THE MECHANISMS FOR HARMONISATION OF GLOBAL ANTI-MONEY LAUNDERING LAWS: AN INSTITUTIONAL FRAMEWORK

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1.

INTRODUCTION

The article examines various institutional mechanisms for harmonisation of private and public international law, the realm within which global anti-money laundering regimes fall. Some of the said mechanisms are generated by specialist institutions such as harmonisation of private international law, coordinated by the International Institute for Unification of private Law (“UNIDROIT”). This is an independent intergovernmental organisation with its seat in Rome. Then there is the United Nations Commission on International Trade Law (UNCTRAL) with its seat in Vienna. This is a core legal body within United Nations system in the field of international trade law. It was established in (1966) by the General Assembly with the Mandate to further the progress of harmonisation and unification of international trade law. The above two institutions are specifically created for harmonizing a specialized area of law, whatever this may happen to be. There are other bodies specifically created to foster harmonization of global anti-money laundering laws such as the Financial Action Task Force (FATF), the Basle Committee Principles on Supervision of Banks (BCSB) and the Financial Stability Forum (FSF). These bodies provide a platform for interstate cooperation on matters of money laundering and combating financing of terrorism. This paper explores the institutional mechanisms for harmonization of global anti-money laundering laws at a national level.

Harmonization is implemented in different ways, not least by way of a state adopting soft law norms enunciated by AML/CFT oversight institutions. Soft Laws are non-binding obligations which are created to plug gaps in the international legal system with regard to the envisaged regulatory issue area. Soft law norms are initially issued as “guidelines” but with the intention of crystallizing them into hard law in future. These soft law norms can help to define standards of normative practice. Secondly, harmonization can take place through the adoption of hard law such as treaties. Treaties create binding legal obligations such as directives of the European Union which the state will have to domesticate nationally after a stipulated timeframe. This can either be done by way of passing an enabling legislation or through the interpretative role of national courts as this article demonstrates. Thirdly, harmonization can be encouraged through the reform process of national economies such as those encouraged by the World Bank and the International Monetary Fund (IMF). International financial institutions play a significant role in engineering financial sector reforms in many countries to ensure that those countries are able to

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3 See its official website at http://www.unctral.org, (last visited, 10th December 2009).
4 As such soft law norms tend to have echoes of customary law which states accept to adopt because they see it as important and necessary for the society.
5 These reforms may be dictated by different reasons, targeting different areas of the economy.
comply with global anti-money laundering standards, such as those envisaged by the Basle Committee principles on banking supervision and FATF recommendations on a forward looking basis. This article examines the process of harmonization of anti-money laundering laws through various institutional platforms. Similarly, the article articulates the challenges of achieving full harmonization of anti-money laundering laws both nationally and international level.

The money laundering process is too complex to be dealt with in the realm of an individual state, however powerful that state is.\(^6\) This is demonstrable by the fact that United States has engineered the creation of multilateral AML/CFT institutions, notwithstanding that it is a powerful economy.\(^7\) It recognises its limits as a state and the offshoot challenges posed by the global threat of money laundering. Money laundering is defined as “a process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.”\(^8\) Money laundering describes a deliberate, complicated and sophisticated process by which proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means. It is a three stage process where initially the dirty money must be severed from the predicate crime generating it; characterised by a series of transactions designed to obscure or destroy the money trail in order to foil pursuit; and reinvesting the crime proceeds in furtherance of the objectives of the business (launderer).\(^9\) In terms of money laundering terminology, these three stages are known as placement, layering and integration respectively. The schemes through which money laundering is committed have become sophisticated due to the instrumentalities of globalization such as the sophisticated methods of moving illicit proceeds of crime about.\(^10\) The foregoing situation is underscored by the following complexity: money laundering could be committed in United Kingdom, hypothetically by an American citizen who channels the money to Uganda in the South African currency, in a matter of minutes if not seconds.\(^11\) When the aforementioned complexity is coupled by differences and fragmentation of national anti-money laundering laws is capable of being exploited to facilitate the spread of money laundering and predicate threats. Thus, the complexity of money laundering crimes and the fluidity of the current global climate can afford criminals, the latitude to commit money laundering and stay put. Criminals have also gained access to the new markets by exploiting the discrepancies between the legal systems of countries in different parts of the world.\(^12\) This seems to justify the need for harmonisation of

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\(^6\) The united States operates robust anti-money laundering laws but it is also at the forefront of encouraging the creation of specialised anti-money laundering bodies such FATF and Basle Committee to coordinate the fight on money laundering and its predicate threats.

\(^7\) It United States engineered the adoption of the Basle Committee on Banking and Supervision of Banks in 1974; and it was also influential in the establishment of the Financial Action Task Force in Paris in 1989.


\(^10\) In relation to this, many methods abound, such as telegraphic money transfers, e-money methods, the letter of credit and not to mention the traditional ones such currency smuggling.

\(^11\) Heba Shams, supra, note 7.

\(^12\) United Nations Office for Drug Control and Crime prevention (UNDCCP), available on its website at [http://www.undccp.org](http://www.undccp.org) (last visited on 16th December 2006).
global AML laws so that they are easily are applied within the borders of different countries.

It has to be pointed out that harmonisation is necessary for countries to work together on overlapping global issues; but also to ease the potential conflict of laws and regulatory extraterritoriality. It is my contention that integration of financial markets must be supported by the application of a uniform framework on which the anticipated global changes can be implemented. Secondly, the conflict of laws issue, where different countries apply different laws and legal systems has the potential to undermine the regulation of financial institutions that are offering cross border financial services within the same legal framework. The conflict of laws issue in the delivery of cross border financial services was envisaged as a major challenge by representatives of FATF members in their efforts to create a harmonised framework in the delivery of financial services. Perhaps thirdly is to mention the potential challenge of forum shopping, otherwise known as the race to the bottom, which occurs when states parties to the same market domain (the European Single Market) adopt different regulatory standards—one adopting a rigorous regime and the other one not. This apparently justifies why FATF member countries and regional trading partners are required to introduce national laws based on international standards on money laundering and its underlying predicate threats.

The adoption of FATF’s 40+9 recommendations by member countries created a platform for global anti-money laundering standards to be applied internationally. Global AML/CFT regimes have encouraged inter-state co-operation by way of evolving guidelines for implementing the envisaged global initiatives such as the FATF and the supervisory standards under the Basle Committee. Globalisation of markets has also encouraged reforms within individual member countries as demonstrated by the work of the World Bank and IMF in many developing countries. It has to be noted that if the policy environment is conducive, globalisation has the potential to generate some synergies, particularly to less developed countries. In the first place, multilateral banking institutions can provide invaluable forums for information exchange. Multilateral initiatives have the potential to promote more open-ended and creative discussions among governments, as well as to provide effective channels for citizen input, both domestically and at the level of international institutions. Secondly, harmonisation regimes such as soft law norms can be instrumental in developing and enforcing international standards. While existing international banking organisations have no formal legislative or enforcement power, they do have the authority to issue and promote supervisory guidelines and best practices. These guidelines and best practices, though far from binding, can assume

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13 Heba Shams, supra, note 7.
14 Financial Action Task Force (FATF) Recommendation 21. This recommendation calls on financial institutions to give special attention to business relations and transactions with persons, including companies and financial firms from countries which do not or insufficiently apply the FATF forty plus nine recommendations.
15 Globalisation is not overly bad, but what countries ought to do prior to subscribing to the system is to remove the impediments that saddle the adoption of global initiatives.
16 This enhances the sharing of valuable information, best practices of risk management methodologies and monitoring.
the status of ‘soft law’ and help guide countries struggling with design and implementation problems to establish cooperative arrangements. Thirdly, globalisation can bring about the benefit of impartiality and legitimacy. For example, the world’s central banking organisation, the BIS, embodies the opinion of its world members. When the BIS adopts a particular set of standards (as it did through the adoption of Basle Capital Accord), it is seen as embodying the interests of the international banking community as a whole. In doing so, the BIS maintains the legitimacy and neutrality respected by banking supervisory authorities worldwide.

Fourthly, countries that do not have the physical or human resource capacity to develop their own systems can draw upon the expertise and experience that other members with whom they conduct business bring. Multilateral banks in Uganda have led the way in spearheading the development of AML procedures and policies over their local counterparts. This is because the parent supervisory authorities are responsible for the supervision of their home branches and subsidiaries operating in foreign jurisdictions, and will therefore supervise them in the same effective way as their home counterparts. This is necessitated by the fact that the parent is responsible for the supervision of branches and subsidiaries under consolidated supervision. Consolidated supervision is undertaken by the single regulator of both the parent and subsidiaries or branches of the bank. The rationale for consolidated supervision is that a single supervisor or regulator, as it is sometimes called, is more effective than multiple supervisors in monitoring risks across financial institutions. In United Kingdom consolidated supervision of banks and other financial institutions is the responsibility of the Financial services Authority (FSA).

It is important to point out that a uniform AML/CFT framework is required to prevent criminal organisations from abusing the financial system; but it is also essential to contain the threat of money laundering. The global framework will certainly help to plug weaknesses inherent in the local regulatory system. Foreign banks which operate in Uganda have managed to circumvent the absence of AML/CFT laws by exploiting the parent grown banking policies, which have to be applied to all international branches. It has to be said that if the home and foreign laws are not aligned together by way of an enabling legislation, there is the likelihood of regulatory arbitrage to the disadvantage of foreign banks.

2. INTERNATIONAL HARMONISATION PROCESSES

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18 Soft law can generally be adopted more rapidly because it is non-binding. It can also be quickly amended or replaced if it fails to meet current challenges. It extends to implementation and compliance where the dynamic interaction of the various actors can play a crucial role.
19 Dinah Shelton, supra, note 15.
20 Barclays has put in place guidelines to prevent ML; the Standard Chartered Bank has also formulated AML guidelines to use in conjunction with minimum group standards.
21 This is the required approach under the Basle Committee consolidated supervision of international banks modal.
23 If foreign banks are tightly regulated when their local rivals are not, foreign banks will be out-competed by their local rivals.
Harmonisation provides a working platform where the envisaged global anti-money laundering standards are implemented nationally. The essential feature of harmonisation is that states accepting to apply harmonisation instruments will take them seriously and internalise them into their national legal system. As already noted, for the envisaged global standards to work across different countries, they have got to be harmonised with the laws of countries where they are to be applied. This is intended to bring about convergence of anticipated international norms and substantive national law. Convergence of the two legal systems is intended to minimise potential conflict of laws and its negative effects. Through harmonisation processes, different courts are able to apply different laws differently especially when those courts belong to different legal jurisdictions. Laws may take the form of Modal Laws or soft laws, for example, laws issued by the European Bank for Reconstruction and Development (EBRD) on economic development through private sector investment in Eastern Europe. The adoption of soft law norms by a country is essential to pave way for their crystallisation into hard law both nationally and internationally. International Soft law norms can arise from agreements that would not be possible in a treaty or other enforceable agreements because of fundamental differences among states and the concomitant reluctance by specific legal obligations of these regimes to undermine national interests. This paper demonstrates the challenges inherent in harmonisation of laws—due to asymmetries in the international system, varying legal cultures and the multiplicity of different global laws. Some of the envisaged global AML laws may come in form of modal laws on money laundering, such as the third AML Directive in Europe and those created under the auspices of United Nations Convention on Transnational Crimes in Palermo (2000) and its predecessor the Vienna Convention on Drug Trafficking and Other Psychotropic Substances (1988). These laws would have been transposed nationally to generate a normative effect on money laundering locally. The transposition of

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24 Harmonisation of Private International Law is coordinated by the International Institute for Unification of private Law ("UNIDROIT"). This is an independent inter-governmental organisation with its seat in Rome. It works to examine ways of harmonising and coordinating private law of states, and of groups of states, and gradually to prepare for the adoption by states of uniform laws of private law. Detail of UNIDROIT can be accessed on its website at http://www.unidroit.org (visited 26th October 2008). Then there is the United Nations Commission on International Trade Law (UNCITRAL). This is a core legal body within United Nations system in the field of international trade law. It was established in 1966 by the General Assembly with the Mandate to further the progress of harmonisation and unification of international trade law. Its seat is in Vienna. See UNCTRAL’s official Website at http://www.unctral.org (last visited 26 the October 2008). Then we have other bodies such the International Chamber of Commerce (ICC) which seats in Paris. Its functions can be accessed on its website at http://www.iccwbo.org (last accessed 26th of October 2008).


26 Heba Shams, supra note 7, p. 13.

27 These are set by bodies such as United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT)—created specifically for harmonizing a specialized area of the law. For an overview of these two bodies, See Heba Shams supra note 7.


29 Kern Alexander, supra, note 20.

30 Kern Alexander, supra, note 20, p.5.

31 For the detailed reading on global anti-money laundering framework, see forty plus nine recommendation available at http://www.fatf.org (accessed 15th December 2008).
global anti-money laundering standards locally would see governments making policy adjustments, to reflect the state’s obligations under the treaty.

It would seem that subscribing to global regimes necessitates a move away from state centrisms as this engenders accusations of paternalism and undermines the adoption of a uniform global framework.\textsuperscript{32} The United Kingdom’s accession to the European Union demonstrates that individual European member states were made to adjust or dispense with some of the national laws to promote a functional European Single Market. To achieve the effective functioning of the EU in relation to its envisaged objectives, three sources of law are created at an EU policy level, namely Regulations, Directives and Decisions. These laws are designed literally to level the playing field in the application of EU law within all participating member states because of the varying legal and economic backgrounds of member countries. Regulations have a normative force as well as direct applicability in all participating member states irrespective of national interest. Directives are transposed in a flexible manner whereby member states are given a stipulated time frame in which to bring their laws to EU standards taking into account national considerations. They are legislative measures binding member states as to the result to be achieved. Member states are however given the mandate to decide the mode of implementing these targets.\textsuperscript{33} There are also Decisions, which are issued by the ECJ requiring all member states to comply with Decision of ECJ pursuant to Article 226 of the EC.\textsuperscript{34} Harmonising existing differences between states such as varying legal backgrounds and cultures has the potential to enhance state cooperation and to create a level playing field on which to harness the envisaged global standards.

The court as an institution provides the required interface to implement the envisaged global anti-money laundering laws. Courts elaborate rules and proffer guidelines on global anti-money laundering/counter-terrorism regimes locally and internationally.\textsuperscript{35} The engendered norms are then widely disseminated through local institutions to ease the process of internalising global AML/CFT standards into the society.\textsuperscript{36} The internalisation of soft Law norms can also be achieved through the legal processes where by soft laws are voluntarily incorporated before they can be applied nationally. The ECJ for example, plays a normative role in bringing about harmonisation of different laws in Europe. When the ECJ intervention is sought on an issue of EU law in relation to a member state, the court will proffer guidelines on the contentious issue. When it comes to the decisions of the court with regard to the issue of EU law, the respective Member State has no choice but to apply the decisions passed by the ECJ in its entirety. But this is at the EU level where there has been some progress on the EU institutions and individual member countries. The down side in translating the desired global regimes through the domestic court system, is that in some regions

\textsuperscript{32} This position is popular among skeptics of the global system, for example, former communist countries but also in countries that don’t seem to have benefited a lot from the global market system.

\textsuperscript{33} Craig Paul and Graine DeBurca, \textit{The EU Law: Text, Cases, Materials}, Oxford University Press, 3\textsuperscript{rd} Edition (2002) at p.105

\textsuperscript{34} Craig Paul and Graine DeBurca, supra note 27

\textsuperscript{35} Here so many cases abound, but in United Kingdom we have witnessed cases where the court through its interpretative has clarified the law on money laundering. See for instance the case of \textit{R v. Gibson}, \textit{Criminal Law Review} [2000] p.479.

\textsuperscript{36} This is indeed bad news for those countries which have been advocating for further expansion of the European Union such as France and Germany, and could spell doom for the wider European integration of economies such as Turkey (now on the waiting list) in Europe.
where Judges are poorly trained, corrupt, courts overloaded and struggling to retain experienced prosecutors, there will be backlogs, delays and hence the prevalence of corruption in some organisations as a quick fix.\textsuperscript{37} It is also possible that conforming national rules to global standards will be sidelined in the absence of harmonisation initiatives to align different regulatory systems. In this regard local institutions should undertake necessary adjustments based on the exigencies of the market such as money laundering and its predicate threats.

This paper is of the contention that in harnessing the global anti-money laundering regimes, individual national governments should be afforded the opportunity to determine the measure of their participation.\textsuperscript{38} The national legal systems should be used to plug weaknesses inherent in the system by evolving mechanisms or modalities for national participation.\textsuperscript{39} It is in this contention that societies must be dynamic to changes ushered in by the imperatives of the global market economy. The shortcomings of the global system notwithstanding, the global system has also created opportunities for national development.\textsuperscript{40} It would therefore infer that if the global system is properly managed through harmonisation of existing differences, it has the potential to generate synergies for development nationally and internationally than it takes way.

Furthermore, harmonisation could also be impeded by the undemocratic manner in which some global regimes are introduced into some countries.\textsuperscript{41} Global regimes have demonstrated on a number of occasions, the propensity to sideline local economies by competing for the sovereign space societies manifest themselves. I suppose in this regard developed countries have had to surrender more of their sovereign space and independence than their less developed counterparts. All countries subject to the same regulatory framework— based on envisaged global AML/CFT standards, will have to incorporate desired changes into substantive national law. As I have already noted, developed countries which have robust systems in place, would have had a lot to surrender compared to their counterparts in developing countries.\textsuperscript{42} I also feel very strongly that to foster the harmonisation process, countries subject to global regulatory regimes should be given the opportunity to contribute to the evolving anti-money laundering standards. This form of indirect participation in global standard setting would make emerging regimes legitimate; and correspondingly states would be more than willing to internalise them into their substantive national laws. The

\textsuperscript{38} Some of the 40+9 recommendations (e.g. recommendation 12) of the FATT are conspicuously inapplicable in developing countries because they are largely oriented to the developed countries market environment. I suppose this is an issue which reflects the asymmetric composition of the committees that propose the creation of AML/CFT recommendations.
\textsuperscript{39} Norman Mugarura, supra note 31.
\textsuperscript{40} No country today can afford to run a closed economy, however big or privileged that country is.
\textsuperscript{41} The Financial Action Task Force forty recommendations plus nine on money laundering and predicate offences are introduced into domestic governments through the back door using the World Bank and the International Monetary fund lending conditionalities.
\textsuperscript{42} This point is illustrated by the inclusion of New Entrant Countries within the European Union. Countries which had originally had weak systems in place would the ultimate beneficiary of a robust European Union. It is my contention that Countries like United Kingdom have a lot to lose if they are to subject their laws at the same level with a small country like Slovakia.
apparent challenge with the Basle Committee\textsuperscript{43} supervisory standards is that they are inclined to favour the G-10 economies environment than other countries especially less developed economies.\textsuperscript{44} The Basle committee should be reconstituted to ensure that other financial centres subject to the same regulatory regimes are able to field representatives on AML committees. This preposition would afford state parties the leverage to participate directly on the evolution of global anti-money laundering or the wider banking regulatory standards to which countries in question are subject. Broader participation of states is essential to ensure the legitimacy of Basle Committee and to overcome the allegations levelled against it, that the above committee as it stands is not world representative and less legitimate.\textsuperscript{45}

In many less developed economies, courts as institutions are not as powerful as in developed economies because of the dynamics of economic development. In any case the envisaged regimes are sidelined, either by the absence of well trained judges, the prevalence of corruption or lack of a requisite infrastructure to caution the society against its threats including money laundering offences. Therefore, national courts need to have a far reaching mandate to deal with contemporary threats not least the mandate to deal with money laundering and its related predicate threats such as corruption. This way, courts would play a crucial role in the translation of desired anti-money laundering norms within the framework of internationally agreed standards. Unfortunately in some jurisdictions, the role of courts is undercut by the obduracy of governments, treating courts as conduits of the ruling governments. Traditionally courts have always been mere accessories of the state, primarily interpreting laws to foster the will of Parliament.\textsuperscript{46} Courts undertake this function by interpreting and applying the law created by parliament and other organs through delegated legislation. Courts have always played a primary role in the translation of normative standards into the society. Where it is deemed necessary, courts may go as far as referring statutes back to parliament for any anomalies in the law to be ameliorated or removed.\textsuperscript{47} Laws should be introduced to reflect necessary changes in the dynamic society, as I have already elucidated by way of alluding to the European Communities Act in 1972; and the Human Rights Act 1998 in United Kingdom. There are situations where states have ratified international treaties such as Palermo Convention on Transnational Crimes in 2000, but subsequently dither when it comes to translating engendered obligations into policy and practice at a national level.\textsuperscript{48}

Furthermore, national courts proffer an interpretative function in deciding cases brought before them by disputant parties. Decisions generated at the court level are consolidated as guidelines for future policy development purposes. Secondly, the

\textsuperscript{43} This committee was created under the auspices of the Bank for Internal Settlement (Geneva) and given the oversight responsibility of supervision and regulation of international actively banks.

\textsuperscript{44} I am sure this would undermine the potential of the Basle Committee Supervisory Standards on Banks to crystallise into an International global framework.

\textsuperscript{45} Some of the allegations have been that the G-10 is a reconfiguration of new colonial structure, providing a platform to perpetuate neo-colonial policy and its tendencies.

\textsuperscript{46} Norman Mugarura, supra note 31.

This scenario is captured by the case of \textit{Fisher v Bell (1961)} 1 QB 394, which was based on the Dangerous Weapons Act (1959). The law was deemed so vaguely structured that it had to be referred back to parliament for the anomaly to be removed the following year.

\textsuperscript{47} Uganda is a signatory to the above AML instrument but it has delayed implementing it through National Parliament. This means that at the moment courts cannot apply this law as a framework for prosecuting money laundering locally. If courts are to prosecute money laundering, they can do so on the basis of other AML regimes such as the Leadership code (2002) but not Palermo as of yet.
court is in a reciprocal relationship with other decision making bodies such as parliament in giving direction on how the society should be governed.\(^{49}\) The reciprocal relationship is manifested in the fact that Parliament creates laws through its legislative process and courts interpret them, proffering direction on the engendered norms. It would seem that the court’s influence is subordinate as it plays what is arguably a secondary role for acting as the shock absorber from the governments and society. In dualist countries, governments must pass legislation to proffer directions on how anticipated global initiatives are to be domesticated.\(^{50}\)

The adoption of European Communities Act (1972) in United Kingdom is significant in demonstrating the fact that countries must be prepared to surrender part of their sovereign space in order to accommodate the envisaged market changes.\(^{51}\) I have always viewed the ECA (1972) as an instrument of harmonisation which enabled the UK to internalise EU law locally. By embracing the European Union, the UK had demonstrably compromised its national self-interests for the common good of a fully functional European single market. Similarly, adjustment of national laws happens to be the case with all emerging global regimes including Structural Adjustment Programmes (SAPs) introduced by the World Bank and the IMF in many economies. With regard to the latter, it is now a settled fact that through International Monitoring and Surveillance of national economies under article IV of Articles of Agreement\(^ {52}\), the independence of national governments has been sidelined by the operation of International Financial Institutions in many countries. The only difference between the EU and the aforementioned institutions is that the EC treaties are ratified and given primacy in all member countries by incorporation into the substantive national law. By contrast, the World Bank and IMF reforms are largely viewed in some countries as intrusive and paternalistic of national economies as they are adopted through lending conditionalities.\(^ {53}\) The World Bank Conditionalities such as financial sector adjustment reforms is what one would call “soft law obligations” as opposed to soft law.\(^ {54}\) Much as soft law obligations are not legally binding, countries are nevertheless expected to undertake positive measures to achieve certain objectives at an institutional level.\(^ {55}\) Thus, in relation to the World Bank and IMF regimes, courts are sidelined because traditionally, based on the doctrine of separation of powers, courts always work in tandem with the executive, and the legislature to foster national interests. Courts have literally had to act as the shock absorbers in translating the global regimes on any issue area domestically.\(^ {56}\) Courts are in a predicament where

\(^{49}\) The relationship between courts and other organs of governments is constitutional under the principle of tripartite separation of powers.


\(^{51}\) Is it a form of quid pro quo?

\(^{52}\) The legal basis on which the World Bank Group operates in executing its mandate world wide

\(^{53}\) These regimes are designed and imposed to maintain the economic stability of borrowing countries.

\(^{54}\) Soft law is non-binding at all but soft law obligation although not binding in an explicit sense requires states to make necessary adjustment to implement them. Failure to comply with soft law obligation may trigger sanctions on a non-complying member state.

\(^{55}\) Francois Gianviti, “The evolving Role and Challenges for the International Monetary Fund”, (2001), International Lawyer, pp.8-12.

\(^{56}\) Courts as institutions are expected to provide the required interface on the future direction of a country. They are used as a platform to internalise the will of Parliament in their decision making process. However, where Parliament is literally pushed in a corner, the court will have to absorb part of that pressure as the two are constitutionally expected to work together in tandem.
they are relegated to applying pre-existing laws whenever it is deemed right and necessary to do so in settling cases brought by the disputing parties. Save for situations where the law passed by parliament is so bad that applying it would amount to an absurdity as I have already demonstrated, courts have a constitutional obligation to work in tandem with parliament in evolving a legal framework on the basis of inherent traditions and customs of that particular society. 

Given the limits of national courts in relation to overlapping matters of international law, I propose the creation of a global AML/CFT court constituted with a global mandate. This court should be designed with a specialist division on money laundering and its predicate threats. Thus, the proposed anti-money laundering court should proceed on the framework of the ECJ in its relationship with member countries on matters of EU law. In the dispensation of the EU law, the interaction of the ECJ and national judges provides a platform for incorporating EU law into national law, and of diffusing within the national legal order modes of reasoning and decision making developed by the court. Therefore, it has to be said that national judges are active participants in translating desired changes into the mainstream legal system. This is exemplified by the fact that in the event of a conflict involving member countries in the application of European Union law, national judges will where necessary file for a preliminary reference to the ECJ for the issue to be resolved. In so doing, judges provide the required interface between two policy domains and fostering the traditions and fundamentals on which the European Union is founded while incorporating changes into the society at the same time. It therefore goes that the EU legal system is equipped with the capacity to generate policy outcomes and structure future policy processes, both at a national and supranational level. These connections are organised and sustained by the preliminary reference procedure established by article 234 (formerly 177). Article 234, combined with the development of the doctrines of supremacy and direct effect constitute a decentralised means of enforcing EU law, connecting supranational and national governance.

The third instrument for harmonisation is the adoption of soft laws such as those on Capital Adequacy framework on regulation of international banks. Capital Adequacy was negotiated under the auspices of the Basle Committee otherwise known as the ‘Basle Accord 11’ to provide a capital measurement baseline of all

57 Norman Mugarura, supra, note 38.
58 The creation of the global court would reinforce the enforcement mechanism of global anti-money laundering regimes.
59 Under article 68 EC, there are restrictions on national courts to submit cases to the ECJ. Only courts of last resort are required to seek a preliminary ruling from the ECJ.
60 If judges refused to give effect to EU law by refusing to file preliminary references, the EU legal system would have been stillborn. Therefore national judges have been active participants in the development of EU and this should be a modal for national legal systems on how to proceed in relation to supranational regimes.
61 This respective article mandates member countries to refer a contentious issue of EU law to the ECJ which is the highest court. However for this to happen, the litigant would have exhausted the available remedies at home.
63 It was motivated by several factors. Firstly, bank regulators were interested in enhancing banks capital position, in order to enhance banks ability to absorb losses due to LDC debt and other exposures. Secondly, there was a need to forestall a possible competition in regulatory laxity in bank capital adequacy standards.
internationally active banks.\textsuperscript{64} Under capital Adequacy framework, all internationally active banks must hold assets in value of at least 8 percent of their risk-weighted assets plus off-balance sheet commitments.\textsuperscript{65} Capital Adequacy framework was initially intended as a caution for international banks with regard to four types of risks: credit, market and operational risks—an inability to meet payment as and when they fall due. There was also liquidity risk, which is the temporary inability to meet payment, and then market, or positional risk, and systemic risk.\textsuperscript{66} Bank illiquidity could potentially lead to financial distress and cause demand for withdrawals from depositors. This causes panic by way of depositors trying to get a head of each other, which causes bank runs.\textsuperscript{67} The above challenge coupled by macro-economic factors has been a potential trigger for financial crises by way of changing asset prices and increasing interest rates.\textsuperscript{68} This can potentially trigger a contagious effect as investors lose confidence in the system, affecting not only the single region involved but also other regions including even those with well performing fundamentals.\textsuperscript{69} Therefore Capital Adequacy was not only intended to secure the international banking institutions against the aforementioned risks, but also to level the ‘playing field’ by requiring uniform capital regulation, so as to prevent the race to the bottom as competitors out-price each other on International Markets.\textsuperscript{70} Supervisors would be able to apply the same standards and prevent free riding off the reputation of less regulated international banks.

3. THE LEGAL STATUS OF SOFT LAWS

International soft laws encompass the whole range of legal norms, principles, codes of conduct and transaction rules of the state practice that are recognised either in formal or informal multilateral agreements.\textsuperscript{71} The use of soft law in multilateral agreements generally connotes the consent of the state to apply them but there is no opinion juris to make them legally binding as rules of customary international law. Customary law, is a product of dialectic of practice, as opposed to legislation, which is the product of


\textsuperscript{65} Krugman R. Paul and Obstfeld, \textit{International Economics: Theory and Policy}, 5\textsuperscript{th} Edition (2000), pp. 659-67. The Basle Accord goes further to divide capital into two tiers. Tier capital defined as paid share capital/common stock and published reserves from post tax retained earnings, must comprise of at least 5 percent of the banks capital base. Tier 2 is defined as undisclosed reserves, asset revaluation reserves, general provisions/general loan loss reserve and subordinated debts being limited to 10 percent of Tier 1 and combined with Tier 1 must comprise of 8 percent of the risk weighted assets.

\textsuperscript{66} The East Asian Crisis 1997/8 demonstrated the way in which the impaired bank assets are adjusted downwards and the ability of the central bank to act as lender of the last resort to illiquid but solvent banks.


\textsuperscript{68} Brownbridge, M. and C. Kirkpatrick, supra note 48.

\textsuperscript{69} Brown bridge, M. and C. Kirkpatrick, supra note 48.


dialect of ideas. Customary law is the presentation of those conditions in form of law; that is to say, setting the terms of the future co-existence of society members in form of legal relations. The space of consent in customary law is subtle—not made by any specific act of will on the part of its subjects. Their assent is manifested in their participation in the day-to-day struggle of social self-ordering, knowing that some aspect of that self-ordering may come to be universalised as law. As this delineates, soft law norms are applied courtesy of the states consent to apply them and there are not legally binding.

While soft law norms are not legally binding on member states, they nonetheless create guidelines to deal with certain business exigencies. Soft law norms contribute to the development of international rules, standards and legal principles that can as time goes on metamorphose into hard law. It therefore has to be said that countries gain immensely from adopting soft law norms such as the Basle Committee’s guidelines on Banking Supervision, and the FATF 40+9 recommendations. In a sense, the adoption of soft law norms is driven by the need to have a working framework capable of applying to different countries. In theory, failure to observe soft law does not amount to the breach of international law norms, but in practice it may generate some tensions with other countries. Jurisdictions that refuse to cooperate and comply with the recommendations of the FATF are publically blacklisted (“named and shames”) by FATF and economic sanctions may be imposed against them. When the non cooperative jurisdiction is a dependency territory, then the blacklisting apply to that territory. In the same respect, the World Bank and the International Monetary Fund have co-opted the Basle and FATF supervisory standards in its monitoring framework of national economies. Therefore countries seeking to use the World Bank and the Fund’s resources are expected to adjust their national economic systems as a condition for lending. Soft law norms should be introduced to foreclose gaps inherent in some sources of Public International Law. For instance, state parties will be required to apply AML standards regardless of whether they have already transposed the provision of the treaty or not. States should also bring their laws in harmony with international anti-money laundering standards by adopting legislative

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72 This is one of the sources of International Law as enunciated in article 38 (1) (a)-(d) of the Statute of International Court of Justice to describe many areas of international state practice. First, there are Treaties which expressly create obligations recognised by the State; Second, there are International Customs as evidence of a general practice of states and accepted by states as law; third, there general legal principles of the world’s leading legal system; and fourth, subsidiary sources including judicial decisions.


74 I think it is important for one to say that there are certain obligations generated by soft law norms except that these obligations are subtle as in the case of those enunciated by the World Bank.

75 International law should be enforced to demonstrate that law works to maintain sanity in the society by punishing offenders.

76 Kern Alexander, supra note 18.

77 Francois Gianviti, supra note 51 at p. 14


79 Kern Alexander, Rahul Dhumale and John Eatwell, supra note 162.

80 Article 1 of United Nation Convention on Drug Tracking and Other Psychotropic Substances, otherwise known as Vienna Convention of (1988).
measures on concealment, and laundering of the proceeds of crime.\textsuperscript{81} Soft law could also be utilised to plug loopholes in existing law so that there is a framework for uniform application of global anti-money laundering standards across the board.

Furthermore, this article contends that if the global anti-money laundering framework is to work effectively, there should be a mechanism for extradition of culprits apprehended in one country to the jurisdiction of another country for trial.\textsuperscript{82} Thus, each country should recognise money laundering as an extraditable offence,\textsuperscript{83} accepting to extradite its own nationals or where it doesn’t do so solely on the grounds of nationality, the country should, at the request of another seeking extradition, submit the case without delay to its competent authorities for the purpose of prosecution of the offence set forth in the request.\textsuperscript{84} In this regard all states should ratify the United Nations Convention on Transnational Crimes (2000) in order to have a uniform policy framework for dealing with aspects of money laundering, particularly cross border jurisdictional issues. The United Nations Convention should be ratified by all states to ensure the application of a uniform policy approach on drug trafficking and money laundering. Signing up to global AML regimes would afford state parties the benefit of mutual legal assistance with regard to investigations, prosecutions and judicial proceedings in relation to money laundering offences. Similarly Palermo provides modalities for extradition in respect of money laundering offences, alleged by the jurisdictions that make formal request.\textsuperscript{85} The extradition request should only be declined where it has reasons to believe that compliance would facilitate the prosecution or punishment of any person on account of religion, race, nationality, political opinion or would cause prejudice for any of those reasons to any persons affected by request.\textsuperscript{86}

It has to be noted that Treaties such as Palermo (2000) are only effective when state parties ratify and subsequently internalise them into substantive national laws.\textsuperscript{87} If the State does not ratify the Convention to a great extent\textsuperscript{88} it cannot generate binding legal effect at home. Once the treaty has been transposed, it forms part of national law reflecting the proposed changes internally.\textsuperscript{89} This is as opposed to customary law which is a product of dialect of practice but not dialect of ideas as legislation.\textsuperscript{90} Therefore different forms of law generate different obligations in different societies. The need for national sovereignty notwithstanding, it is a common state practice for civilised states to transpose international treaties and to ensure international

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\textsuperscript{81} Article 3(1) of the AML framework, supra note 75.

\textsuperscript{82} In the absence of a global court, money laundering can only be tried in a country where the offence was committed.

\textsuperscript{83} Recommendation 3 of FATF forty recommendations

\textsuperscript{84} Recommendation 39 of FATF forty recommendations.

\textsuperscript{85} Article 7(1) of the same Convention.


\textsuperscript{87} In Monist countries, after treaties are ratified, they form part of national law.

\textsuperscript{88} Norman Mugarura, supra note 15.

\textsuperscript{89} The foregoing is particularly the case with dualist economies such as United Kingdom but in the case of monist economies like France, once treaties have been ratified they form part of international law without recourse to national parliaments.

However, the issue of national self interest may create ambivalence in some states, choosing to stay on the sidelines in the domestication of international anti-money laundering regimes. Given this, some countries may ratify international treaties but literally drag their feet in translating the envisaged standards into domestic law for the same reasons elucidated above. For example, some countries may not be inclined to protect depositor’s assets, when they are themselves exposed in terms of their net out flows to service national debt.

The need for countries to adopt a global anti-money laundering framework is essential to ensure that fugitive offenders are pursued and prosecuted wherever they are hiding. Individual states should work together to ensure that they have a framework to respond astutely to the exigencies of globalisation and its related challenges. It has to be pointed out that whenever a law is created in a society, the purpose would be to close the disparity gap in the existing legal framework, obviously in keeping with local realities. It is improbable that laws created in a different social setting will have resonance in other jurisdictions where the problems may be informed by a different set of factors. Besides, law as an institution is capable of engendering values and traditions translating requisite changes into the society. States usually undertake a cost-benefit analysis and seriously assess the implications of anticipated global regimes to local development interests. This rather cautious approach notwithstanding, there is no country; even if it is a developed powerful country that can afford to be ambivalent, as all countries have got to work together on overlapping global issues. Countries which were initially on the sidelines of global initiatives such as Russia and China, with regard to the WTO, have been clamouring to join as they have acknowledged that they cannot afford stay out and sidelined. Staying on the sidelines of global initiatives, whatever these may happen to, will undercut the same countries influence on issues of global importance. The analysis of the international law and its dynamics is essential to underscore the parameter within which global AML/CFT laws are harnessed nationally. It has to be noted that the realm of implementing global anti-money laundering framework is international laws.

4. INTERNATIONAL FINANCIAL INSTITUTIONS

The World Bank and the International Monetary Fund (IMF) are among the cohort of international financial institutions, which are active in facilitating the fight against money laundering and its predicate offences. The above two institutions were created in the aftermath of World War II to facilitate the recovery of countries that

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92 Jeffrey Frieden, Banking on the World: The Politics of American International Finance (1988), p. 188. Jeffrey argues that the debt burden in less developed countries led to international bankers being blamed rather than courted.
93 Norman Mugarura, supra note 31.
94 Norman Mugarura, supra note 31.
95 Actually China has already joined the WTO and with Russia yet to join.
96 This explains why China which has more or less operated a close economy has began to open up, not to mention that it has been clamouring to join multilateral trade initiatives such as the WTO.
97 Other financial institution which are active on money laundering and financing of terrorism include regional banks and FATF affiliated regional bodies in Asia, in the Caribbean, South America and in Africa.
had been devastated by War.\(^98\) In the final stages of the World War II, a series of conferences took place to discuss how to prevent the reoccurrence of the economic conditions that led to the worldwide depression and the rise of Nazis in Germany.\(^99\) The 1944 Articles of Agreement of the IMF and the World Bank were adopted a few months before the submission of the Dumbarton Oaks Proposal establishing a General International Organisation—the future United Nations in the same year. The arrangements for International co-operation in the Dumbarton Oak Proposal were limited to the facilitation of international economic, social and humanitarian problems and promotion of respect for human rights and fundamental freedoms. The proposal did not intend to found the United Nations as an organisation, which would have to deal first and foremost with human development. Its main purpose was supposed to become the maintenance of peace and security, the mandate that was given to the Security Council based on the sovereign equality of its members.\(^100\) The international economic and social co-operation in the UN Charter differs from the Dumbarton Oaks Proposals in that it was meant to promote:\(^101\) (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of economic, social, health and related problems; and international cultural and educational co-operation; and (c) universal respect for, observance of, human rights and fundamental freedoms for all without distinction as to race, sex language or religion.

The IMF and the International Bank for Reconstruction and Development (World Bank) were created for different economic ambitions. The Articles of Agreement of the IMF limited the purpose of the Fund to the facilitation of the expansion and balanced growth of international trade, and to contribute to the promotion and maintenance of high levels of employment, real income and the development of the production resources of all members as primary objectives of economic policy.\(^102\) Article 1 of the Articles of Agreement prescribes the purpose of the IMF as basically two fold: first, to promote International cooperation through permanent institutions which provides the machinery for consultation and collaboration on international monetary problems. Second, it was to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of productive resources of all members as primary objective of economic policy.\(^103\) The Articles of agreement also mandates the fund to impose legal obligations on member states not to engage in the kind of practices that had contributed to the great depression of early 1930 and the World War II.\(^104\) On the other hand, the main purpose of the World Bank (IBRD) was to promote the long range balanced growth of international trade and the maintenance

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\(^99\) Andreas F. Lowenfeld, above note 1.


\(^102\) Article 1 of the IMF Articles of Agreement.

\(^103\) See the IMF website at http://www.imf.org (last visited June 2008)

\(^104\) Before 1945 there was international monetary system. States and their enterprises traded within one another, currencies were exchanged, and states held monetary reserves—in gold, silver and foreign currencies. By the dawn of the second World II no international legal regime governed the conduct of state. The currency market was literally in a state of what one would call to whom it may concern.
of equilibrium in the balance of payments in order to assist its members in raising productivity, the standards of living and conditions of labour in the territories. To facilitate the achievement of that end in 1980s both Bretton Woods institutions adopted the so-called structural adjustments facilities where by countries seeking to use these institutions facilities would be asked to undertake certain reforms as conditions. These reforms adjustments were deemed essential to stimulate economic growth in the financially stressed countries, to generate revenues through increased international trade and be able to meet their borrowing obligations. As far as the World Bank is concerned, the list of borrower countries is confined to governments of developing countries and former communist government. As for the IMF, even though its facilities are available to all member governments, very few of OECD member countries can be made subject to conditionalities.

The World Bank and the International Monetary Fund contributed enormously to the global fight against money laundering through their work of promoting stronger financial, economic and legal systems internationally. Both of these institutions encourage financial institutions to adopt robust supervisory standards, legal and institutional framework to prevent financial sector abuse. The International Monetary Fund Surveillance function under Article IV of the Charter of Agreement involves intensive exchange with each member country on its economic and financial systems. The IMF staffs will examine the countries economic and legal system to identify potential vulnerabilities and advise the respective member country to take corrective measures and polices. The IMF has adopted several discrete initiatives designed to strengthen the financial stability and to prevent global crises. In 1999, the IMF together with the World Bank adopted the Financial Sector Assessment Programmes (FSAPs) as a centre piece for inquiring into the health and stability of member countries. The mandate of both the World Bank and Fund will cover the country’s banks, securities, money markets, foreign exchange and payment systems, also assessing regulatory, supervisory and legal framework of financial institutions. It is this work of the World Bank and International Monetary Fund which has relevance for fighting money laundering. By undertaking the regulatory assessment programme any vulnerabilities in the system would be identified, and states subsequently advised to take corrective measures.

5. FINANCIAL SECTOR REFORMS (FSRS)

106 These reform adjustment programmes were prescribed in many developing countries since they were the countries that needed to borrow most from the World Bank and the International Monetary Funds resources.
108 Jeffrey Frieden, supra note 69.
110 William E. Holder, supra note 82.
111 William E Holder, supra note 82.
International Financial Institutions such as the IMF and the World Bank can be seen as playing a normative role in shaping the global economy. Through economic surveillance and monitoring of the world economies, IMF seeks to control national monetary policies. The IMF helps national authorities to strengthen their supervisory and regulatory systems, which in turn helps to promote the safety and soundness of the financial sector and to create an environment that prevents financial system abuse. In order for states to attract Foreign Direct Investment (FDI), they are required to adopt a robust legal system that guarantees the interests of investors. The International Monetary Fund (IMF) and the World Bank impose conditions on many countries so that they demonstrate a realistic effort to internationalise their economies. Countries will have to implement the Basle Capital Accord in order to qualify for financial assistance and as part of IMF Financial Sector Assessment Programmes (FSAP) and World Bank Financial Sector Adjustment Programmes (FSAP). As part of the financial sector reforms, IFIs monitor the observance of international standards, codes, and best practices in areas of financial supervision, prudential regulation, transparency of fiscal and monetary policies, and data provision and dissemination in order to foster financial and market integrity. Therefore, international financial institutions have engineered the adjustment of laws and systems to the level of expected international standards on money laundering. As I have argued consistently, money laundering thrives in an environment where there are weaknesses in the global regulatory system and any stability would work adverse to the interests of the money launderer.

6. TECHNICAL ASSISTANCE

Technically, the International Monetary Fund (IMF) and the World Bank have helped countries in identifying and addressing structural and institutional weaknesses that contribute to lack of market integrity and the potential for financial abuse. It participates in targeted international efforts to combat money laundering based on its mandate and expertise. These institutions have helped countries to put in place strong economic, financial and legal foundations as their principal contribution towards the fight against financial abuse.

In light of the above contentions, the bank has greatly expanded its programmes in areas of anti-corruption, governance and public financial management. The Bank

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112 Under the existing Fund policies, anti-money laundering issues other than those relating to financial sector regulation and supervision are covered under surveillance and conditionality, as with other governance matters. See the 1997 Guidance Note on Funds Experience in Governance Issues (Executive Board Meeting 01/14 February 2001) available at www.imf.org (accessed on 26th April 2007). The monitoring and surveillance function of the bank is supported by article IV of Articles of Agreement.


114 See, the IMF Policy paper, supra note 78.

115 IMF Policy paper, supra note 78.


117 The Bank and the Fund work in collaboration with FATF, OECD, IOSCO in bolstering the financial supervisory regimes.

118 For more detailed information on the banks governance, anticorruption, and public sector reform programs, See Helping Countries Combat Corruption: Progress in the Bank since 1997, September
has supported more than 600 lending and non-lending activities in approximately 90 countries aimed at stimulating institutional reforms needed to reduce corruption and strengthen governance.\textsuperscript{119} These include, for example, adaptable programme loans and technical assistance operations designed to enhance capacity and reform incentives in the civil service (including employee of financial regulatory service), reforms in public sector, management systems; and in tax and customs administration, strengthened legal, judicial and regulatory reforms and as well as encouraging reforms to establish mechanisms for combating public sector corruption.\textsuperscript{120}

The bank has stepped up its efforts in several areas that are key to cultivating a robust market environment with the intention of strengthening legal, judicial and institutional reforms, corporate governance, accounting and auditing and market transparency.\textsuperscript{121} The Bank focuses its efforts especially in small states, which are susceptible to potential financial abuse, including money laundering, and facilitate them by putting in place the policy and institutional foundations specifically designed to reduce the risk of market abuse.\textsuperscript{122} In relation to money laundering, the Bank supports legislation to do away with anonymous banking accounts, improvement of the ‘Know Your Customer mandate’, modification of secrecy legislation to verify implementation of the Know Your Customer requirement; and implementation of anti-money laundering regimes.\textsuperscript{123} The Bank has also encouraged and supported the introduction of banking laws and regulation, tax laws and regulation, development of financial management through proper accounting and auditing systems, legal and judicial reforms for policy based lending as well as reforms relating to economic and development issues.\textsuperscript{124} In supporting desired reforms, the Bank established Institutional Development Fund to provide grants for projects such as “the preparation of new legislation, public procurement and associated training, or the carrying of studies, which diagnose the problem of civil service or the judiciary.”\textsuperscript{125} In my view, less developed countries should be given grants but not loans to support the development of an effective infrastructure to harness global initiatives. At the moment a one-size-fits-all approach plays in favour of developed countries which are naturally endowed with an environment where the envisaged AML/CFT standards can be easily implemented.

7. INTERNATIONAL FINANCIAL INSTITUTIONS (IFIS) FRAMEWORK ON CORRUPTION

The World Bank and the International Monetary Fund have engineered an environment which promotes good governance in the majority of borrowing member

countries. Good governance includes promotion of transparency and accountability in stakeholder countries to ensure that borrowed funds are properly utilised. Although the World Bank has a limited mandate to enforce the application of the required laws or norms in a member country, it nevertheless ensures that soft law obligations are applied to stem the problem of corruption. Suffice it to say, the World Bank and the International Monetary Fund are not mandated to deal with matters involving corruption. But again it needs to be noted that corruption has huge economic impact on the economy which brings it within the purview of the World Bank and the International Monetary Fund. Bribes represent illegal use of fees, taxes, access charges paid to public agents. These payments represent economic decisions and making it obviously for the World Bank and the Fund to address it. If the level of corruption in a country is so high as to have an adverse impact on the effectiveness of the Bank’s assistance, and there is factual and objective analysis that the government is doing very little about it, the Bank will often take that as a factor in its lending strategy towards that country.

To demonstrate its seriousness on corruption, the World Bank enacted the internal staff rules, requiring annual financial disclosure of all assets and financial transactions by senior staff, disclosure of adverse family interests that affect the World Bank’s dealings, and provides guidelines for how employees are to behave in their dealings inside and outside of the World Bank. The IMF provides advice and technical assistance to foster good governance in areas within the IMF mandate and expertise (mostly legal and institutional reforms), collaborating with other institutions particularly the Work Bank, to co-ordinate their complementary areas of expertise.

126 The IMF acts as an open forum for the discussion of corruption where corruption issues are not actively addressed by the borrower country. It can therefore make financial support conditional on reform when necessary to meet the IMF programme objectives. The IMF has in the past suspended financial assistance to a number of developing countries (for example Kenya) due to concerns about macro-economic and programme implications of corruption and lack of fiscal transparency. See ‘Twenty-nine Countries Agree on OECD Anti-Corruption Convention and Other International Initiatives Progress’, 13 INT’L Enforcement L. Rep (1997), pp. 510-512.


129 In July 1996, the Executive Director added a new section to their procurement guidelines on “Fraud and Corruption.” This section allows the World Bank to cancel financing when corrupt practices are discovered and not satisfactorily remedied by the borrower, declare ineligibility to bid in future contracts for a contract, consultant or supplier who engages in corrupt practices, require the inclusion of contract provisions that allow the world bank to inspect the accounts and records of contractors, suppliers and consultants and have them audited, require disclosure of any payments made to local agents, and conduct large scale audits of bank operations and a specific country by outside auditors.

130 Due to the fact that the Bank does not have any mandate on corruption, the official of the bank who witnesses corruption is not allowed to inform the government or to talk to the press directly. If he does he or she will risk being deported out of the country for political meddling.

131 Ibrahim F.I. Shihata, supra note 110.

132 Susan George Ackerman, supra note 20.

133 On a number of occasions, the Bank suspended funding on the development projects upon discovering evidence of corruption.

134 Ibrahim Shihata, supra note 64.

135 Ibrahim Shihata, supra note 64.

136 Ibrahim Shihata, supra note 64.
It does this by assisting member countries economic policies through building policy making institutions and improving accountability of the public sector.137

8. THE WTO AS HARMONISATION PLATFORM

The WTO as a multilateral forum provides a platform for harmonisation as it was founded on negotiation of trade rounds in the interest of its member countries. The World Trade Organisation (WTO) was born in 1995 to provide a rule-based trading system built on the edifice of non-discrimination and liberalisation, openness and free trade: to forbid discrimination in favour of national producers while also regulating national behaviours on the part of exporters (dumping).138 It was also to reduce tariffs; to prohibit other forms of quantitative restrictions—overt forms such as quotas and unfair practice concealed by unfounded health or administrative regulations.139 The WTO as a global institution provides a platform for negotiating agreements but also settling trade disputes. The WTO subsumed the work of the General Agreement on Tariffs and Trade (GATTS) which was the vehicle for negotiating trade agreements between countries.140 The weaknesses of GATTS however was that much as it provided a vehicle for negotiating trade agreements in relation to goods; these negotiations did not cover negotiation in relation to trade in services.141

In relation to financial markets, the General Agreement in Trade in Services (GATS) provides a framework for dealing with trade in cross border financial services, including financial services.142 The GAT regime is founded on the premise that enhanced competition in financial services will lead to healthier financial institutions and improve the quality of financial services.143 The GATS incorporates four modes of trade in services: cross border; consumption abroad; commercial presence; and last temporary movement of natural persons.144 Given the focus of this article, the aforementioned areas will be analysed in relation to banking services. Cross border supply of services would have taken place when consumers of goods in one country are allowed to get loans in another across the border.145 Consumption of banking services of banking services abroad would have taken place when to purchase banking services such as letter of credit, e-money, when travelling abroad. Commercial presence is highlighted by a situation where a bank is allowed to establish a branch or a subsidiary in another country. The movement of natural person would have taken place when a financial institution registered in one country is allowed to send its executives, managers, and other banking personnel to travel to another country in order to deliver these modes of supply.146 GATS has important implications especially

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138 Norman Mugarura supra note 36.
139 Norman Mugarura, supra note 36.
141 The GATS was agreed in 1997 but to effect two years later.
143 Kern Alexander, supra note 113.
145 James R. Barth, Gerard Capiro, Jr Ross Levine, supra note 133.
146 James R. Barth, Gerard Capiro, Jr Ross Levine, supra note 133.
for regulation of banks. Its specific provisions and general principles such as Most Favoured Nations and Market Access. The Most Favoured Nations (MFN) treatment connotes the treatment of WTO members equally on the principle of non-discrimination. In banking, if a concession is made to a country’s bank, then similar concession under MFN should also be given to foreign banks. This is important to make sure that there is no discrimination against foreign banks as this would be inimical to full integration of financial services. Under GATS, if a country allows foreign competition in a sector such as banking, equal opportunities in that sector should be given to other service providers from all other WTO member countries. The GATS also provides a flexible approach based on a flexible set of rules for members to negotiate specific commitments on the principle of Nationality treatment and Market Access. The principle of National treatment forbids discrimination between domestic and imported products.

National treatment (Article XVII) requires that any conditions or qualifications are negotiated and become a schedule of commitment, prohibit home regulators from treating foreign banks less favourably than they treat domestic banks. This also means that under the Nationality principle, member countries cannot erect barriers to entry or operate policies that discriminate against foreign banks as compared to domestic banks. In so doing, the WTO promotes harmonisation or approximate national domestic policies to the free flow of international trade in services. The WTO Council on trade in services has responsibility for issuing legally non-binding interpretation of the GATS. It fulfils this function by acting upon recommendations of various WTO committees’ examination in particular sectors. The internalisation of financial services signifies that a country’s prudential regulatory and supervisory regimes should promote sound banking practices. It is this function that has particular relevance to fighting money laundering as it replicates the same principle fronted by the Basle Committee on the principles Banking and Supervision of Banks.

As regards market Access, there are certain commitments in the GATS schedule that are inscribed, and the extent of market access being given to those sectors. For example, if government commits itself to allow foreign banks to operate in its domestic market, that is a Market Access commitment. The principles of National treatment and Market access work in a such way that a member country would indicate in its negotiated schedule of commitment that it is granting market access and national treatment to foreign banks from other member countries. The country would then list in its schedule all restrictions on market access and national treatment that would be imposed on foreign banks. The market access prohibits six types of limitations, unless they have been inscribed by a member in its schedule of

147 James R. Barth, Gerard Caprio, Jr Ross Levine, supra note 133.
149 Kern Alexander, Rahul Dhumale and John Eatwell, supra note 31.
150 Article X1 of GATTS which sought to eliminate quantitative restrictions of imported products.
152 Arie Reich, supra note 26.
154 The WTO, supra note 124.
155 The WTO, supra note 124.
157 The WTO Legal Text, supra note 146.
The following are the prohibited limitations: limitations on a number of suppliers; limitations of the total value of service transactions or assets; limitations on the total number of natural persons that may be employed; measures which restrict or require specific type of legal entity or joint venture; and limitation on participation of foreign capital. In particular, paragraph 2(a) states that “Notwithstanding any other provisions of the agreement, a member shall not be prevented from taking measures for prudential reasons. These measures would include but obviously not limited to protection of investors; depositors; policy holders or persons to whom a fiduciary duty is owed by financial services supplier; or to ensure the integrity and stability of financial system.” However the above list of prudential measures would have to be inscribed in a member’s schedule of commitment, as they are not regarded as limitations on market access or National treatment. It has to be noted however that the above paragraph 2(a) does not specifically define what prudential measures are and neither does it provide any indicative list of what such measures are. Measures that are consistent with prudential measures would seem to encompass the following: capital adequacy ratios; restriction of credit concentration; portfolio allocation, disclosure and reporting requirements as well as licence criteria which are not burdensome than necessary. It is this paragraph 2(a) that seems to have particular relevance to societies in relation to measures adopted by the financial institution against money laundering and its predicate threats.

Similarly, the principles of Nationality and Market Access can be limited when a member country enters into economic integration such as the European Union (EU), the East African Community (EAC). Certain concessions agreed as a result a regional agreement are exclusive to non member countries. This exemption also allows a country to apply more favourable treatment than that guaranteed by GATS commitment on a non MFN basis, but it doesn’t permit less favourable treatment. Also Article XIX provides that developing countries may attach to their market opening conditions designed to increase their participation in services trade—for example transfer of technology. In view of the foregoing, the WTO is a more harmonising institution than its counterparts, the World Bank and International Monetary Fund (IMF), given that it provides a negotiation platform and its dispute settlement mechanism. However, the WTO as a global institution replicates the principles of good regulatory standards in much the same way like the FATF and BCBS—created to champion prudential regulation and supervision of financial institutions.

9. THE POTENTIAL CHALLENGES OF IFIs

158 The WTO Legal Text, supra note 146.
160 Aaditya Matto, supra note 148.
161 Aaditya Matto, supra note 148.
162 Aaditya Matto, supra note 148.
163 The service industry is an area where developing countries lack a competitive advantage and article X1X is actually meant to give a concession so as to enhance their market access.
The biggest challenge of IFI’s involvement in many developing countries is one of ignoring the dynamics of local development in a recipient country. This subsequently undermines the stability of local economies as has demonstrably been the case in the majority of countries. International economic involvement ultimately entails political adjustment but there is no word about law and democracy. Legislation in developing countries has been substantially affected by Social Adjustment Reform Programmes (SAPs): debtor states have been coerced into passing legislation that is by the standards of these economies pernicious.

The plausible role-played by the IFI’s in many economies notwithstanding; the foregoing adjustment programmes are perceived as intrusive with regard to internal state sovereignty and the concept of self-determination. Self-determination presupposes the decolonisation of the state (external) as per the UN Resolution 1514 (XXV) of 1960 but also people within the sovereign state in determining their destiny (internal) as prescribed by the UN Resolution 1541. For example, the introduction of financial sector reforms in developing countries is blamed for the downward spiral of many economies. As such, there is a growing disenchantment and hostility towards the market economy. A familiar example that demonstrates the impact of SAPs in Uganda was the restructuring of the army in 1990s, then the government succumbing to pressure from the donor agencies to reduce the size of the public sector employees. When it was compounded by the demobilisation of other public sector workers, it created a fertile climate that fed and reinforced different fighting groups in the country where the disengaged soldiers were easily enlisted. One wonders why many governments have followed the World Bank and IMF adjustment programs since they were first introduced in 1970s and yet are still in great development problems. This would infer that the World Bank/IMF reform programmes should be specifically tailored to local development specific conditions, to generate any meaningful effect. In Africa, where more than thirty countries adopted structural adjustment measures, average incomes fell by 20 percent during the 1980s, open unemployment quadrupled to 100 millions; investment fell to levels which were lower than in 1970s, and the regions share of world markets fell by half, to 2 percent. The foregoing development climate is exploited by criminals such as money launderers,

164 On corruption, the resignation of the World Bank president Paul Wolfowitz in (2007) exposed the problem of internal corruption such as cronyism, favouritism, incompetence and improper political dealing at the World Bank. The president violated internal staff rules by elevating his girl friend to a high office with unjustified salary scheme.

165 Norman Mugarura, supra note 36.

166 These two Resolutions were passed within a space of twenty fours of each other, one setting out the rights and duties of a state and the other giving people within the sovereign to determine their destiny.

167 Norman Mugarura, supra note 36.

168 These programmes, designed by the World Bank and the IMF, proliferated in the early 1980s, as one country after another was afflicted by a lethal combination of high interest rates and falling commodity prices.

169 Norman Mugarura, supra note 36.

170 Under SAPs required of the country, Uganda was to reduce its civil service to one-sixth of its original size from 320,000 people to 55,000 between 1995 and 1997. In 1998 the Uganda government was required to undertake further large-scale civil service reform, including lays off and merging of ministries within six months. These figures were tendered by the Ministry of Civil Service when setting guidelines to improve privatization on 13th May 1998.

establishing themselves in disintegrating states. Secondly, the foregoing weakness has generated a negative environment adverse to the domestication of anticipated anti-money laundering obligations within a country. Therefore, many IFIs regimes are either too onerous on weak vulnerable states to be implemented or their programmes are incompatible with the political, economic and social environment in the recipient states. While I appreciate that IFIs have the right to design prudential measures to ensure that loans are paid, they should do so bearing in mind the need to promote social welfare standards and enhancing economic stability of countries receiving development assistance. If Financial Sector Reforms Programmes work adverse to their intended purpose—the stability of national economies, they become difficult to justify their importance. This is supposedly the reasons why some critics of the IFS led reform programmes have argued that FSRPs are motivated by a hidden agenda.

Furthermore, some countries in the G10 countries can flatly disregard global standards whenever they deem it desirable to do so, while requiring non-G10 countries to make adjustments for implementing global standards irrespective of the prevailing economic conditions. The above problem is compounded by the absence of a robust supervisory infrastructure to enhance the adoption of global anti-money laundering standards locally. Many less developed countries are deficient in terms of requisite human resource capability to oversee the implementation of desired anti-money laundering global standards compared to their counterparts in developed countries—a problem which is tangential to under-development and all its attendant shortcomings.

As regards WTO as a harmonisation platform, it is accused of saying one thing in theory but doing exactly the opposite in practice, literally being two faced. This is always a vivid manifestation of poor leadership because the leader is deemed to be the alchemy of great vision. There is superficial equality which masks serious inequality in both approach and reality of power in this institution. Its claim to defend fair competition is far from justified as it is subservient to the Multinational Corporations (MNCs). It has been described as the most opaque institution imaginable, meeting in secret in the shadow of international Chamber of Commerce (the club of biggest transnationals). Not surprisingly then is the fact that the WTO is oblivious to issues of sustainable development, which are confined to debates in other forums. It is

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172 By IFIs, I mean the World Bank, the International Monetary Fund and other lending institutions such as regional banks.
173 For much of this paragraph, see, Norman Mugarura, supra, note 31.
175 This causes accountability problems, creates chaos in administration of the system as well as resentment on the part of countries that are coerced to adopt these standards.
176 This runs counter to the WTO principle of most favoured nations (MFN).
177 This is both economic and legal infrastructure necessary to carry the proposed reforms or changes in the local systems forward. Because these reforms are cosmetic and undermined by a precarious economic environment (wars, poverty in its varied manifestation, lack of good education) usually doesn’t take long before the system develops cracks and subsequently crumbles.
178 The Dispute Settlement Mechanism has greatly been used and could progressively engender a change in attitude within WTO. This is again the same premise why I am strongly arguing for the global court on money laundering. Laws must be enforced to generate effect a sense of being taken serious locally.
179 S. Amin, supra note 57.
180 For detailed discussion on WTO, see Norman Mugarura, supra note 36.
181 S. Amin, supra note 125.
equally oblivious to issues of the environment, protesting, at the expense, of the future, against any regulation of mining industry. The deregulation recommended by GATT-WTO is simply intended to benefit transnational monopolies by reducing to zero the space in which states (and particularly Third World States) can exercise management. The conduct of WTO as a multilateral forum has provoked a range of arguments that cannot be easily compartmentalised as only economic. Not only do these arguments over the objectives and pace of liberalisation range across the economic and political spaces, it is also clear that WTO replicates the structural imbalance in world power between developed and the developing world. Therefore the WTO will have to refocus its attention to its initial mandate of addressing the embedded weaknesses that plagued it under the GATTS arrangement.

10. LOCAL INSTITUTIONS

Law in a sense of formal written rules will be largely irrelevant, if the emerging rules do not reside in an institutional framework. Therefore as local societies make efforts towards implementing the envisaged anti-money laundering regimes, the challenge remains one of creating fully-fledged local institutions to translate the engendered norms locally. These institutions are essential to ease the translation of anti-money laundering regimes locally but also to engender an institutional ethos based on the envisaged norms. Policy making institutions should initiate studies on regional basis with regard to understanding the global typologies of money laundering, cross-border jurisdictional issues and forging a working partnership with others sectors of government that are to be affected by the envisaged global regimes. It is equally important to institute a committee of experts (based on the modal of something like the committee of wisemen under Lamfalussy in the integration of financial markets in Europe) to filter through the proposed policy measures and expedite the implementation of anticipated reforms. Institutional mechanism should be imbued with checks and balances for error minimisation at the initial policy formulation stage.

The creation of the Inspector General of Government (IGG) in Uganda, as a specialist anti-corruption institution, has been applauded as a step in the right direction. This institution is premised on the United Nations Convention on Corruption framework which provides that where there is a significant increase in the asserts of a public official for which no reasonable explanation in relation to his lawful income is provided, an offence of illicit enrichment is committed. The United Nations commitment to fighting corruption is further exhibited by article 24, which deals with the concealment of the proceeds of corruption. It also states that where an individual who has not participated in corruption conceals or retains property, which he knows is a result of an offence of corruption, he or she will be committing an offence of

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182 S. Amin, supra note 125.
184 Article 19 of United Nations Convention against Corruption (UNCAC), where there is a significant increase in the assets of a public official for which no reasonable explanation in relation to his lawful income is provided, an offence of illicit enrichment is committed. Article 24 deals with the concealment of the proceeds of corruption. Where an individual who has not participated in the corrupt activity conceals or retains property, which he knows is the result of an offence committed under the UN Convention, he will have committed the offence of concealment.
185 Article 28 of United Nation Convention against Corruption (UNAC), supra note 79.
concealment.\textsuperscript{186} The Inspector General of Government (hereinafter the IGG) is created on the United Nation framework on corruption (UNCAC). Indeed this institution has of lately demonstrated that it is capable of doing a very good job in investigating corruption-related cases and subsequently getting corrupt public officials to be prosecuted.

However, much as the proliferating institutions are well intentioned given their mandate, their capacity to stem or control corruption has been hamstrung by the fact that they are created in a manner that makes them subordinate to the appointing authority (the executive) hence susceptible to manipulation. The Inspector General of Government (IGG)—an anti-corruption institution, in Uganda has been criticised for targeting mavericks and the members of the opposition.\textsuperscript{187} Many times, local institutions in developing countries are not independent in executing their mandate and worse in situations when it is investigating public officials on allegations of corruption. The anti-corruption institutions are accused of literally being the launderette whereby these institution are used to cleanse corruption allegations of government officials or even suppressing any investigations against state officials—the same officials they are supposed to hold to account.\textsuperscript{188}

It would be prudent that officials who are appointed to lead anti-money laundering agencies should be vetted by non affiliated independent bodies to avoid duplicity and conflict of interests, which tends to undermine the underlying objectives of local anti-money laundering institutions. There must be established mechanisms for enforcement of emerging anti-money laundering laws. Otherwise laws which are not enforced cannot be taken seriously as they do not generate any effect. Experience shows that unless laws are enforced, they cannot be taken seriously in achieving their intended objectives. In any case the anti-corruption institutions should have an autonomous mandate so that they can bring their weight to bear on corrupt government officials whenever it is deemed necessary to do so. This will help to counter a situation where the accuser is the judge, the jury and the executioner.

It is my contention that anti-money laundering institutions at a national level are created with a monitoring mechanism, for example on-site visits for system verification, and should focus on placating societies with regard to practical, desirable change.\textsuperscript{189} It would seem that some governments just create dysfunctional local institutions for the sake of appeasing the international donor community. The monitoring process should encourage continuous review assessments and civil society participation.\textsuperscript{190} This should go along way cultivating a culture of seriousness and to ensuring that institutions do not eventually veer off the path charted in their initial objectives. There should be a clear set of rules and procedures to monitor the adaption of the system to proposed changes.

\textsuperscript{186} Article 24 relates to those who aid and abett the commissioning of corruption under Article 28.
\textsuperscript{187} This corruption typology is common in much of Africa; see “the Monitor Newspaper”, 15\textsuperscript{th} July 2007.
\textsuperscript{188} Some local AML institutions are widely viewed in some countries as undemocratic because of the way officials in these institutions are appointed, and also because of working under the direct influence of ruling governments.
\textsuperscript{189} This is precisely the reason why it is important to have bodies such as FATF. However, it can do much better by addressing some of its weaknesses such as lack of accountability.
\textsuperscript{190} This is proposed based on the World Bank way but in a manner that is local society oriented.
The attendant challenges in integration of financial markets in Europe signify that\(^{191}\) global governance of international finance is easily said than done.\(^{192}\) While the EU is a successful integration story with four functional institutions to co-ordinate EU policy details nationally, the European single market is far from realistic and still fragmented. Policy guidelines are co-ordinated through any of the four institutions of the EU: the Parliament, the Commission, the Council and the Court constituting it as a quasi European super state in default. However, integration of financial markets is far from realistic as demonstrated by the fact that member countries are allowed to maintain their national regimes along side the EU ones, only being required to adopt a minimum level of conformism through the principles of home country control and minimum harmonisation.\(^{193}\) Thus the concept of global governance without fully-fledged global institutions such as a global Parliament to legislate on policy details, let alone being a constituency of different member countries with varying backgrounds, has become a pertinent issue in the integration of world markets. This environment could potentially cultivate conditions for criminal exploitation such as money laundering and market abuse. The local financial institutions should be developed bearing in mind the need to accommodate the envisaged global standards. However, local institutions should be created after wide consultations have been undertaken to ensure that the proposed institutional framework is appropriate and adaptable to the local imperatives of development.

11. NON-GOVERNMENTAL ORGANISATIONS (NGOs)

The action of international Non-Government Organisations (“NGOs”) has contributed to enunciation of soft law norms regarding the regulation of many global issues including money laundering and corruption.\(^{194}\) The role of non-governmental organisations in fostering global initiatives and in filling the void occasioned by the reduced role of the state cannot be underestimated. Perhaps i need to say that NGOs\(^{195}\) have traditionally been accorded the legal status of individuals—they generally exist under national law of a place where they have been created, as well as the law of the place where they are active. The state is in the predicament where it has either lost or ceded its traditional powers to non-state actors as it reconstituted itself at a supranational level.\(^{196}\)

It can be said that Non-Governmental Organisations (NGOs) have the potential to create a platform for citizen’s participation directly in the affairs of national self-interest, promoting issues of governance, government accountability, judicial reform, election reform and generally improving the institutional framework of governments. With regard to Corruption and Money Laundering, Transparency International has played a vital role, generating data on corruption and disseminating it to various stakeholders and often pressurising some governments to reform their policies. In the

\(^{191}\) Despite efforts at integration, financial markets are still divided highlighted by minimum harmonization initiatives and mutual recognition to achieve some level of convergences of markets.

\(^{192}\) This contention is further strengthened by the regulatory failure highlighted in the recent global financial crisis (2009).

\(^{193}\) See, e.g. the Directive 91/308/EEC.


\(^{195}\) The International Court of Justice decided in Barcelona Traction case has the nationality of the place of incorporation. See the case of Belgium v Spain, International Court of Justice (1970), pp, 42-43.

\(^{196}\) Pierre-Marie Dupuy, supra note 143.
case of the United Kingdom for instance, several articles in the press echoed the Working Groups’ assessment and put pressure on the government to introduce some legislation changes. In France, just before the parliamentary election in 2007, Transparency International (TI) pinpointed the fact that a provision in the draft legislation expressly excluded ongoing corrupt arrangements. The ensuing public pressure contributed in the deletion of the provision.  

Likewise, Civil Society Organisations (for example ICC and TI) have been instrumental in changing attitudes in the business community. They have made some organisation to change their internal procedures and to develop compliance mechanisms in accordance with OECD Convention and recommendation. In addition, TI, as well as various business associations, assist companies that want to learn about successful models of codes of conduct and compliance programmes. Civil society organisations have provided analyses and organised debates on corruption and political party funding as a way of fighting private sector corruption. Therefore Civil Society Organisations have played an influential role in enhancing the capacity of societies in fighting money laundering and its attendant evils including corruption. Civil society organisations are not affiliated to any government and will therefore not be inhibited in the campaign against any corrupt practices and money laundering for that matter. Some governments have adopted strict licensing laws to undercut the work of NGOs especially those organisations that are viewed to be critical of the government. However this study contends that all development minded societies should embrace the role of civil societies especially as already analysed.

12. INTERNATIONAL POLICE ORGANISATION

The international police organisation, augmented by creation of other regional police agencies have also played a central role in enhancing the fight against money laundering by exchanging essential information to ensure that money launderers as well as other cross border crimes are prosecuted. Its ethos as a multilateral police organisation gives it the mandate of a global police institution.

The idea of international police Institution (Interpol) was first mooted in 1914 but materialised in 1923 with the composition of 176 member states, of which, 46 European Member States account for 80 percent of its communication traffic. The move to create a transnational police was prompted by the growing concern over internationalisation of certain crimes which could not be confined in a single state,
such as terrorism, drug trafficking offences and money laundering.\textsuperscript{203} The creation of an international police was also prompted by common social influences caused by people in Europe, objecting to every day crimes and inadequacies of national criminal justice system.\textsuperscript{204} The third reasons was the need for common definition of crimes as some of the problems were far more understood than either recent criminological orthodoxy or as common sense would expect.\textsuperscript{205} Then there was a fourth point underpinned by the scholarship that points to the absence of a reliable and valid method of evaluating the scope of transnational crimes. This scholarship contends that there is little hard data of recorded across border crimes in Europe, and the absence of information about the economic cost of such activity.\textsuperscript{206}

Interpol operates at three levels: The first is the macro-level, which entails the constitutional and international legal agreements and the harmonisation of national laws and regulation; secondly, the meso-level, which focuses on the operation, structure practices, and procedures of police and law enforcement agencies; then last is the micro-level which entails the investigation of specific offences and the control and prevention of particular forms of crime.\textsuperscript{207} At a macro-level, government ministers take decisions on matters relating to rights of entry and exit from sovereign states (extradition procedures, asylum policies and visa harmonisation) and on legal issues about operational powers across borders in respect of arrest, detention, investigation and surveillance.\textsuperscript{208}

Interpol is created to undertake two fundamental functions. It promotes and ensures mutual legal assistance between criminal police authorities within the legal limits laid down in different countries and in the spirit of Universal declaration of Human rights. Secondly, it is created to promote public policing that is likely to contribute to the prevention and suppression of ordinary law crimes.\textsuperscript{209} Each Interpol member is required to nominate an office of communication with Lyon Headquarters (the National Central Bureaux (NCBS)) being the mechanism through which Interpol enquiries are channelled. Police information is circulated between NCB’s on international notices, which contain photographs, fingerprints and physical description of persons and colours coded according to the nature of the enquiry. Clearly, Interpol’s role as a communication network restricts it to the exchange of information on a case by case basis, and partly because of this, its capacity to promote greater police co-operation in Europe as elsewhere is limited.\textsuperscript{210} Interpol’s work is also limited in another respect: Article 3 of the Convention (1956), mindful of the sensitivities surrounding national sovereignty, defined the organisations mission as the efficient expression of common law crimes and offences to the exclusion of other matters having political, religious and racial character.\textsuperscript{211} It was largely because of this exclusion of political crime from Interpol’s operation brief, that following

\textsuperscript{203} J. Anderson, (eta al) supra note 175.
\textsuperscript{204} J. Anderson (eta al) supra note 175.
\textsuperscript{206} L. Johnson, supra note 175.
\textsuperscript{208} M. Anderson, supra note 177.
\textsuperscript{210} M. Anderson, and E. Bort, (eds.), supra, note 177.
\textsuperscript{211} M. Anderson, and E. Bort, (eds.), supra, note 177.
terrorist acts 1960s and the early 1970s, the European Council of Ministers instigated the creation of Trevi.\textsuperscript{212}

Specifically, in relation to money laundering, Interpol has a specialist branch (FOPAC) which co-operates with police departments and multilateral organisations in gathering and disseminating information on the movement and laundering of the proceeds of crime.\textsuperscript{213} It has developed modal legislation designed to make it easier to obtain the kind of evidence needed in criminal investigation and proceedings aimed at confiscation of the proceeds of crime and is working with the United Nations Agencies to complete an automated compendium of information on the status of legislation and law enforcement in different countries.\textsuperscript{214} However, the problem with Interpol is that, just other international agencies, it is an institutional inclined in favour of developed countries, developed countries accounting for 80 percent of communication traffic.

13. THE SCHENGEN CONVENTION

The Schengen Convention provides the most complete modal of European co-operation in fighting European wide crimes. The original agreement was signed in 1985 by Belgium, France, Germany, Luxembourg, Netherlands, Italy, Spain and Portugal in 1991 and Greece in 1992.\textsuperscript{215} The Schengen convention (1985) acknowledged the need to remove all internal frontiers between member states in order to facilitate the free movement of workers, goods and capital but ensuring at the same time that the borders were strengthened to control the unnecessary entry of aliens.\textsuperscript{216} According to the Schengen agreement, non-European immigrants will need to acquire a visa normally of three months duration to enter in any of the Schengen member countries, while asylum applications made in one member state, any decision reached will be binding in all other state.\textsuperscript{217} The agreement stipulates a number of measures including increased border surveillance, the right of ho pursuit of criminals across borders, and the co-ordination and sharing of information between the police forces of member states. The last of these is underpinned by the establishment of a computerised data exchange, the Schengen information system (SIS), which is intended to be a common database shared by all members with the capacity of eight million personnel and seven records on objects. SIS is regarded as a compensatory measure for the removal of frontier checks, enabling police agencies in different

\textsuperscript{212} Trevi operates at three levels: the macro-level-the Ministerial Group meets every six months, being services at a meso-level by senior official group. There is Trevi 1 with the mandate is to combat terrorism, as well as to address the problem of drug trafficking; Trevi 2 is concerned with scientific and technical knowledge and police training; then Trevi three was set up to address the question of security such as civilian air travel, a role which was later assumed by Trevi 1.

\textsuperscript{213} M. Anderson, supra note 177.


\textsuperscript{215} L. Johnson, supra, note 184.

\textsuperscript{216} L. Johnson, supra, note 184.

\textsuperscript{217} These concerns were reflected in the Maastricht Treaty (1992) on the European Union whose so-called Third Pillar (Title IV) contained a series of provisions on co-operation in the field of Justice and Home Affairs. As such members states would regard the following as areas of common interests: preventing and combating terrorism, asylum policy; rules on crossing of external borders of the Member States and the exercise of control thereon; immigration policy and policy regarding national of third countries, Judicial co-operation in Criminal matters.
countries to have identical information on wanted persons, ‘undesirable persons’, asylum seekers and those extradited or under surveillance.\textsuperscript{218}

Just like Trevi and Interpol, the Schengen also works at three levels: the macro agreement deciding policies such as hot pursuit; meso level structures, such as SIS being put into place to facilitate micro-level policing. The work of Schengen is immune to judicial and overall parliamentary accountability to European institutions, an issue which has particular implication to human rights, data protection and the issue of sovereignty.\textsuperscript{219} It has been argued that Schengen members are prepared to surrender some issues of sovereignty in return for an enhanced capability to combat crime, limit clandestine immigration and enable internal border controls to be removed.\textsuperscript{220} However, the success of such endeavour depends upon members adopting a common policy on matters such immigration.\textsuperscript{221}

The above institutions are augmented by the European police co-operation which was created in 1991 with the mandate to collect and analyse data on drug trafficking, money laundering and related criminal organisations, together with facilitation of intelligence exchange between law enforcement agencies in member states.\textsuperscript{222} The mandate of Europol\textsuperscript{223} extends to prevention of illicit trafficking in motor vehicles, nuclear and radioactive substances and smuggling of illegal immigrants.

14. CONCLUSION

This article has demonstrated that for the proliferated anti-money laundering regimes to work globally, they must be followed by harmonisation to foster internalisation of engendered norms locally. There is a need for the involvement of specialist organizations and agencies\textsuperscript{224} in local economies but based on agreed rather than coercive terms, a fundamental tenet of contractual agreements. In my contention, the intervention of IFIS has assisted fledging national governments in building local institutions based on international standards by offering technical assistance, leveraged information exchange and launching initiatives to close the disparity gap between the local and the global societies. Chiefly, the World Bank and its counterpart the IMF have played a key role in boosting local capacity building by way of encouraging financial sector reforms and funding many local initiatives on financial crimes, a bill local fledging economies would not be able to foot. However, it would seem to me as if the relationship of the World and IMF and borrowing countries is contractual which should be subjected to the tenets of international loan contract. It is my contention that conditionalities which the parties have not readily agreed but just accepted so as to enable it to borrow amount to unfair terms. These

\textsuperscript{219} J. Sheptycki supra, note 188.
\textsuperscript{220} J Sheptycki, supra, \textit{note} 188.
\textsuperscript{221} In January 2008, Italy\textsuperscript{ decision to grant political asylum to the Iraq Kurds fleeing persecution led to demands for de-linking from the common immigration arrangement with the French and German Ministers for fear of opening immigration floodgates to Northern Europe.
\textsuperscript{222} L. Johnson, supra, \textit{note} 184.
\textsuperscript{223} This police organisation is similar to the Federal Bureau of Investigations (FBI) in USA.
\textsuperscript{224} Some of these organisations have been criticised for being driven by their own motives rather than the interests of recipient local governments in overcoming overdependence and development problems. Civil society organisations have taken credit of engaging with the grassroots in tackling development problems of the local society.
can potentially jeopardise the validity of the above loan contracts. I know the World Bank and the IMF do not have the mandate to interfere in the internal politics of country they operate in but it nevertheless would seem that their operations are political as they involve all sorts of political issues in countries they operate in. In some countries, these institutions operations have caused problems for the ruling governments such as sliding popularity, and widespread unemployment—issues which have huge political connotations for the society.

The work of the civil society such Transparency International (TI) has enhanced local economies with regard to information gathering and engaging with governments in fighting corruption and money laundering. It is my contention that the global threat of money laundering would be greatly enhanced with the introduction of the global court based on the modal of the European Court of Justice (ECJ) in the European Union. The court through its influence and mandate would engender a change in social attitude engendering a positive anti crime ethos in many societies. The court would also be used as a forum for dispute settlement (as the WTO), elaboration and enforcing compliance on emerging global anti-money laundering norms. Although the majority of anti-money laundering regimes are imbued with sanctions mechanism, the fact that sanctions are invoked in a coercive manner has not helped in fostering compliance among member states. What states do instead is to express their dissatisfaction in a subtle way by circumventing the engendered obligations under the ratified treaties. The court through elaboration process would ease resentment against the emerging anti-money laundering regimes, thus causing the engendered norms to be internalised. Apparently, the issue of trying money laundering cases before national courts signifies that the culprit (often well resourced) can exploit weaknesses in the national legal system to stay put. In any case, those who commit corruption as another predicate of ML are people in elevated government positions and would be protected by the system. However, with the court, extradition treaties and mutual legal assistance in place, it is possible that there could be some headway in fighting money laundering offences. The global court would help to plug weaknesses in global enforcement regimes of anti-money laundering laws, which are capable of being exploited by the launderer to further his criminal enterprise. Short of that, money laundering is bound to remain a challenge for the international community for many years to come.

225 States may have to enter into an arrangement to sign the treaty subject to certain reservations, which may constrain the implementation of the treaty in the state.