.[31]

The Palermo Convention) states in part:

> Each state Party… shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering…have the ability to cooperate and exchange information at the national and international levels…and to that end shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.[32]

The Egmont Group's mission is to aid in the detection and battle of money laundering and terrorism financing, as well as to offer overall assistance to member nations' national anti-money laundering programs. An FIU is defined by the Egmont Group as:

> "a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money laundering".[33]

To comprehend the Kenyan FRC's history, it is crucial to examine the institution's foundations. The formation of an FIU, according to the International Monetary Fund (IMF), [34] is a crucial step in fighting financial crime. As a result, the concept behind an FIU should be founded on criminal policy concerns unique to each country, and the FIU's core elements should be compatible with each country's supervisory framework, legal and administrative systems, as well as financial and

[31]Nomzi Gwintsa, 'Money Laundering Experiences - Chapter 3 - Challenges of Establishing Financial Intelligence Units', *ISS MONOGRAPH SERIES • NO 124, JUNE 2006* (2006).
[32]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000, Article 7 (1) (b).
[33]Nomzi Gwintsa, 'Money Laundering Experiences - Chapter 3 - Challenges of Establishing Financial Intelligence Units', *ISS MONOGRAPH SERIES • NO 124, JUNE 2006* (2006) 40.
[34]Louis Forget and Vida Šeme Hočevar, *Financial Intelligence Units: An Overview* (International Monetary Fund : World Bank Group 2004).

technical capabilities. As a government agency, the FIU must be granted the necessary autonomy to carry out its duties while also being held accountable for its results.[35]

3.2.1 Powers and Functions of the Financial Reporting Centre

FIUs were established in 160 jurisdictions as of July 2017, and their powers differ from nation to nation depending on the breadth of the FIU's mandate and its location within the government structure. The FRC is the primary operational institution for assisting in the identification of proceeds of crime, and it is normally authorized by the POCAMLA and its enabling subsidiary laws to undertake the three fundamental functions of collecting, analyzing, and disseminating pertinent financial data.

The FRC is empowered by the POCAMLA to: "(a) receive and analyze reports from reporting institutions about unusual or suspicious transactions; [36] (b) If, after reviewing the report, there are reasonable grounds to assume that the transaction is suspicious, the report shall be forwarded to the appropriate law enforcement authorities, any intelligence agency, or any other appropriate supervisory body for further action; [37] (c) The Centre may, at any time, arrange for an authorized inspection by an inspector at the premises of any reporting institution during normal business hours to inspect any documents kept in accordance with the POCAMLA's requirements, ask any questions about them, take notes, and make copies of the whole or any part of them; [38] (d) If there are reasonable grounds to suspect a transaction contains proceeds of crime or money laundering, the Centre will report any information gathered during an inspection to the appropriate law enforcement authority, intelligence agency, or supervisory body;[39] Under the POCAMLA, the Centre is authorized to provide information to any foreign FIU based on mutual agreements and reciprocity for the same reasons."[40]

[35]Louis Forget and Vida Šeme Hočevar, *Financial Intelligence Units: An Overview* (International Monetary Fund : World Bank Group 2004) 40.
[36]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 24 (a).
[37]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 24 (b).
[38]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 24 (c).
[39]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 24 (d).
[40]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 24 (k) and (l).

Aside from financial institutions as provided in Section 2, the Centre also receives suspicious transaction reports (STRs) from designated non-financial businesses and professions (DNFBP)[41] with anti-money laundering obligations; suspicious transaction reports (STRs). In general, when it comes to monitoring reporting institutions[42] and STRs and prioritizing their analytical efforts, the Centre takes a risk-based approach (including with monetary value threshold reporting and by focusing on high risk sectors). The FRC assesses STRs and produces financial intelligence, which is then disseminated to appropriate authorities (such as the Directorate of Criminal Investigations (DCI), the Ethics and Anti-Corruption Commission (EACC), and/or shared with a foreign FIU, using internal expertise and additional data inputs from other domestic databases and foreign FIUs. The FATF emphasizes the need of FIUs having access to a diverse set of data sources in order to adequately conduct their investigations. FIUs should not be confined to passively receiving information from reporting institutions, but should be able to actively request fresh or additional information from them. [43]

FIUs, such as the Kenyan FRC, have the authority to hold confidential material in addition to their access to information powers.[44] The data shared with FIUs is sensitive transactional information with a wider application than an AML/CFT investigation. The data collected is thus subject to bank secrecy or other privacy regulations,[45] and the FRC has very rigorous internal security and confidentiality procedures in place, as well as the authority to protect data confidentially when it is sought by non-authorized sources or for purposes other than AML/CFT.

As a result, the FRC, like all other FIUs, withholds some information from other government organizations or the general public. This authority stems from the FRC's operational

[41]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 2, "These are, casinos (including internet casinos); real estate agencies; dealing in precious metals; dealing in precious stones; accountants, insurance companies, non-governmental organisations; such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the Centre declare."
[42]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 2, means a financial institution and designated non-financial businesses and professions.
[43]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020, Recommendation 29.
[44]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13, 4 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.
[45]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya ss 123 & 130.

independence[46] and the importance of the Centre's reputation and private sector trust in the FRC.[47]

3.2.2 Structure of the Financial Reporting Centre

The Centre is led by a Director who serves as the Chief Executive Officer (CEO) and is assisted by a Deputy Director, both of whom are appointed by the AMLAB and Treasury, with the National Assembly's approval.[48] The Director, as CEO, is responsible for the construction and development of an efficient performance-driven administration, as well as the management and maintenance of employee discipline. The Director will carry out the duties of the office in accordance with the policy framework established by the Cabinet Secretary on the Board's guidance.[49]

The staffing of the FRC was drawn from CBK and this is historical, based on CBK's role functioning as the Kenyan intelligence unit by collecting STRs[50] until 2012. The Centre started as a functional unit within CBK, situated within the same premises as CBK staff. The FRC moved offices recently, however, functionally remains under the mandate of CBK to date and not independent as envisaged by the POCAMLA. The basis is for CBK to keep nurturing the FRC by continuing to provide technical capacity, resources and give the institution time to grow organically.

[46]Abigail J Marcus, 'Financial Intelligence Units (FIUs): Effective Institutional Design, Mandate and Powers' [2019] Transparency International (2019) 13, 41 <https://www.jstor.org/stable/resrep20481> accessed 25 April 2020.

[47] "Financial institutions as defined in the POCAMLA have their own bank secrecy laws and the criminal justice system has laws against money laundering and terrorist financing. There may be a policy tension between these two frameworks of laws. FIUs, intermediaries, between the reporting entities and the criminal justice system, are required to exert their power to reduce the tension between privacy and efficiency. FATF Recommendation 4 helps FIUs to push against the extreme limits of financial privacy laws, raising legitimate concerns about the potential for the abuse. It states: Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations."

[48]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 25.

[49]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 28 (2).

[50]Central Bank of Kenya, 'Banking Circular No 7 of 2012 - Suspicious Transaction Reports.' (CBK 2012) <https://www.centralbank.go.ke/uploads/banking_circulars/751425116_Banking%20Circular%20No%207%20of%202012%20-%20Suspicious%20Transaction%20Reports.pdf> accessed 1 September 2020.

3.2.3 Location of the Financial Reporting Centre within the Government structure

The institutional framework of the government differs from one country to another. The essential characteristics of an FIU should be in line with that country's supervisory structure, legal and administrative processes, and financial and technical capabilities. Four basic models for FIUs have been recognized by the Egmont Group, the IMF, and the World Bank. Each model has its own set of advantages and disadvantages, but all should adhere to the FATF's FIU guidelines. The preceding descriptions are based on the IMF and World Bank Overview of FIUs, as well as the Egmont Group's FIU model studies and summaries.[51]

The FRC administratively sits under the National Treasury, along with other regulators within the financial sector such as the Central Bank of Kenya (CBK). Functionally, however, the FRC remains under the CBK until such time the Centre has acquired the relevant technical skills, capacity and budget to run independently. This remains one of the reasons the FRC has never published an annual report from 2012 to date as with other parastatals and consequently cannot join the Egmont Group, until capacity in line with international standards is achieved.

Kenya's FRC adopted the administrative model as with countries such as South Africa, the United States of America (USA) and Canada. The FRC in its formative stages started as a Unit within the structure of the Central Bank of Kenya (CBK). The FRC became fully independent from CBK circa 2017[52], full details of the autonomy are not available, but the study established that the FRC now has a fully functional Director General in charge of the FRC operations.

The FRC administrative model has the benefit of allowing the Centre to act as a neutral buffer between reporting institutions and enforcement/prosecutorial bodies, which fosters reporting institutions' trust and confidence in the FRC and makes information exchange with foreign FIUs

[51]Louis Forget and Vida Šeme Hočevar, *Financial Intelligence Units: An Overview* (International Monetary Fund : World Bank Group 2004).

[52]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000) 215, . Whilst all administrative FIUs such as the FRC enjoy a considerable degree of independence, some are attached to a supervisory authority and hence are not completely independent; the FRC is strongly attached to CBK.

easier due to its autonomy. The FRC and its personnel are well-versed in the intricacies of the financial system due to their institutional ties to CBK and Treasury.[53]

3.2.4 The FRC's Experiences and Successes in Combating Anti-Money Laundering

The filing of cash declarations, cash transactions reporting (CTR), and suspicious transaction reporting are the three key preventative procedures under POCAMLA that aid in the detection of suspect proceeds of crime (STR). Customs personnel, financial institutions, and DNFBPs are all obliged to utilise these detection methods. These techniques can help identify proceeds of crime in general; but, any loopholes in the provisions could limit their efficacy.[54]

The Centre's successes are challenging to capture due to the confidential nature of STRs. STRs form the bases of further investigations by competent authorities (such as CBK, EACC and DCI) and publication of such information would defeat the role of the FRC and overall obligation to combat ML.

The FRC Statistical Analysis Report of 2017[55] reports of the FRC having registered a total of 289 reporting institutions ranging from those regulated by the CBK, the Insurance the Regulatory Authority (IRA), the Capital Markets Authority (CMA) and telecommunication companies. In the period 2012-2016 the FRC has received 4574 STRs from reporting institutions with 84.7 % of the STRs coming from commercial banks[56]. The mode of money transaction in the STRs in a descending order of frequency was money transfers, cash deposits, money laundering, cash withdrawals and cheque deposits. There were a large number of reports whereby accounts were dormant for not transacting, some wanted by the Interpol and others were suspected to be associated with terrorists.

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[53]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000) 189.

[54]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, 3 <https://www.emerald.com/> accessed 20 March 2020.

[55]Thomas Muli Kathuli, 'An Assessment Of The Effectiveness Of The Financial Reporting Centre And Financial Institutions In Prevention Of Money Laundering: A Case Study Of Nairobi County' (University of Nairobi 2018). The author accessed and sourced the information from the FRC Statistical Analysis Reports and related reports that are unavailable to the public. .

[56]Thomas Muli Kathuli, 'An Assessment Of The Effectiveness Of The Financial Reporting Centre And Financial Institutions In Prevention Of Money Laundering: A Case Study Of Nairobi County' (University of Nairobi 2018) 15.

For the period 2012-2017, 4574 STRs were received by the Centre, of these 52 reported cases were closed for not revealing any criminal activity, 442 reports were disseminated to various law enforcement agencies for further investigation and action while the remaining 4080 reports are at various stages of analysis[57]. Of the reports deployed to other law enforcement agencies, 175 forwarded to the DCI, 123 reports had corruption related elements and forwarded to the EACC and 144 to National Intelligence Services (NIS). Few cases invited the interest of tax evasion[58] were sent to the Kenya Revenue Authority (KRA) and the ARA for matters that required urgency in tracing and forfeiture of assets.

The research[59] further reported that from the above statistics of the 175 DCI referred matters, they were merged into 95 cases of which 10 cases were referred to the DPP, 14 were referred to Anti-Terrorism Police Unit (ATPU), 13 are pending before court, 9 have been closed and 49 are pending under investigations. The study further revealed that the possible criminal activities emanating from STRs were led by terrorism at 45% and corruption at 25% and the remaining STRs were related to fraud; drug trafficking, theft, smuggling, poaching, money laundering, forgery and theft in varying degree. A total of Kshs 20,493,197,158.00 is the amount that was involved in the 442 STRs analyzed and disseminated.

3.2.5 Reporting obligation to the Financial Reporting Centre by Reporting Institutions.

The filing of cash declarations, cash transactions reporting (CTR), and suspicious transaction reporting are three processes utilized under POCAMLA to detect proceeds of crime in a country (STR).[60] Cash declarations are aimed at preventing illicit monies from moving across borders.

[57]Thomas Muli Kathuli, 'An Assessment Of The Effectiveness Of The Financial Reporting Centre And Financial Institutions In Prevention Of Money Laundering: A Case Study Of Nairobi County' (University of Nairobi 2018) 16.

[58]Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000) 220. Stessens (n 51) p.220. Apart from money laundering prosecutions, the information supplied by reporting institutions can of course also prove to be very useful in other prosecutions, notably those regarding the predicate offence.

[59]Thomas Muli Kathuli, 'An Assessment Of The Effectiveness Of The Financial Reporting Centre And Financial Institutions In Prevention Of Money Laundering: A Case Study Of Nairobi County' (University of Nairobi 2018).

[60]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.

Cash declarations for sums equal to or exceeding US$10,000[61] must be made at any port of entry, according to the POCAMLA Regulations (POCAMLR) [62].

Any declarations made must be sent to the FRC, and if a customs officer initiates a seizure, the customs officer must give the individual a receipt as acknowledgement of the seizure. This clause can enable in the identification of suspect illicit funds since as it involves the disclosure and surrender of the amount seized to the ARA.[63] The Regulations could be more effective if it was a requirement to report to both the FRC and the ARA at the moment of seizure, and the reporting time lowered to two days rather than five.[64]

Monitoring and reporting suspected money laundering activity are among the reporting obligations imposed on reporting institutions under POCAMLA.[65] These include; ensuring customer due diligence (CDD), which involves developing and maintaining customer records[66] as well as confirming customer identity, commonly referred to as "know your customer" (KYC) [67]; Ensuring Internal reporting procedures are established and maintained[68]; Reporting on cash transactions[69] and keeping track of the required details for wire transfers. [70]

Financial institutions have a legal obligation to disclose any suspicious transactions or cash transactions worth more than $10,000, and failing to do so is a criminal offense.[71] The FRC examines the STRs after they are submitted in order to identify any suspicious transactions that may entail proceeds of crime or money laundering. When the FRC discovers a suspicious transaction, it refers the case to the appropriate agencies for further investigation. As a result, the

[61]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 8.
[62] Special Issue Kenya Gazette Supplement No. 52 (Legislative Supplement no. 21) of March 8, 2013
[63]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 8 (6).
[64]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, 63 <https://www.emerald.com/> accessed 20 March 2020.
[65]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 44.
[66]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 47.
[67]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 45.
[68]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.
[69]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 34.
[70]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 32 (1).
[71]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 42.

responsibility to monitor and report STRs is critical in assisting in the detection of possible proceeds of crime laundering operations. [72]

A known detection challenge is that reporting institutions may choose defensive reporting, which involves reporting everything.[73] This is likely in Kenya, because, in addition to making reports on suspicious transactions, reporting institutions are also required to file CTRs for cash transactions of US$10,000 or more (in any currency designated), whether or not the transaction is suspicious. As a result, the FRC becomes overburdened with information, and while some questionable acts are detected, many more are likely to slip through the gaps. The end result would be that the FRC will be overwhelmed by reports, diminishing its ability to detect suspected money laundering activity.[74] A review of qualifiers to the nature of transaction that need reporting needs to be done so as to maintain or improve the flagging of ML transactions while reducing the load of Data and therefore the burden on FRC.

3.3 The Anti-Money Laundering Advisory Board (AMLAB)

The POCAMLA establishes the Anti-Money Laundering Advisory Board (AMLAB) in Section 49(1) that echoes FATF Recommendation 2[75]. AMLAB is an institution charged with coordination and development of policies and strategies in combating money laundering.

3.3.1 Structure of the AMLAB

The membership of the board is made up of (a) the Principal Secretary from Treasury; (b) the Attorney-General; (c) the Governor, Central Bank of Kenya; (d) the Inspector General, National Police Service; (e) the Chairman, Kenya Bankers' Association; (f) the Agency Director, Asset

[72]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, s 62 <https://www.emerald.com/> accessed 20 March 2020.
[73]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59, 63 <https://www.emerald.com/> accessed 20 March 2020.
[74]Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59 <https://www.emerald.com/> accessed 20 March 2020.
[75]FATF/OECD, 'FATF (2019), Financial Action Task Force – 30 Years' (FATF, Paris 2019) 2 <www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html> accessed 12 April 2020. "on National Cooperation and Coordination, Countries should have national AML/CFT policies, informed by the risks identified, which should be regularly reviewed, and should designate an authority or have a coordination or other mechanism that is responsible for such policies."

Recovery Agency; (g) the Chief Executive Officer, Institute of Certified Public Accountants of Kenya; (h) two other persons appointed by the Cabinet Secretary from the private sector who shall have knowledge and expertise in matters relating to money laundering and (i) the Director of the FRC, who is the Secretary to the AMLAB. [76] A chairperson of the AMLAB shall be appointed by the Cabinet Secretary of Treasury from among the aforementioned members of the Board. The Cabinet Secretary and AMLAB are the two main supervisory bodies that determine the FRC's efficacy. The appointment and replacement of the FRC Director and Deputy Director, as well as the establishing of performance targets and the budgeting process, are all subject to monitoring.

3.3.2 AMLAB's Challenges

The Board's primary function is advisory, and board members face the issue of being appointed based on the executive positions they hold in other government agencies. It could have been more advantageous if the Board members were subjected to a competitive recruitment procedure to bring specialized knowledge, skills, and expertise on money laundering issues on board. The AMLAB also excludes a wide range of reporting organizations, including insurance companies, telecommunications providers, casinos, and Mobile Virtual Network Operators. Finally, AMLAB terms of reference are unspecific and vague leaving it unclear on its roles are and what it is required to do. It has also been a glaring challenge to AMLAB due to overlapping oversight role between FRC/AMLAB and CBK, as recent as April, 2020[77], CBK sanctioned Absa Bank for not ensuring the standard checks on anti-money laundering and combatting financing terrorism (AML/CFT) and know-your-customer (KYC) requirements were applied. This should have been a regulatory sanction by AMLAB or the FRC, a clear indication of the dismal performance of the AMLAB.

This overlap of functions leads to inefficient utilization of scarce resources needed for AML operations, resulting from the finances spent independently by these institutions to do the same job. It is also a recipe for chaos when institutions that should otherwise be cooperating are

[76]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 49.
[77]Central Bank of Kenya, 'Press Release - Regulatory Action Against Absa Bank Kenya PLC' (CBK 2020) <https://www.centralbank.go.ke/uploads/press_releases/1403162604_Press%20Release%20-%20Absa%20Bank%20Kenya%20PLC.pdf> accessed 18 July 2020.

usurping each other's roles or having ambiguous designation of functions as is the case with AMLAB.

3.4 The Asset Recovery Agency

The Asset Recovery Agency (ARA) is a semi-autonomous entity formed by the POCAMLA[78] under the office of the Attorney General (AG) and it is led by an AG-appointed Agency Director.[79] As earlier noted, setting up freezing, seizing and confiscation systems is one of the key AML/CFT Standards/precepts that remove incentives from organized crimes such as money laundering[80]. A successful anti-money laundering and counter-terrorist funding framework requires a strong system of provisional measures and seizure. Confiscation of criminal property to prevent it from being laundered or reinvested for the purpose of facilitating other types of crime or concealing illicit proceeds. The aim of such confiscation is to suppress criminal operations by frustrating the movement of proceeds of crime. Confiscation also allows victims of the crimes to be compensated (fully or partially) even after the proceeds are moved across the globe, this is the relevance of asset recovery institutions and to support this, Kenya established the ARA.

The primary goal of FATF Recommendation 2 is to encourage governments to implement steps to identify, trace, and evaluate confiscated property. According to FATF Recommendation 38, there must be authority to respond quickly to requests from foreign nations to identify property that may be liable to confiscation..[81]

The ARA was functionally set up in 2013-2014 and filed the firs recovery matter in court in 2015 and due to its short history, the ARA has not published any periodical or annual reports. The ARA's budget is under the OAG/DOJ and thus does not run an independent budget todate.

[78]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 53 (1).
[79]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 52 (2).
[80]Carrington Ian and Heba Shams, 'Elements of an Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity' (2006) 2.
[81]FATF, 'Best Practices on Confiscation (Recommendation 4 and 30) AND a Framework for Ongoing Work on Asset Recovery' [2012] BEST PRACTICES 13.

3.4.1 The Asset Recovery Authority within Government Structure

Functionally in its day-to-day activities the ARA is independent but for purposes of administration as a Government function is under the OAG for purposes of checks and balances. The ARA budget is under the Office of the Attorney General (OAG) & Department of Justice (DOJ), which is a special office that sits in the Cabinet. The OAG & DOJ is the parent ministry coordinating all legal services within the government structure, where other institutions such as the ODPP, Judicial Service Commission, State Counsel, Kenya School of Law etc administratively report. The research therefore found out that the ARA in its functions is unfettered despite being under the OAG/DOJ.

3.4.2 Multi-Agency Approach of the Asset Recovery Authority

The legal AML framework can be located in several statutes, including the Prevention of Organized Crime Act (Cap 59, Act No 6 of 2010.), Office of the Director of Public Prosecution Act (Act No 2 of 2013), Prevention of Terrorism Act (Act No 30 of 2012), Narcotic Drugs and Psychotropic Substances (Control) Act (Act No 4 of 1994), Bribery Act (Act No 47 of 2016), Anti-Corruption and Economic Crimes Act (ACECA) (Cap 65, Act No 3 of 2003.) and POCAMLA that contains the most detailed and comprehensive provisions on asset recovery.[82]

The institutional framework for asset recovery is primarily vested with the ARA but achieved through the framework of co-operation known as the multi-agency teams (MAT) comprising of the FRC, DCI, Kenya NIS, ODPP, Ethics and Anti-Corruption Commission as well as the Kenya Revenue Authority. The MAT has had many successes and this is evident in the successes in court of the ARA discussed ahead. The ARA receives reports of property that can fall under POCAMLA from various sources as whistle blowers, general members of the public, display of wealth on social media that may seem unjustified. The ARA further receives intelligence reports on suspiciously acquired property from the NIS, DCI, FRC, IG, KRA, EACC or any other government body with a view of seizing the assets under its civil forfeiture powers.

[82]Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 Journal of African Law 27, 28.

Under the MAT, the approach taken in curbing ML and related offences such as corruption is detailed. Once a person is identified as handling proceeds of crime, a classic MAT approach will trigger KRA demanding the income tax due (as tax is due whether the proceeds are legitimately obtained or otherwise); FRC and NIS will give intelligence reports on a suspect's banking activities to the DCI. DCI handover the matter to the ODPP or EACC to charge the suspect in court. Simultaneously, the ARA applies to court for seize and confiscation orders that immobilize funds in banks and allow for confiscation of property. The goal is to ensure the suspect is curtailed from offering bribes and delay of court cases will not lead to transfer or waste of money and moveable property.

Despite the MAT's successes, some challenges remain, including: complexities of cases; inadequacy of capacity, particularly when it comes to recovering assets hidden in other jurisdictions; a lack of witnesses to support applications, rendering them unviable in court; and the time frame for processing mutual legal assistance requests , which can be lengthy.[83] Specific illustrations of this challenges have been enunciated in the next chapter on lessons for Kenya from South Africa).

The Mutual Legal Assistance Act (Act No 36 of 2011) governs the mutual legal assistance to be given and received by Kenya in investigations, prosecutions, and judicial proceedings , along with the Foreign Judgements (Reciprocal Enforcement) Act (cap 43), which makes provisions in Kenya for the enforcement of foreign judgments and acceding to foreign judgments.[84]

The asset recovery jurisprudence is nascent as the operation of the POCAMLA started in 2010 and the ARA commenced formal operations between 2015-2016 after the National Governance and Accountability Summit at State House, Nairobi on 18 October 2016[85]. The ARA has had great success in obtaining preservation and forfeiture orders under Part VIII (Sections 81, 90, 92 and 100) of the POCAMLA. The court as recent as 10 June 2020 upheld preservation orders of proceeds suspected to be proceeds of crime[86].

[83]Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency Experience in Fighting Corruption in Kenya' (2017).
[84]Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency Experience in Fighting Corruption in Kenya' (2017).
[85]Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency Experience in Fighting Corruption in Kenya' (2017) 110.
[86]*Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others [2020] eKLR* 8.

In similar preservation and forfeiture proceedings involving money laundering, the courts upheld a preservation order and the court noted that it was unfortunate that the law has set such a low bar of proof of evidence for a party to obtain exparte preservation orders and even retention of the same by the court. The court sympathized with the effect of the ARA orders and had no option but enforce the law at such a low bar based on reasonable suspicion.[87] There is need to discuss the other side to this. Despite the fact that the standard is low, there are safeguards in place. For instance, the prosecution doesn't have to prove that a forfeiture order will be issued. The rationale for this approach is based on the fact that, while being an interlocutory order,[88] a preservation order can be appealed and that the court can grant a provisional preservation order.[89]

3.4.3 The Criminal Assets Recovery Fund

The Criminal Assets Recovery Fund[90] (Fund) is established by Section 110 of the POCAMLA . Section 110 specifies the components of the Fund, which include:

a) "all funds obtained through the execution of the POCAMLA's seizure and forfeiture orders;

b) all property obtained as a result of forfeiture orders issued under Section 100 of the POCAMLA;

c) the balance of all money obtained through the execution of foreign confiscation orders after appropriate payments have been made to requesting countries under the POCAMLA;

d) any funds appropriated by Parliament, as well as any funds paid into or assigned to the Fund under the terms of any other law;

e) domestic and international grants;

[87] *Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others [2020] eKLR* 8.
[88] POCAMLA Section 89.
[89] Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 Journal of African Law 27, 39.
[90] Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 109.

f) money or property recovered under the provisions of the Anti-Corruption and Economic Crimes Act No. 13 of 2003, or under any other Act excluding money or property recovered on behalf of any public body or person;

g) any property or monetary sum gained or obtained from any other lawful sources; and

h) all property or funds transferred to the Fund in accordance with the POCAMLA."

The ARA administers this Fund and all monies collected from this Fund are paid into Treasury's consolidated fund for re-allocation as public revenue.[91] Section 111 should be revised to allow the ARA to use Fund proceeds to fight crime, increase budget capacity, and give technical training to ARA officials and members of the public on ML and associated offenses. This was recommended as early as 2015. Another suggestion was to change Section 112 of the POCAMLA so that all proceeds from confiscated assets could be put into the Criminal Asset Recovery Fund.[92]

3.5 Conclusion

In conclusion, this chapter has discussed the establishment and functions of the key institutions in Kenya dealing with combating AML that is the Financial Reporting Centre, Anti-Money Laundering Advisory Board and the Asset Recovery Agency. While acknowledging that the institutions have been very bold and instrumental in curbing ML, the Chapter has highlighted deficiencies in the institutions such as overlapping roles, capacity constraints and minimal budgetary allocation. The next Chapter 4 will provide an analysis of ML institutions in South Africa. This country has been selected due to the advanced nature of its anti-money laundering laws that were enacted a decade before Kenya's AML law and has had the benefit of continuously improving its AML institutions. To this extent, the jurisdiction can provide good insights on institutional frameworks necessary to fight the ML. The Chapter will further provide best practice recommendations that Kenya can adopt in its AML institutions.

[91] Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya s 112.

[92] October 2015 Report of the Taskforce chaired by the Attorney General, Githu Muigai, on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya presented to H.E Uhuru Kenyatta.

CHAPTER FOUR

SOUTH AFRICAN ANTI-MONEY LAUNDERING FRAMEWORK: BEST PRACTICES

4.1 Introduction

The Republic of South Africa (RSA) boasts a strong economy and one of the world's most efficient and contemporary financial sectors. South Africa is a developing country in a region with a predominantly cash-based economy. It has a first-world banking system with well-developed infrastructure and technology, but low participation (almost 60% of the adult population was excluded from formal financial services in 1994) and rising demand for financial services. The government of the Republic of South Africa has made it a priority to ensure that individuals excluded from formal financial services, particularly potential low-income customers, can access and use financial services offered by registered financial services providers that are appropriate to their needs on a long-term basis. [1]

This chapter's goal is to identify best practices in South Africa's anti-money laundering (AML) framework that Kenya could adopt. There are several reasons why the author chose South Africa to study best practices. First, like Kenya, South Africa is a signatory to AML international treaties (such as the Palermo[2] and Vienna[3] Conventions), and both countries are members of the FATF (Financial Action Task Force), all of which establish minimum standards for money laundering control.

In his final statement as FATF president in 2019-20, Xiangmin Liu said : "The challenge many countries face today is not the absence of comprehensive global standards, but the effective implementation of those standards."[4] This assertion is reflected squarely in the basel AML

[1]FATF/OECD and ESAAMLG, 'Mutual Evaluation Report of South Africa - Executive Summary Anti-Money Laundering and Combating the Financing of Terrorism' (2009) 3 <http://www.treasury.gov.za/> accessed 12 September 2020.
[2]The International Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 29 September 2003) UNTS 2225 (p.209) 2000.
[3]United Nations Organisation, 'The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted on 20 December 1988, Entered into Force 11 November 1990) UNTS 1582 p.95' (1988).
[4] 'Basel AML Index 2020' (*Basel Institute on Governance*) <https://baselgovernance.org/news/basel-aml-index-2020-released-today> accessed 26 March 2021.

reports that have Kenya consistently ranking among the top ten countries prone to ML, and not South Africa. In the 2019 report for instance Kenya was seventh place, with an ML index score of 7.33 while SA was eighty-fourth with an ML index of 4.83.[5] Worth noting is that, this index marked an improvement for South Africa that went from sixty-fourth place to eighty third, while Kenya worsened from nineth place to seventh. As a result, South Africa would is therefore suited to provide guidance for Kenya in implementing the provisions of the numerous international responsibilities.

Second, because both nations are categorized as developing countries, South Africa's AML framework would be a good starting point for benchmarking. Thirdly, from July 2005 to June 2006, South Africa held Presidency of the FATF and as a member of the Egmont Group. As a result, South Africa would be an excellent example for Kenya in terms of developing a more efficient anti-money laundering legal and institutional framework.

4.2 Anti-Money Laundering in South Africa: Legislative History and Key Legislation

South Africa's anti-money laundering and anti-terrorist financing structure is three-tiered, with fundamental legislation, regulations, and sector-specific recommendations forming the base. All tiers were operational at the time of this study.[6] The Prevention of Organized Crime Act 121 of 1998 ('POCA') and the Financial Intelligence Centre Act No. 38 of 2001 ('FICA') form the backbone of South Africa's anti-money laundering regime. The FICA established the administrative framework for ML control, whereas the POCA established the ML-related offences and sanctions.[7]

Historically, South Africa's anti-money laundering legislation was enhanced by statutory measures in the Drugs and Drug Trafficking Act 140 of 1992. This Act made it illegal to launder the proceeds of certain drug-related offenses and mandated the reporting of suspicious transactions involving drug-related proceeds. The Proceeds of Crime Act No. 76 of 1996

[5] Basel Institute on Governance, 'Basel AML Index 2019' (2019) <https://baselgovernance.org/sites/default/files/2019-08/Basel%20AML%20Index%202019.pdf> accessed 26 March 2021.

[6] Charles Goredema, 'Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones' 11 <https://oldsite.issafrica.org/uploads/M132CHAP4.PDF> accessed 3 June 2020.

[7] FATF/OECD and ESAAMLG, 'Mutual Evaluation Report of South Africa - Executive Summary Anti-Money Laundering and Combating the Financing of Terrorism' (2009) <http://www.treasury.gov.za/> accessed 12 September 2020.

expanded the scope of statute laundering laws to include all forms of criminal offenses. When the Prevention of Organized Crime Act No. 121 of 1998 took effect in 1999, it repeals the Proceeds of Crime Act No. 76 of 1996, as well as the Drugs and Drug Trafficking Act's laundering provisions.[8]

Money laundering is illegal under Section 4 of the POCA, which imposes severe maximum penalties for ML-related offenses, including a fine of R100 million (US$16 867 thousand) or a sentence of up to 30 years in jail. [9] The AML control measures are found in the FICA and The Money Laundering Control Regulations ("the Regulations") issued under the FICA Act in December 2002 and amended in 2010

The requirements are further detailed in guidance notes provided by the Financial Intelligence Centre (FIC) of South Africa and circulars issued by the South African Reserve Bank (SARB), the country's central bank. On February 22, 2010, the FIC inaugurated a new communication platform, the Public Compliance Communication (PCC) series. The PCC's goal is to help all enterprises, especially accountable institutions, better comprehend the FICA and to answer some of the more complicated concerns that arise from the administration of the FICA and its subordinate legislation. The PCC series' major goal is to provide guidance on the FIC's interpretation of the relevant legislation under Section 4(c) of FICA. This type of guidance will have the same legal standing as the guidance notes that the FIC has published in the past and will continue to provide in the future.[10]

[8]Dennis Cox, 'Handbook of Anti-Money Laundering: International Law and Practice' [2013] John Wiley & Sons, Ltd 754.
[9]Dennis Cox, 'Handbook of Anti-Money Laundering: International Law and Practice' [2013] John Wiley & Sons, Ltd 754, 786.
[10]Dennis Cox, 'Handbook of Anti-Money Laundering: International Law and Practice' [2013] John Wiley & Sons, Ltd 754, 625.

4.3 South Africa's Institutions within the Anti-Money Laundering Framework

4.3.1 The Financial Intelligence Centre (FIC)

4.3.1.1 Powers and Functions of the Financial Reporting Centre

The FIC's primary purpose is to aid in the identification of proceeds of illegal activity and the prevention of money laundering. [11] The FIC has no prosecution or execution powers being administrative FIU under the South African Ministry of Finance. Rather, its intelligence is used to assist current investigation bodies and other intelligence and criminal justice system players.

Its main goal is to aid in the identification of proceeds of illegal operations as well as the combating of money laundering and associated activities.[12] The Financial Intelligence Centre (FIC) relays complaints of suspicious transactions to one of the following agencies under the Financial Intelligence Centre Act (FICA):

- "the Directorate of Special Operations (Scorpions);
- the Asset Forfeiture Unit (AFU);
- the South African Police Service;
- the South African Revenue Service;
- the intelligence agencies; and
- the exchange control department of the South African Reserve Bank."[13]

Nevertheless, the FIC has power to issue sanctions and other administrative remedies in accordance to the dictates of the FICA section 45C[14]. However, since it does not have enforcement jurisdiction, in case a person defies an administrative sanction; e.g. refuses to pay a

[11]Louis de Koker, 'Money Laundering in South Africa' [2002] Centre for the Study of Economic Crime; RAU University, Johannesburg, South Africa 50, 22.
[12]FATF/OECD and ESAAMLG, 'Mutual Evaluation Report of South Africa - Executive Summary Anti-Money Laundering and Combating the Financing of Terrorism' (2009) <http://www.treasury.gov.za/> accessed 12 September 2020.
[13]Charles Goredema, 'Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones' 11 <https://oldsite.issafrica.org/uploads/M132CHAP4.PDF> accessed 3 June 2020.
[14]Financial Intelligence Centre Amendment, Act No. 11 of 2008.

penalty, the FIC files the notice in court as a civil proceeding in favor of the Centre as stipulated in section 45C, (7) of the FICA[15].

In case one wants to appeal a decision by the FIC, an appeals board is set up by the minister. Under section 45E of the FICA. Members of the Financial Sector Tribunal (formed under section 219 of the Financial Sector Regulation Act, 2017 and appointed under section 220 of same Act) will be members of the minister-nominated appeals board to examine a FIC judgment. Furthermore, the appeals board's decision can be appealed in the high court as if it were made in a magistrate court.[16]

4.3.1.2 Structure of the Financial Intelligence Centre

The FIC is led by a single director, with a term limit of 5 years, appointed by the minister under section 6 of the FICA[17]. Within the FIC, other than the director the rest of the employees are referred to simply as employees with no expressly defined ranks in the FICA, and they are all appointed by the director[18]. If the director is not able to carry out his functions, for one reason or the other, the minister is mandated to appoint one employee to be acting director. The director serves as the CEO and accounting authority of the Centre and employees work according to the functions and duties; the director assigns them[19].

The integrity, correctness, and dependability of the information it receives and disseminates are critical to the Centre's reputation. As a result, the following safeguards against information integrity violations have been put in place. The National Intelligence Agency, which is in charge of screening government personnel, conducts security checks on the staff of the Centre. In addition, all employees take an Oath of Confidentiality. The Centre also has a security policy in place that covers the laws that apply to the Centre's operations and the protection of the confidentiality of its information, as well as the responsibilities of each employee in terms of security. Document security includes classification, access, handling, and storage of documents, as well as IT/Computer security, which includes network access and exit management.

[15]Financial Intelligence Centre Amendment, Act No. 11 of 2008.
[16]Financial Intelligence Centre Amendment, Act No. 11 of 2008 s 45 (D) (11).
[17]Financial Intelligence Centre Amendment, Act No. 11 of 2008 s 6.
[18]Financial Intelligence Centre Amendment, Act No. 11 of 2008 s 11.
[19]Financial Intelligence Centre Amendment, Act No. 11 of 2008 ss 10 & 11.

The Centre holds stakeholder feedback sessions with a variety of stakeholders to review past actions, difficulties and accomplishments, emerging trends and typologies, and future collaboration in order to improve their AML efforts. Furthermore, the Centre provides public feedback through an electronic question system. On the FICA's website, members of the public can ask questions about the organization and its operations. In 2003, the FIC joined the Egmont Group of Financial Intelligence Units. As a result, the Centre agreed to follow the ideals outlined in the Egmont Group Charter.

4.3.1.3 Location of the Financial Intelligence Centre within the Government structure

Administratively, the FRC is under the Ministry of Finance. In terms of operational independence and autonomy, the FIC has plenty of both and is free of excessive influence or intervention. The Centre is established as a statutory organization with legal personality, allowing it to engage in commercial activities, hire and remunerate employees, and acquire services in its own name. It reports to the Minister of Finance and is housed under the Ministry of Finance.

The Centre is an entity outside the public service but works within the public administration (as envisaged in Section 195 of the Constitution of the Republic of South Africa). The Public Finance Management Act of 1999 (the PFM Act) classifies it as a Section 3(a) organization. Consequently, while the Centre is considered an independent organization within government, it is not subject to the same rules that govern government ministries. [20]

4.3.1.4 The FIC's Experiences and Successes in Anti-Money Laundering

The FRC Annual Report of 2015-2016, indicates that the FRC has had immense success in combating money laundering[21]. The FIC receives an upward of 10 million reports and recovery of hundreds of millions of Rand annually. In the year 2016, their intelligence helped in the

[20]FATF/OECD and ESAAMLG, 'Mutual Evaluation Report of South Africa - Executive Summary Anti-Money Laundering and Combating the Financing of Terrorism' (2009) <http://www.treasury.gov.za/> accessed 12 September 2020.
[21]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.

recovery of R186 million worth of proceeds of crime[22]. The following are some examples of times when the FIC was able to produce financial intelligence that aided law enforcement and prosecuting authorities, as well as other partners, in investigating crime, thanks to reports submitted by institutions and other data.[23].

The FIC aided in the identification of South African scammers who were part of a global network. The syndicate defrauded hundreds of internet users outside South Africa millions of dollars. The fraudsters used phony profiles on dating sites and hundreds of fraudulent e-mail accounts to induce customers to send electronic products or wire money to bank accounts in Gauteng. The FIC determined that the organization used the proceeds from their frauds to buy real estate and vehicles. The FIC was also able to track down their domestic bank accounts and blocked the accounts of three of the syndicate's kingpins. Preservation and forfeiture orders were issued for assets totaling R2.4 million.[24]

In another instance, On Christmas Day 2015, two Mozambican nationals were caught at the Lebombo Border Post, where they were found with over R78 million in cash and a Toyota Hilux. Mpumalanga's Asset Forfeiture Unit, which used various FIC financial intelligence reports during its investigation, apprehended the subjects with US dollars and euros hidden in several custom-made compartments in the automobile. The Asset Forfeiture Unit issued preservation orders for this money.[25].

4.3.1.5 Reporting obligation to the Financial Intelligence Centre by Reporting Institutions.

Since 2003, the South African Financial Intelligence Centre (FIC) has been receiving information, largely in the form of suspicious transaction reports from financial and non-financial organisations. The reports are followed up on and assessed, and they are forwarded to investigating agencies if necessary. The FIC Act recognizes business sectors that are vulnerable to money laundering and terrorist funding and specifies them as schedules 1 and 3 of the Act.

[22]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.
[23]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.
[24]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.
[25]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.

The following are the requirements and obligations of schedule 1 and 3 institutions under the FIC Act: Clients must be identified and verified, client records must be kept, clients must be registered with the FIC, and compliance officers must be appointed. Employees should be taught how to comply; Register with the FIC; File statutory reports, such as cash threshold and terror property reports; and reflect the organization's compliance structures.[26]

In the 2015/2016 fiscal year, Cash threshold reports (CTRs) accounted for 9.3 million of the total number of reports received, up from 6.6 million in the previous year's comparable period.[27] A number of variables, according to the FIC, have contributed to the constant growth in the number of reports. Regular interaction and feedback meetings with the accountable and reporting entities were singled out. Other factors include; development of a reporting tool to make reporting easier by allowing for the electronic submission of batches of reports; Obligations are being covered more frequently in the media; as well as frequent compliance measures such as presentations to various reporting institutions and sectors.[28]

4.3.1.6 Challenges faced by the South African FIC

It is therefore evident that a lot of progress is being made, nevertheless the institution has had recurring challenges with staff recruiting and retention[29]. This comes about because of the scarcity of qualifications and know-how required, by the employees, to carry out its mandate. Consequently, the FIC is composed of a highly skilled but very small workforce[30]. (Small relative to the tasks and mandates required of them).

As a countermeasure, the Corporate Services Division works to guarantee that the organization has the capabilities it requires, and that current employees are constantly learning and enhancing

[26]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.
[27]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.
[28]Charles Goredema, 'Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones' 11 <https://oldsite.issafrica.org/uploads/M132CHAP4.PDF> accessed 3 June 2020.
[29]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.
[30]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.

their skills and knowledge[31]. As a result, the FIC invests in training and development to keep personnel engaged and informed about technical advancements. In 2018/19, the entity continued to implement its learning and development strategy, as well as its career development and talent management frameworks. [32]

4.3.2 Asset Forfeiture Unit in South Africa

4.3.2.1 The Asset Forfeiture Unit within the Government Structure

The National Prosecuting Authority in South Africa (NPA) is in charge of the Asset Forfeiture Unit. The Asset Forfeiture Unit (AFU) was established by the NPA in 1999 to ensure the implementation of the Prevention of Organized Crime Act, Act 121 of 1998. (POCA). The unit's mission is to take the profit out of crime through confiscation and forfeiture proceedings based on both convictions and non-convictions.[33] Only the National Director of Public Prosecutions (NDPP) has the authority to initiate or institute asset forfeiture proceedings under the POCA. POCA specifically allows parties with an interest in the property, whether foreign or domestic, to claim it. The POCA allows for conviction-based forfeiture, in which a High Court may inquire into any benefit a convicted person may have derived from an offence in order to issue a confiscation order. Non-conviction-based preservation orders are also provided for, where the National Director of Public Prosecutions may apply to a High Court for an order prohibiting any person, subject to such conditions, through an ex-parte application.[34]

4.3.2.2 Multi-Agency Approach of the Asset Forfeiture Unit

The criminal forfeiture scheme outlined in Chapter 5 of POCA is based on the United States' Criminal Justice Act and the Criminal Justice Act of the United Kingdom.[35] Unlike Kenya, the

[31]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.
[32]FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.
[33]ARISNA, 'ARINSA Annual Report 2019' (Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) 2020) <https://new.arinsa.org/> accessed 25 September 2020.
[34]ARISNA, 'ARINSA Annual Report 2019' (Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) 2020) <https://new.arinsa.org/> accessed 25 September 2020.
[35]Vinesh Basdeo, 'The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma' (2014) 17 Potchefstroom Electronic Law Journal 1047 <https://journals.assaf.org.za/index.php/per/article/view/2279> accessed 20 October 2020.

Asset forfeiture Unit is more or less an extension of the NDPP in respect to its mandate and leadership. To this end, only the NDPP can institute forfeiture proceedings in the courts. Nevertheless, the unit liaises with other supervisory bodies under the FICA, to facilitate investigations and analysis of evidence. These supervisory bodies include

- the South African Police Service;
- the Directorate of Special Operations (Scorpions);
- the Financial Intelligence Authority (F);
- the South African Revenue Service;
- the intelligence agencies; and
- the exchange control department of the South African Reserve Bank.

The FIC annual report 2015/2016, gives numerous instances (some of which have been discussed in the previous section) where the cooperation between these supervisory bodies culminated to orders of forfeiture from the courts[36]. Further international co-operation with the Asset forfeiture Units of other countries has lent further credence to its effectiveness[37].

In comparison to Kenya, South Africa has a greater influence in the asset recovery arena. Due to its extensive expertise and implementation of civil forfeiture cases, South Africa serves as a mentor to the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) member nations. The country also hosts the ARINSA secretariat, which is hosted by the National Prosecuting Authority (NPA) of South Africa and the United Nations Office on Drugs and Crime's Regional Office for Southern Africa (UNODC-ROSAF). Representatives from ARINSA also work with the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) to explore asset forfeiture actions and opportunities.[38]

[36]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.
[37]ARISNA, 'ARINSA Annual Report 2019' (Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) 2020) <https://new.arinsa.org/> accessed 25 September 2020.
[38]ARISNA, 'ARINSA Annual Report 2019' (Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) 2020) 5 <https://new.arinsa.org/> accessed 25 September 2020.

4.3.2.3 The Criminal Assets Recovery Unit

The Criminal Assets Recovery Unit (CARU) is in charge of the Criminal Assets Recovery Account (CARA), which is a distinct account within the National Revenue Fund (NRF) where money and property is deposited following a judicial forfeiture or confiscation order. The Prevention of Organized Crime Act (POCA) of 1998 governs the confiscation and forfeiture processes, as well as the establishment of the CARA.[39] Asset forfeiture legislation is based on the idea that taking or forfeiting the earnings or proceeds of crime reduces the incentive to conduct specific crimes. POCA governs the CARA's formation and mandates that all confiscated and forfeited funds and property be placed in the CARA. The forfeited assets and cash deposited in the CARA are assigned to certain law enforcement agencies, institutions, organizations, or funds described in the POCA, and are used to administer the Account.[40]

4.3.3 The Defunct Money Laundering Advisory Council (MLAC)

Under the FICA, the South African MLAC was established to advise the Minister of Finance on policies and best practices for combatting money laundering activities, as well as the Minister's exercise of his responsibilities under the FICA. It also provided advice to the FIC on how to carry out its duties and served as a platform for the FIC, associations representing different types of accountable institutions, state organs, and supervisory authorities to consult with one another. Before the Minister could make, abolish, or change regulations under FICA, the MLAC was one of the parties that had to be consulted.[41]

However, the MLAC is presently defunct. Amendments to the Financial Intelligence Centre Act 38 of 2001 were recommended in the 2009 FATF Mutual Evaluation Report of South Africa (FICA). The Counter Money Laundering Advisory Council was abolished as one of the amendments. It included members of the government department's Security Cluster as well as other stakeholders. Its only contribution was to the early formulation of FICA Regulations. Its

[39]Auditor General Republic of South of Africa, 'Report of the Auditor-General to Parliament on the Financial Statements and Performance Information of the Criminal Assets Recovery Account (Cara) for the Year Ended 31 March 2008 Report on the Financial Statements' (2008) <https://www.npa.gov.za> accessed 25 September 2020.
[40]Auditor General Republic of South of Africa, 'Report of the Auditor-General to Parliament on the Financial Statements and Performance Information of the Criminal Assets Recovery Account (Cara) for the Year Ended 31 March 2008 Report on the Financial Statements' (2008) <https://www.npa.gov.za> accessed 25 September 2020.
[41]Louis de Koker, 'Money Laundering in South Africa' [2002] Centre for the Study of Economic Crime; RAU University, Johannesburg, South Africa 50, 24.

existence and functioning subsequently became a challenge because it was made up of high-level delegates who often had difficulty attending its yearly sessions.[42].

4.4 Lessons for Kenya from the South African Experience

On paper, the law and institutions enacted by the POCAMLA are similar in nature and powers as the South Africa (SA) institutions, both countries have mirrored model laws recommended by FATF and the IMF. The key distinction however is in the autonomy of the institutions and the cooperation between the various bodies responsible for AML. While the foregoing notes that the bold steps taken by SA in implementing the AML policy, Kenya remains timid in her approach.

Anti-money laundering measures should be viewed as part of the larger war against crime. It is also widely acknowledged that AML programs will fail unless they are systematic, strategic, and long-term.[43]. South Africa has particularly exemplified this through the elaborate cooperation framework and professionalism exhibited by FIC. In the examples listed previously (under title 4.3.1.4) The arrest of the two Mozambique nationals at the Lebombo Border Post was possible because of Mpumalanga's Asset Forfeiture Unit, worked with FIC and used several timely FIC financial intelligence reports during its investigation[44]. The courts also played a key role in issuing preservation orders for the recovered proceeds. The transparency exhibited by the South African's institutions create confidence in the institutions and arguably deter reputable persons or organizations from participating in ML. On the other hand, to date, neither the ESAAMLG nor FATF have been able to stimulate the necessary political will in Kenya, for instance the Government Taskforce has not given its Report since March 2019. This provides a major loophole for the escape of the ML culprits. With regards to courts, interlocutory applications challenging the constitutionality of the shift of onus of proof, among other issues, have contributed to unreasonable delays in court proceedings. Since, under article 50(2)(e) of the Constitution, the right to a fair trial includes the entitlement to have court proceedings

[42]'Anti-Money Laundering: National Treasury's Proposal to Establish and Lead an Inter-Departmental Committee' (*De Rebus*, 31 August 2018) <http://www.derebus.org.za/anti-money-laundering-national-treasurys-proposal-to-establish-and-lead-an-inter-departmental-committee/> accessed 20 October 2020.

[43] Charles Goredema, 'Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones' 11 <https://oldsite.issafrica.org/uploads/M132CHAP4.PDF> accessed 3 June 2020.

[44]FIC, 'Financial Intelligence Centre Annual Report 2015- 2016' (Financial Intelligence Centre, South Africa 2016) <https://www.fic.gov.za/aboutus/Pages/Annual-Reports.aspx> accessed 20 September 2020.

commenced and finalized 'without unreasonable delay', prosecutions for corruption have been quashed on that basis[45].

In addition, the Corporate Services Division in South Africa (as indicated under title 4.3.1.6) works to ensure that the organization has the skills it requires, and that current employees are constantly learning and enhancing their abilities and knowledge.[46] As a result, the FIC invests in training and development to keep personnel engaged and informed about technical advancements. Given the effectiveness of the FIC in investigation and dissemination of information, a human resource-oriented approach appears to greatly affect the success of FIC. Kenya can borrow this approach, to ensure the FRC is not the weak link in the fight against ML courtesy of underequipped staff.

As a lesson, Kenya also needs to reform her institutions to at the very least achieve total independence from political influence, executive control and budgetary control. The Anglo-Leasing Scandal exemplifies the breadth and depth of corruption among government officials that has long plagued Kenya. Kenya is listed as one of the most corrupt countries in the world in Transparency International's Corruption Perceptions Index every year[47]. Such occurrences point to the vast amount of public cash that is being laundered by government officials. Stakeholders must work together to convince Kenya's political elites that stronger financial governance, including strengthened anti-money laundering measures, is a strict requirement for Kenya's continuing participation in the global financial and trade system. Progress on the FRC will be impossible to achieve unless such political will is mustered.

International co-operation has aided SA build her institutional capacity, by her being a member of the Egmont Group and hosting the UN regional offices on Drugs and Crime, Kenya can learn to better tap into benefits of co-operation with regional and international AML agencies and seek free technical assistance from institutions such as the IMF.

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[45] Tom Kabau, 'Constitutional Dilemmas in the Recovery of Corruptly Acquired Assets in Kenya: Strengthening Judicial Assault on Corruption' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2861698 <https://papers.ssrn.com/abstract=2861698> accessed 26 March 2021.

[46] FIC, 'Financial Intelligence Centre Annual Report 2018-2019' (Financial Intelligence Centre, South Africa 2018) <https://www.fic.gov.za> accessed 12 September 2020.

[47] Peter Warutere, 'Detecting and Investigating Money Laundering in Kenya' [2006] Money Laundering Experience. ISS Monograph Series.

Finally, SA legislature is seen to be quick with writing off bad law that seems to have a counter-effect on the spirit behind it. SA did not hesitate to amend the FICA to remove legal provisions of the MLAC due to its counter-productivity to the whole body of AML policy. Kenya's policy framers and legislature can pick the lesson that if an institution, in the view of the author such as the AMLAB, requires an overhaul or from its very nature lacks independence, it is possible and a legitimate act to repeal the law to pave way for much needed reforms. For instance, Kenya could anchor in law the Multi-Agency Task force commissioned by the president in 2015 to provide a clearer legal basis for its operation.[48] A review of reporting obligations of institutions should also be carried out to eliminate redundancies and enable a more focused and precise approach. This stems from the fact that FRC is overburdened by excessive reporting from reporting institutions which results in oversight mishaps on ML activities[49].

4.5 Conclusion

The fact that South Africa's institutional AML framework is robust and only comparable to those in developed nations may be confirmed by referring to the aforementioned. Despite both South Africa and Kenya being developing countries, it is clear that the South African government devotes more resources to money laundering prevention and control than the Kenyan government. The South African government has taken substantial steps to guarantee that the FATF's obligations, in terms of building robust institutions within the AML framework, are met. While the Kenyan legal and institutional AML framework has flaws, the South African framework includes best practices that Kenya may adopt. The main points of departure between the two frameworks include low capacity for AML efforts in Kenya, lack of political goodwill and a weak FIC, an effective judiciary and effective training in AML. The author believes that borrowing and adopting best practices from South Africa would be a good place for Kenya to start. This would mainly entail institutional and legal reforms as discussed in Chapter Five

[48] Caroline Nyaga, 'Enhancing Synergies: The Multi-Agency Experience in Fighting Corruption in Kenya' (2017).
[49] Wafula Anna Mercy Nafula, 'Challenges Of Implementing Effective Anti-Money Laundering Strategies In Kenyan Commercial Banks' 74.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

Kenya is considered compliant with international AML and CFT standards following the passage of the AML and terrorist prevention laws. Furthermore, the FRC's mandate in identifying criminal proceeds and combating money laundering would reflect the government's commitment to ending money laundering in the country. However, the implementation of these legislation has been hampered in some way. As a result, the primary goal of this study was to figure out why there is a gap between the legislation and practice in Kenya when it comes to AML, as well as make recommendations.

In order to assess this problem, the research had to first establish that indeed the AML framework in Kenya is ineffective. Thus, the aim was twofold; on the one hand establish or disprove the hypothesis that Kenya's AML is ineffective, and on the other hand find out the reason for ineffectiveness and possible remedies. Other hypotheses were that poor inter-agency co-ordination between all Government agencies involved in combating AML and specific institutional weaknesses within the FRC, AMLAB and ARA were the biggest impediments to the success of the AML.

5.2 Findings of the Research

The findings to the research are premised on the four research questions. They include; determination of the regional and international institutional initiatives that Kenya has adopted, the challenges and shortcomings of the current institutional AML framework in Kenya, best practices that Kenya can adopt from international AML best practices, and other reforms that Kenya can implement to create a more effective AML institutional framework.

5.2.1 Key Findings

The provisions of the Proceeds of Crime and Anti-Money Laundering Act[1] (POCAMLA) and the numerous international instruments to which Kenya is a party to were established in Chapters One and Two as the benchmarks for an efficient AML framework in Kenya. The literature was evaluated in these chapters, and numerous recommendations were given based on the deficiencies and developing challenges in AML efforts. The various policy, legal, and institutional constraints that restrict the efficiency of Kenya's AML institutions were noted in Chapter Three. The South African AML-based institutions were evaluated in Chapter Four, and it was determined that there are best practices that Kenya should follow in order to make her framework more successful.

The analysis found that, despite the country's efforts to meet the targets set, the standards have not been met. Nonetheless, it is crucial to emphasize that Kenya has taken considerable measures toward criminalizing money laundering by enacting an anti-money laundering legal and institutional framework.

Further it has been established that the Government has shown its commitment to addressing issues relating AML institutions for instance the operationalization of the Financial Intelligence Centre (FIC) under the POCAMLA, the Asset Recovery Authority (ARA) and the Anti-Money laundering Advisory Board (AMLAB). However, the commitment efforts need to be intensified seeing that these institutions are starved off finances critical for their operation. It is hoped that this commitment would be followed up by the provision of the necessary financial and human resources to enable these organizations to fulfill their responsibilities. The FIC is required by law to be enhanced with a variety of talents, including specialized investigation tactics, information technology, forensic auditing, banking practices, and prosecution, since it is designated as the country's Anti-Money Laundering authority.

The POCAMLA has been modelled around European Directives, International Convections and the 43 directives of the Financial Action Task Force (FATF) with little or no domestication. The strict implementation of the law therefore creates such burdensome responsibilities on some private sectors such as banks, insurance companies and other reporting entities, which ends up

[1]Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Laws of Kenya.

making them inwardly focused and reduces competitiveness over time. The imposition of criminal sanctions and heavy financial penalties on reporting institutions that fail to comply with the law, makes it clear that the law against money laundering is intent on removing the proceeds of crime from circulation.[2]Thus, the spirit and the objectives of the anti-money laundering regime is laudable: to reduce the crime of money laundering by making it less profitable and cutting off its funding; to protect the reputation and integrity of business and to avoid economic and competitive distortions

It was also established that, in spite of the existence of the FIC and AMLAB, the Central Bank of Kenya (CBK) is seen as the primary institution spearheading the fight against money laundering. It is was also noted in this paper that the Kenyan FIC has not joined the Egmont Group, however, her counter South Africa became a member in 2003.

5.2 Importance of the Findings

The findings would help the government in Kenya and other developing countries fill the gaps arising from their respective AML frameworks. This is particularly so, as they draw attention to the economic disparities between the countries from which the AML is copied from and the developing countries that aspire to implement them. Whereas, increasing the budgetary allocations for these institutions would suffice, a more substantive approach of making the laws compatible with the economic realities would go a long way in ensuring there is a full proof AML framework.

5.3 Recommendations

5.3.1 Policy Reforms

The study found that Kenya lacks a national AML policy which affects the way AML concerns are handled by the Government and the citizenry. It is vital that Government moves with due speed to complete the outstanding process of The Taskforce[3] created in March 2019 that was to

[2]Beth Ngima Warui, 'Implementation and Enforcement of the Law on Money Laundering: An Analysis of Kenya's Legal and Institutional Framework.' (University of Nairobi 2016).
[3] The Kenya Gazette 22nd March, 2019 (VolCXXI-NO34) 1087.

completely analyze the efficacy of the AML legal and institutional framework and recommend reviews of the same framework.

Further research needs to be carried out to establish the best fit anti-money laundering practices that correspond to the economic realities of most developing countries.

5.3.2 Institutional Reforms

The institutions that are involved in AML in Kenya under the MAT include the Kenya Revenue Authority, the FRC, the Asset Recovery Authority, the ODPP, the DCI, the Ethics and Anti-Corruption Commission, Central Bank of Kenya and AMLAB. The reforms proposed relating to these institutions are discussed below;

a) provide adequate training to law enforcement and judicial agencies;
b) Deprive criminals of their criminal proceeds by putting in place effective freezing, seizure, and confiscation processes.;
c) Except for the FRC and the AMLAB, all of the institutions have some level of general capacity and resources. Because the FRC, ARA, and AMLAB are all relatively young bodies that were built from the ground up, the multi-agency task force should place a greater emphasis on developing human capability in these three institutions.
d) Continued and broadened international collaboration with similar institutions in the region and around the world.
e) At the academia, the universities and specifically Law Schools need to create a thematic area addressing uniquely about AML institutional, legal, policy and framework
f) There is a pressing need for Treasury to deploy specialized information systems and extremely powerful computer programs that will enable data collecting and analysis. The FRC will need to develop a mechanism that allows accountable institutions to disclose threshold transactions electronically, as quickly as possible and as inexpensively as possible. These systems, as well as the skills required to create and administer them, may be prohibitively expensive, but foreign help may be sought.[4]

[4]Louis de Koker, 'Money Laundering in South Africa' [2002] Centre for the Study of Economic Crime; RAU University, Johannesburg, South Africa 50, 44.

Under the established Multi-Agency TaskForce, it is also recommended that measures be put in place to train various government officials working with the POCAMLA and the Regulations, such as the judiciary, Office of the Director of Public Prosecutions, Directorate of Criminal Investigations, and Kenya Revenue Authority (MAT). Joint training programs for these authorities would be one example of such initiatives. It's possible that the government lacks the necessary resources. If this is the case, donor financing should be sought, as the legislation will only be alive when law enforcement officials are substantially informed on the content and of the POCAMLA.

5.4 Final Conclusion

Kenya has a well-developed institutional structure for combating money laundering. Its current challenge is to breathe life into those institutions through reforms and overhauls. If properly implemented, the framework can aid in the development of Kenya's economy as well as the fight against crime. Kenya will undoubtedly be able to draw on domestic and international knowledge to shape its anti-money laundering institutions during this process. Kenya, however, suffers a number of issues that are unfamiliar to developed countries, such as power abuse, a lack of political goodwill, high levels of corruption, and a lack of money. Kenya will have to come up with her own solutions and restructure its institutions and tactics in this regard. Greater regional cooperation will allow Kenya and other nations to combine their experience and resources, as well as establish institutions that will effectively combat money laundering when it manifests itself in their economies.[5]

[5]Louis de Koker, 'Money Laundering in South Africa' [2002] Centre for the Study of Economic Crime; RAU University, Johannesburg, South Africa 50, 49.

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